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[1] Became Presiding Judge Nov. 18, 1940.
[2] Term expired Nov. 18, 1940.
[3] Appointed, took office Nov. 18, 1940.

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SAN DIEGO TRUST & SAVINGS BANK et al. v. SAN DIEGO COUNTY et al.

L. A. 16942.

Supreme Court of California.

Aug. 26, 1940.

Rehearing Denied Sept. 25, 1940.

1. Taxation ⚷57

Generally, statutes govern in tax controversies.

2. Taxation ⚷61

The definition of property contained in provisions relating to taxation in the Political Code control the classification of property for taxation purposes. Pol.Code, § 3607 et seq.

3. Taxation ⚷200

The meanings of terms "real property" and "personal property" as used in Bank and Corporation Franchise Tax Act, providing that tax shall be in lieu of all other taxes "except taxes upon their real property", are determined by reference to provisions of the Political Code which classifies and defines property for taxation purposes. Gen.Laws 1937, Act 8488, § 3; Pol.Code, § 3607 et seq., and § 3617; Civ.Code, § 660; Const. art. 13, § 16, subd. (a).

4. Fixtures ⚷7

When an article must be destroyed in order to accomplish its removal, such is a factor indicating the permanency of its affixation.

5. Fixtures ⚷4, 5, 6

In determining whether an article is a "fixture", it is necessary to consider the manner of its annexation, its adaptability to the use and purpose for which realty is used, and the intention of the party making the annexation.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixture".

6. Fixtures ⚷4

As between private parties, such as those bearing relationship to each other of landlord and tenant, or vendor and vendee under a conditional sales contract, their mutual intention as to whether an article is a fixture and part of realty or is personalty is controlling, but as to third persons who are not parties to any such private agreement, the intent which controls is not a secret hidden intent but that manifested by physical facts, giving due consideration to status of party by whom the articles have been installed.

7. Fixtures ⚷4

In order to make an article a permanent accession to land, its annexation need not be perpetual, but it is sufficient if article shall appear to be intended to remain where fastened until worn out, until purpose to which realty is devoted has been accomplished or until article is superseded by another article more suitable for the purpose.

8. Taxation ⚷200

That under regulations of controller of currency, national banks must from time to time furnish controller, and publish at regular intervals, a sworn statement of their assets and liabilities, and in such statement segregate real estate and personal property owned by them, and that in such classifications they list vaults and vault doors as personal property, was not determinative of the character of such property for purposes of taxation under the Bank and Corporation Franchise Tax Act, providing that tax should be in lieu of all other taxes "except taxes upon their real property". Gen.Laws 1937, Act 8488, §§ 1–3; 12 U.S.C.A. § 548; Const. art. 13, § 16, subd. 1(a).

9. Appeal and error ⚷842(7)

Where there was no conflict in evidence, trial court's finding amounted to mere "conclusion of law", and as such was proper subject of review upon appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

10. Taxation ⚷200

Under provision of Bank and Corporation Franchise Tax Act that tax should be in lieu of all other taxes "except taxes upon their realty", bank vault doors, in view of their size and expense of removal, and fact that they were infrequently removed, were "real property", and hence not exempt from local taxation. Gen.Laws 1937, Act 652, §§ 61, 84; Gen.Laws 1937, Act 8488, §§ 1–3; Pol.Code, § 3607 et seq., and § 3617; Civ.Code, § 660; Const. art. 13, § 16, subd. 1(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Real Property".

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by the San Diego Trust & Savings Bank and others against the County of San Diego, a quasi-municipal corporation, and Crowell D. Eddy, as assessor of San Diego County, to restrain defendant assessor from assessing as real property for local taxation purposes certain vault doors and other equipment belonging to plaintiffs. From judgment for plaintiffs, the defendants appeal.

Reversed, with directions.

Rehearing denied; TRAYNOR, J., did not participate.

Prior opinion, 96 P.2d 137.

James B. Abbey, Dist. Atty., and Carroll H. Smith, Deputy Dist. Atty., both of San Diego (Roger J. Traynor, of Berkeley, Dixwell L. Pierce, of Sacramento, Henry C. Ramsey, of Los Angeles, and George M. Johnson, of Washington, D. C., of counsel), for appellants.

Earl Warren, Atty Gen., and H. H. Linney, Deputy Atty. Gen., amici curiae.

Hugh A. Sanders, J. Dean La Motte, and Sanders & La Motte, all of San Diego, for respondents.

O'Melveny, Tuller & Myers and Louis W. Myers, all of Los Angeles, amici curiae for Security First Nat. Bank.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiae for California Bankers' Ass'n.

CARTER, Justice.

This is an appeal from a judgment granting an injunction permanently enjoining defendant, Crowell D. Eddy, as assessor of the defendant County of San Diego, from assessing as real property for local taxation purposes certain vault doors and other equipment belonging to the plaintiff banking corporations.

Plaintiffs were the owners of certain vaults, vault doors, an elevator, marble and bronze decorations, air conditioning systems, steam heating and ventilating systems, iron grille work and cages and counters, all of which were used by said plaintiffs in the conduct of their banking business in San Diego county. On the first Monday in March, 1938, said county assessor proposed to enter this property upon the tax rolls of said county as improvements on real property and subject to assessment and taxation by said county. Contending that the equipment was personal property, and therefore exempt from ad valorem taxation under the provisions of section 16, subd. 1(a) of article XIII of the Constitution of the state of California, plaintiffs asked for an injunction restraining the assessor from making the contemplated assessment.

At the opening of the trial it was stipulated that the decision as to the vault doors would control as to all the property in question except the vaults and elevator. At the close of the evidence and before argument it was further stipulated that the court might find that each of the vaults in question, as distinguished from vault doors, was real property for the purposes of local taxation "except in those instances where the relationship of landlord and tenant or lessor and lessee exists".

The court found in accordance with the stipulations, and further found that the elevator mentioned was real estate for the purposes of local taxation and that all the vault doors in question were personal property.

As one of its conclusions of law the court found that section 61 of the Bank Act (Stats. 1909, p. 87, as amended, Deering's Gen.Laws 1937, Act No. 652) was applicable in the classification of property of banking corporation as real or personal for purposes of local taxation.

Judgment was entered accordingly and this appeal was taken from that portion of the judgment which restrains the assessor from assessing any of the property in question as realty for purposes of taxation.

In view of the stipulations entered into, the main question presented on this appeal is whether bank vault doors are real property within the meaning of that phrase as used in section 3 of the Bank and Corporation Franchise Tax Act (Deering's Gen. Laws 1937, Act No. 8488).

That section, pursuant to section 16, subd. 1(a) of article XIII of the state Constitution, provides that the franchise tax imposed by sections 1 and 2 of the act shall be "in lieu of all other taxes and licenses, State, county and municipal", upon state and national banks "except taxes upon their real property".

There is practically no conflict in the evidence and the controversy is entirely as to the principles of law which should be applied. It appears from the evidence that the walls, ceilings and floors of the vaults are constructed of heavy concrete reinforced with steel. The vault doors come anchored in a metal frame, the door and frame constituting one complete unit. The opening of the concrete vault into which the door is installed is slightly larger than the frame of the vault door. In installing the door and frame, the rear flange which is attached to the back of the door is removed, the door and frame are then set in the opening and the rear flange is again screwed to the frame. Then, after the door is leveled and held in place by steel or wooden wedges, concrete is poured in between the sides of the vault opening and door frame to keep the latter rigid and from falling out. The door and frame may be removed by removing the inner flange and knocking out the concrete wedge, when the whole assembly can be removed without actual injury to the vault proper.

Section 61 of the Bank Act, which the trial court found applicable in the classification of the property with which we are here concerned, reads in part: "Any savings bank may purchase, hold or sell real or personal property, as follows: 1. The lot and building in which the business of the bank is carried on; furniture and fixtures, vaults and safe deposit vaults and boxes and other personal property such as may be necessary or proper to carry on its banking business." Section 84 of the Bank Act reads: "No commercial bank shall hereafter invest an amount exceeding one-half of its paid-up capital and surplus in the lot and building in which the business of the bank is carried on, furniture and fixtures, vaults and safe-deposit vaults and boxes necessary or proper to carry on its banking business * * *."

It is the plaintiffs' position that said section of the Bank Act defines vaults and vault doors to be articles of personal property; that at the time of the enactment of the Bank and Corporation Franchise Tax Act, the legislature had said definition in mind; and that the legislature did not intend to compel banks to pay an ad valorem tax on their necessary equipment as well as a franchise tax upon the income derived from the use thereof, but that instead it intended to exempt this necessary equipment from local taxation by providing in the act the "in lieu" clause thereof.

We are not convinced that the legislature by the enactment of sections 61 and 84 of the Bank Act meant to define what property of banking corporations should be realty and what should be personalty. We are likewise not impressed with the argument that the legislature had such purported definitions in mind when it enacted the Bank and Corporation Franchise Tax Act. Even if the latter were true the same argument applies, and with more force, to section 3617 of the Political Code which classifies and defines property for taxation purposes.

[1] The general proposition that the statutes govern in tax controversies is well settled. Cooley on Taxation, 4th Ed., vol. 2, p. 1217, and vol. 3, p. 2145, and cases cited thereunder. The Bank Act, under consideration here, is not a tax statute but a regulatory statute intended to regulate the business of banking.

[2] It has often been declared judicially, and it is well settled in this state, that the definition of property contained in the provisions relating to taxation in the Political Code control the classification of property for taxation purposes. People v. Smith, 123 Cal. 70, 75, 55 P. 765; Western Union Telegraph Co. v. Modesto Irrigation Co., 149 Cal. 662, 87 P. 190, 9 Ann. Cas. 1190; County of Ventura v. Barry, 207 Cal. 189, 277 P. 333; Southern California Telephone Co. v. State Board of Equalization, 12 Cal.2d 127, 132, 82 P.2d 422.

The plaintiffs point out that Political Code, section 3617, reads: "Whenever the terms mentioned in this section are employed *in this title,* they are employed in the sense hereafter affixed to them." (Italics added.) However, the above cases have uniformly applied the section as a statute of general definition to be used in the interpretation of all tax statutes.

[3] That the meanings of the terms "real property" and "personal property" when used in the Bank and Corporation Franchise Tax Act are determined by reference to title IX, part III, § 3607 et seq., of the Political Code was decided in the case of Jameson Petroleum Co. v. State, 11 Cal.App.2d 677, 680, 54 P.2d 776. The question involved therein was whether or not oil and gas leases were real property for purposes of taxation under the Bank and Corporation Franchise Tax Act. The

court held that both the Bank and Corporation Franchise Tax Act and title IX, part III, of the Political Code were tax statutes; that both were enacted to carry into effect article XIII of the Constitution; and that since they were statutes in pari materia, they were to be construed together.

Similarly, the character of the property here in question for purposes of taxation under the Bank and Corporation Franchise Tax Act is also determinable by reference to title IX, part III, of the Political Code.

Section 3617 of the Political Code, referred to in People v. Smith, supra, as defining the terms used in the assessment of property for purposes of taxation, describes the term "real estate" to include "improvements", then defines the term improvements as including "all buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land, except telephone and telegraph lines". By section 660, Civil Code, the term "affixed to land" is defined as follows: "A thing is deemed to be affixed to land when it is attached to it by its roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws * * *."

Pursuant to a stipulation of the parties the trial court found that the masonry vaults to which the vault doors here in question are attached were an improvement to the realty.

Even without the stipulation we are of the opinion that such must have been the finding.

[4] The vaults themselves are of heavy steel and masonry construction, and they rest upon the floor of the buildings in which they are erected. Their size and the solidity of their construction, as well as the importance of their use in the carrying on of a banking business, indicate a quality of permanence and an intent that their affixation to the premises upon which they are resting should not be of a transitory or impermanent nature. Realty Dock & Improvement Corporation v. Anderson, 174 Cal. 672, 164 P. 4. Furthermore, since the purport of the evidence was that more often than not the removal of such vaults would necessitate their destruction, the monetary loss occasioned thereby cannot be disregarded. It was testified at the trial that such vaults may cost approximately $6,000. The fact that the lifetime of such a vault is deemed to be indefinite, or perhaps commensurate with the life of the building in which it is located, unless otherwise voluntarily destroyed, presupposes an intent that its annexation is to continue for a long period of time. When an article must be destroyed in order to accomplish its removal this has been held to be a factor indicating the permanency of its affixation. Western Union Telegraph Co. v. Modesto Irrigation Co., supra; Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am.Rep. 107; Tifft v. Horton, 53 N.Y. 377, 384, 13 Am.Rep. 537; Ford v. Cobb, 20 N.Y. 344.

[5] In considering the character of the vault doors, which are the subject of this controversy, we must apply the three tests which have often been used by this court in determining whether or not an article is a fixture—namely: (1) the manner of its annexation; (2) its adaptability to the use and purpose for which the realty is used; and (3) the intention of the party making the annexation. Lavenson v. Standard Soap Co., 80 Cal. 245, 250, 22 P. 184, 13 Am.St.Rep. 147; Hendy v. Dinkerhoff, supra; Western Union Telegraph Co. v. Modesto Irrigation Co., supra; Gosliner v. Briones, 187 Cal. 557, 204 P. 19; Jahnke v. Jahnke, 81 Cal.App. 387, 391, 253 P. 752; County of Los Angeles v. Signal Realty Co., 86 Cal.App. 704, 711, 261 P. 536.

It is undisputed that the vault doors in question are affixed to the realty in a manner to bring them within the class of fixtures as defined in the Civil Code. (Sec. 660.)

Without the stipulation that vault doors were adaptable to the banking purposes for which the plaintiffs herein were using the land and buildings, it is apparent that they are useful and necessary thereto. The fact that vault doors play a prominent part in the protection of the moneys and valuables which are entrusted to a bank for safe keeping, as one of its main functions, is too obvious to require further mention.

[6] As between private parties such as those bearing the relationship to each other of landlord and tenant, or vendor and vendee under a conditional sales contract, their mutual intention as to whether an

article is a fixture and part of the realty or is personalty is the controlling factor. As to third persons who are not parties to any such private agreements, however, the intent which controls is not a secret hidden intent but that manifested by the physical facts, giving due consideration to the status of the party by whom the articles have been installed. Southern Cal. Tel. Co. v. State Board, supra; M. P. Moller, Inc., v. Wilson, 8 Cal.2d 31, 37, 63 P.2d 818; City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826, 90 A.L.R. 148; Gosliner v. Briones, supra; Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 191 P. 524; Lavenson v. Standard Soap Co., supra.

Observation of these physical facts in the case at bar is enlightening.

It is significant that in nearly every instance the party installing the vault doors owned the building in which the same were installed. In the cases where the doors were annexed to leased premises, the annexors occupied the property under long term leases varying in duration from approximately ten to fifty years. In the one instance, where the annexor held the premises under a month-to-month tenancy, it had in fact occupied the property continuously for more than twenty years and had no intention of moving its quarters.

The nature of a vault door itself suggests an intent permanently to affix it to a vault which by ordinary tests must be said to constitute an improvement to realty. Vaults alone without doors would not be useful as vaults, and would fail in their intended purpose. Both functionally and physically a vault door is integrated with the vault itself. Certainly vaults and vault doors constitute a unit for use together and are improvements to the realty. Southern California Tel. Co. v. State Board, supra; City of Los Angeles v. Klinker, supra, 219 Cal. at page 207, 25 P.2d 826, 90 A.L.R. 148; White v. Cincinnati, etc., R. R., 34 Ind.App. 287, 71 N.E. 276.

It was held in Woods v. Bank of Haywards, 10 Cal.App. 93, 95, 106 P. 730, 731, that a vault door is a part of the vault. Although the court therein determined that the steel lining of the vault could be removed without damage to the safe or to the freehold and was a trade fixture, it said: "the whole structure, comprising the brick work, steel lining, vestibule, and door constitute what is referred to in the lease as the vault". In the case of Bank of America Nat. Trust & Savings Ass'n v. New York L. Ins. Co., 16 Cal.App.2d 719, 61 P.2d 364, the trial court found that safety vault doors were affixed to the realty by one or more of the means of affixation named in section 660 of the Civil Code and concluded that they were a permanent and integral part of the realty and not removable under Civil Code, section 1019. Upon appeal in view of conflicting evidence as to the character of the affixation of bank fixtures this finding was not disturbed. See, also, Realty Dock, etc., Corp. v. Anderson, supra.

As appears hereinabove, vault doors are attached to vaults by means of screwing the "rear" flange into place, hanging the door, then attaching the whole securely to the vault by means of cement.

The mere fact that said doors can be removed without material damage to the vaults by chipping away with a chisel, jack hammer, or compressed air hammer, the cement grouting which attaches them to the vaults, does not alone establish their character as articles of personalty. A door or window in an ordinary dwelling house can be removed with very little damage to the realty. It also may be replaced by one of different design or by a new one if the former should become broken or defective, but no one would contend that either was not a part of the realty by reason of these facts alone.

[7] The existence or period of use of a vault door is measured by the life of the building to which it is annexed unless it becomes obsolete or mechanically defective. In order to make an article a permanent accession to the land its annexation need not be perpetual. It is sufficient if the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished or until the article is superseded by another article more suitable for the purpose. 26 C.J. 657, § 6.

The vault doors here in question vary in original cost from $1,800 to $20,000. Their resale value was testified to be but 25 per cent of that original cost. The monetary loss involved in a continuous and frequent replacement of such doors would negative the fact that their removal and replacement was intended to be a very common occurrence.

The size of the vault doors and the resultant expense and inconvenience in moving and replacing them also rebuts the proposition that their installation was intended to be a mere temporary thing. The record shows that the doors may vary in weight from three to forty tons. It also reveals that such removals and replacements are in fact infrequent—one witness testified that he had replaced but two in twenty-nine years. Although there was other testimony that replacements were made more often, still, as a whole, it revealed they were not an every day, an every year, or an every two or three year occurrence. The removals appeared to have taken place most often in cases of obsolescence, mechanical defect or discontinuance of the owner in the banking business.

None of these factors taken alone might establish the annexor's intent permanently to affix the vault doors to the realty, but, viewed together in their entirety, we are unable to perceive that any other intention can be inferred therefrom.

In those instances where the owner of the vault doors is also the owner of the building to which they are annexed their classification as real property for purposes of taxation creates no further problem. Where the owner of the vault doors has annexed his property to the real property of another, however, the question immediately arises as to whom the tax on the vault doors shall be assessed. We are reluctant to render this decision without first disposing of that question, since we are of the opinion that it could well be considered here. However, at the opening of the trial of this case counsel for both parties stated to the trial court that said question was not to be considered as an issue in this case inasmuch as it was said to be at issue in a proceeding for a writ of prohibition (No. 91,260) "trailing" this case and trial of which has by stipulation been held in abeyance pending this decision. The trial court, therefore, did not consider the question, nor did the parties discuss it in their briefs. In order therefore to permit the parties the benefit of their briefs and argument we shall not determine that question in this opinion.

The plaintiffs contend that since the Constitution of the United States and the federal statutes prohibit a state from assessing the personal property of a national bank, that an assessment such as here contemplated by the defendants would deprive national banks of a substantive right guaranteed to them by the provisions of the Constitution and federal statutes. They refer to section 5219 of the Revised Statutes, U.S.C.A., sec. 548 of title 12, which grants a state permission to tax only the shares of stock and real property of national banks. The cases cited by the plaintiffs as determining that furniture and other personal assets are exempt from state taxation are cases where the character of the property was not in question and hence are not helpful in the determination of the case at bar.

[8] The fact that under the rules and regulations of the controller of the currency, national banks must from time to time furnish to said controller, and publish at regular intervals, a sworn statement of their assets and liabilities and in this statement to segregate the real estate and personal property owned by them, and that in such classifications they list vaults and vault doors as personal property, has no bearing on the character of said property for purposes of taxation. There is no indication that said classification was made for purposes of taxation, nor with the intent to establish the legal status of vaults and vault doors as realty or personalty. Southern California Tel. Co. v. State Board, supra.

[9, 10] The plaintiffs maintain that the trial court's finding that the vault doors were personal property is a finding of fact and binding upon this court. However, as there was no conflict in the evidence, the finding of the trial court on this issue amounted to a conclusion of law, which in our view was erroneous. Leis v. City and County of San Francisco, 213 Cal. 256, 258, 2 P.2d 26; Gaston v. Hisashi Tsuruda, 5 Cal.App.2d 639, 642, 43 P.2d 355. We are of the opinion that the only conclusion which can be reached from a consideration of all the evidence is that said doors constitute a part of the realty.

The judgment appealed from is therefore reversed, with directions to the trial court to make findings of fact and conclusions of law and enter judgment thereon in accordance with the views herein expressed.

We concur: GIBSON, C. J.; SHENK, J.; HOUSER, J.

EDMONDS, Justice (dissenting).

For several reasons I cannot join in the conclusions of my associates in this case.

In the first place, the judgment from which this appeal was taken is based upon findings of the trial judge that the vault doors of the respective banks are personal property. These findings were made upon issues of ultimate fact framed by the pleadings, and are conclusive upon appeal if there is any substantial evidence to support them.

It is a settled rule of law that whether a chattel is a fixture, depends upon the cirsumstances concerning its annexation to real property and presents a question of fact. Sec. 660, Civ.Code. In Southern California Telephone Co. v. State Board, 12 Cal.2d 127, 134, 82 P.2d 422, 426, this court pointed out that "a thing becomes a fixture when it is 'permanently attached' to the realty, and permanence has reference to intent". The character of the annexation and the use to which the article is to be put may be considered in this connection, but such evidence is received to throw light upon the intention in regard to permanence.

Although a vault without a door would be useless for all practical purposes, it certainly does not necessarily follow that a vault shall always be fitted with the same door. Indeed, all of the evidence in this case supports a contrary conclusion. According to the testimony, vault doors in many different sizes are built by the manufacturers of safes and locks. Such doors vary in thickness, quality, efficiency and cost. They are kept in stock by the manufacturers of and dealers in such equipment and are usually sold from catalogues and photographs.

A complete vault door unit consists of the door and frame in which it hangs, which is called the "vestibule". Vaults are built so that this entire assembly can be taken out by removing a concrete wedge, and the evidence shows that this is frequently done. One witness testified that he had been in the vault business in San Diego for more than 20 years and had removed many bank vault doors and replaced them with others, always without injury to the building or walls. It is also in evidence that one bank maintains warehouses in various cities of the state in which it keeps vault doors, burglar alarms and various other banking fixtures, which previously had been installed in banking premises and later removed therefrom for the purpose of replacement or change; that it keeps many vault doors on hand in these warehouses and makes a great many changes in its equipment each year, all without injury to the doors or the vaults or the buildings.

According to this testimony, a bank vault is built to allow not only the installation of one particular door but also of any other which may later be found more efficient in operation or more resistant to calamity and attack. Obviously, the growth of a bank's business may require many changes in its physical structure and vaults and vault doors are designed and built to allow for expansion and improvement. These facts not only negative any inference of permanence but affirmatively show an intention to attach vault doors in a manner which will allow them to be changed from time to time with a minimum of expense. The evidence, as I read it, not only amply supports the finding of the trial judge but compels it.

But, my associates say, as there is no conflict in the evidence, the finding of the trial court must be considered as a conclusion of law. This statement is an incomplete one. The rule is that where the facts are undisputed and only one rational inference may be drawn from them, an appellate court as a matter of law may determine the correct finding to be made upon those facts. Gaston v. Hisashi Tsuruda, 5 Cal.App.2d 639, 642, 43 P.2d 355. But if a finding of fact is based upon a reasonable inference drawn from the evidence, it may not be set aside by an appellate court. County of Alameda v. Trieslau, 44 Cal.App. 332, 339, 186 P. 398.

Here the finding of fact made by the trial judge rests upon his inference, drawn from the evidence before him, that the vault doors in controversy were not attached with the intention of permanence. This evidence includes the character of the doors, the means by which they were attached, their purposes, and the custom and practice of the respondents and other banks concerning such equipment. Another equally reasonable inference might possibly have been drawn from these facts. But it is the exclusive province of the trial court or jury to determine issues of fact, and an appellate court may only set aside a finding of fact when it is not supported by substantial evidence.

Moreover, in my opinion, the state has classified vault doors as personal property. The Bank and Corporation Franchise Tax Act (Stats.1929, p. 19, as amended; Deering's Gen.Laws 1937, Act 8488) imposes a tax upon banks which shall be in lieu of all other taxes "except * * * upon their real property". The Bank Act (Stats. 1909, p. 87, as amended; Deering's Gen. Laws 1937, Act 652) specifies the property which a savings bank may purchase and hold as follows: "The lot and building in which the business of the bank is carried on; furniture and fixtures, vaults and safe deposit vaults and boxes and other personal property such as may be necessary or proper to carry on its banking business; * * *." Sec. 61. This law also limits the amount which a commercial bank is permitted to invest "in the lot and building in which the business of the bank is carried on, furniture and fixtures, vaults and safe-deposit vaults and boxes necessary or proper to carry on its banking business * * *." Sec. 84. Here are two legislative classifications of vault doors as personal property, in so far as the right of banks to purchase or own them is concerned.

It is said that these definitions or classifications are not controlling as against the provisions of section 3617 of the Political Code, which specifies the different classes of property which are subject to taxation. But this section contains no definition of a fixture, and the meanings of the terms mentioned in it are expressly restricted to the title of the Code in which it is found. The Bank and Corporation Franchise Tax Act, supra, is not a part of this title.

Stated in its essential particulars, the position of the taxing authorities is that, although a bank must carry on its business in accordance with the legislative requirements which classify vault doors as personal property, it must pay taxes upon them as real property. This is both legally unsound and morally unfair.

For still another reason I believe that the judgment of the trial court should be upheld.

The Bank and Corporation Franchise Tax Act, supra, subjects the real property of banks to local taxation. It also grants to the state's subordinate agencies the right to levy taxes upon the real property of banks. In its application to either of these purposes, the rule, strictissimi juris, applies. Grants of power from a sovereign to a subordinate are always strictly construed against the grant. 23 Cal.Jur. 804. And statutes imposing taxes in invitum are always strictly construed against the state and in favor of the taxpayer. Barker Bros. v. City of Los Angeles, 10 Cal.2d 603, 76 P.2d 97; Uhl v. Badaracco, 199 Cal. 270, 248 P. 917. Thus we have these two settled rules coming together in the present situation, each reinforcing the other, with the result that, for the purposes of the instant case, the phrase "real property" must be given the strictest definition and the narrowest application to which it is susceptible. Such a definition assuredly does not include bank vault doors under the facts in evidence.

Appellants may possibly contend that this case falls within the converse rule of statutory construction, that statutes granting exemption from taxation are to be construed in favor of the state and against the taxpayer. But this case does not fall within that rule. Section 3 of the Bank and Corporation Franchise Tax Act, supra, provides that the franchise tax paid by banks "shall be in lieu of all other taxes and licenses * * *". This court has held that such an "in lieu" tax is not to be regarded as granting an exemption. San Francisco v. Pacific Tel. & Tel. Co., 166 Cal. 244, 135 P. 971; Northwestern M. L. Ins. Co. v. Johnson, 8 Cal.2d 42, 63 P.2d 814.

Moreover, so far as the respondent national banks are concerned, this is a case "arising under the Constitution and laws of the United States"; in such a case the federal statutes are paramount, and the relevant decisions of the federal courts construing and applying those statutes are controlling upon the courts of this state. This is because national banks are immune from state taxation, except in the manner and to the extent that such taxation is authorized by congress. The sole congressional authorization for state taxation of national banks is contained in Revised Statutes 5219, 12 U.S.C.A. § 548, which authorizes taxation of their real property. This grant from the national government to the states, of permission to tax the real property of national banks, must be strictly construed against the grantee, as are all grants from a sovereign. 23 Cal.Jur. 804. It follows that a state which imposes a tax upon property of a national bank must bring itself within the boundaries of this narrow and strictly limited congressional permission.

For these reasons I am of the opinion that the judgment of the trial court should be affirmed.

16 Cal.2d 178

PEOPLE v. LUCAS.

Cr. 4299.

Supreme Court of California.

Aug. 30, 1940.

1. Infants 🔑20

Testimony of complaining witness was not required to be corroborated to sustain conviction for contributing to the delinquency of a minor.

2. Criminal law 🔑742(1)

Credibility of the witnesses is exclusively for the jury.

3. Criminal law 🔑775(2)

Where accused testified in support of alibi and jury was instructed that, to establish guilt, prosecution was required to prove all material allegations of offense beyond a reasonable doubt and to a moral certainty, and instruction charged that, before accused could be found guilty, jury was required to find that accused on or about a certain date in county of venue committed particular acts complained of, refusal to give instructions as to alibi was not error.

4. Criminal law 🔑785(6)

In prosecution for contributing to delinquency of a minor, accused should be afforded the benefit of a cautionary instruction to the general effect that such a charge is easily made and difficult to disprove for which reason the testimony of prosecuting witness should be examined with caution.

5. Criminal law 🔑1165(1)

An error requiring reversal of a judgment of conviction must appear from the record to have been prejudicial and to have caused substantial injury and that a different result would have been probable if the error had not occurred.

6. Criminal law 🔑1173(1)

The principle that a judgment will not be reversed for errors that do not affect the substantial rights of the parties has application to the refusal to give requested and otherwise proper instructions.

7. Criminal law 🔑1173(2)

Where jury were told that accused was presumed to be innocent, the meaning of reasonable doubt was defined and that they were not to act on mere probabilities and were admonished to disregard fanciful theories and unreasonable inferences and accused was ably represented and evidence amply supported verdict of guilty, refusal to give cautionary instruction in prosecution for contributing to delinquency of a minor was not reversible error.

8. Infants 🔑20

Evidence sustained conviction of contributing to delinquency of a minor as against claim of alibi.

HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Alvin Julius Lucas was convicted of contributing to the delinquency of a minor, and from the judgment of conviction and an order denying his motion for new trial, he appeals.

Judgment and order affirmed.

Prior opinion, 99 P.2d 547.

Robert B. Fowler, of Modesto, and A. G. Bailey, of Woodland, for appellant.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and Leslie A. Cleary, Dist. Atty. of Stanislaus County, of Modesto, for respondent.

PER CURIAM.

A hearing was granted in this cause after decision in the District Court of Appeal of the Third Appellate District in order that we might clarify what appears to be an uncertain state of the law with respect to the giving of cautionary instructions in cases of this character. Examination of the record and pertinent authorities satisfies us as to correctness of the conclusion announced in the opinion prepared by Mr. Presiding Justice Pullen and, with such additional comments as shall hereinafter appear, we adopt the following portions thereof as and for the decision of this court:

"The defendant was charged with contributing to the delinquency of a minor, a misdemeanor, and after a jury trial, was found guilty, and from the judgment thereon, and from an order denying a motion for a new trial, this appeal is taken.

"As grounds for appeal it is contended that the testimony of the complaining witness was not sufficiently corroborated; that the court erred in refusing to give a proffered instruction dealing with the question of alibi, and in refusing to give a cautionary instruction, which appellant claims should have been given on account of the nature of the charge against him.

"At the time of the alleged offense the complaining witness was a boy over fourteen, and at the time of the trial was past fifteen, and in the first year of high school. The record discloses no evidence of coaching of the witness nor any passion or prejudice on the part of the jurors, nor is the story of the boy so inherently improbable or incredible as to appear to be the result of imagination or fabrication.

"The defendant admitted that he was frequently in Modesto where the crime is alleged to have taken place, and that he often stayed at the home of a Mrs. Robinson, and asserted that his wife usually spent the night with him at the Robinson home. Other witnesses, however, testified that Mrs. Lucas usually stayed with other friends while defendant spent the night alone at the Robinson home. It is rather significant, and a fact of which the jury could take notice, that the defendant, who was an ordained minister and holding services in Modesto, could not substantiate any of his testimony as to dates from any of his church records or calendar.

[1] "The boy fixes one of the material dates in this case by the fact that on a particular Sunday evening he and appellant together saw the picture 'Marie Antoinette'. Appellant, while denying that he saw the particular picture with the boy, admitted having seen that picture and admitted that they had together gone to this show house and had seen at least one other picture, and that he had, on other occasions, given the complaining witness passes to the theater. It is also not denied that defendant had and used such an automobile as referred to by the complaining witness. It is to be remembered, however, that the testimony of the complaining witness is not required by the statute to be corroborated. People v. Raich, 26 Cal.App. 286, 146 P. 907.

[2] "Appellant claims that on the particular day in question he was visiting at San Quentin prison, and therefore could not have been in Modesto. However, there is nothing in the record to show that appellant could not have been in San Quentin and still have reached Modesto by 8 o'clock in the evening of the day in question. It is upon that testimony appellant has based his defense of an alibi. Under these circumstances we cannot say that the refusal of the proffered instruction as to an alibi was error. No witness, other than the defendant, testified as to his whereabouts at the time of the alleged crime. It very probably was true that defendant was at San Quentin on the day in question, but still he could have been in Modesto at the time charged by the prosecution. There are certain contradictions in the testimony of the complaining witness, and some witnesses testified to facts somewhat at variance to the testimony of others, but the credibility of the witnesses is exclusively the province of the jury.

[3] "The jury were instructed that it devolved upon the prosecution to prove all the material allegations of the offense beyond a reasonable doubt and to a moral certainty before they could find the defendant guilty. Among the allegations as recited in the instructions, and which the jury were charged to find to be true before the guilt of the defendant could be fixed, was that the defendant was, on or about the 25th day of September, 1938, in the county of Stanislaus, and did then and there commit the particular acts complained of. We find no error in the refusal to give the instruction as to an alibi. * * *

"Nor do we find any misconduct on the part of the district attorney, either in his examination of the witnesses nor his address to the jury. As to the latter, the court instructed the jury that arguments of counsel were not to be considered as proving any fact in issue."

[4] We are firmly of the view that in all cases of this character a defendant should be afforded the benefit of a cautionary instruction as was here requested to the general effect that such a charge is easily made and difficult to disprove for which reason the testimony of the prose-

cuting witness should be examined with caution. The appellate courts of this state frequently have held that such an instruction should be given. People v. Adams, 14 Cal.2d 154, 162, 93 P.2d 146; People v. Benson, 6 Cal. 221, 65 Am.Dec. 506; People v. Garrett, 27 Cal.App.2d 249, 81 P.2d 241; People v. Vaughan, 131 Cal. App. 265, 21 P.2d 438; People v. Hewitt, 78 Cal.App. 426, 248 P. 1021; People v. Caldwell, 55 Cal.App. 280, 203 P. 440. As pointed out in the Adams case, supra, "'There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenceless, and Courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding.'" [14 Cal. 2d 154, 162, 93 P.2d 150]. However, because of some unfortunate language in the case of People v. Anthony, 185 Cal. 152, 159, 196 P. 47, trial judges in some instances have felt justified, as here, in refusing such an instruction. The Anthony case is contrary to the uniform rule of decisions in this state to the effect that such an instruction is not improper. Moreover, the objection there voiced to such an instruction, that it contains "statements of fact, not of law", would appear to have spent much of its force in view of the recent amendment to section 19 of article VI of the Constitution authorizing a trial court to comment on the facts.

[5, 6] We therefore expressly disapprove of the language in the Anthony case tending to suggest the propriety of refusing cautionary instructions in cases of this character. However, we do not believe that a reversal is necessary in this case. It is not every error that requires a reversal on appeal. People v. Nolan, 126 Cal.App. 623, 634, 14 P.2d 880. The authorities are legion to the effect that before a judgment may be reversed because of error it must appear from the record that it was prejudicial and caused substantial injury and that a different result would have been probable if the error had not occurred. Murnane v. Le Mesnager, 207 Cal. 485, 495, 279 P. 800; People v. Britton, 6 Cal.2d 10, 13, 56 P.2d 491. In other words, a judgment will not be reversed for errors that do not affect the substantial rights of the parties. Bollinger v. Bollinger, 154 Cal. 695, 699, 99 P. 196; People v. Swift, 140 Cal.App. 7, 10, 34 P. 2d 1041. This principle has application to the refusal to give requested and otherwise proper instructions. People v. Britton, supra; People v. Fellows, 63 Cal.App. 557, 561, 219 P. 80; People v. Lawlor, 21 Cal.App. 63, 68–71, 131 P. 63; People v. Thompson, 68 Cal.App. 487, 493, 229 P. 896; People v. Tucker, 28 Cal.App.2d 206, 208, 82 P.2d 73.

[7, 8] Among other things, the jury was here instructed that the defendant was presumed to be innocent. The meaning of reasonable doubt was defined for it. In addition, the jury was told that it was not to act upon mere probabilities and was admonished to disregard fanciful theories and unreasonable inferences. Appellant was ably represented. The evidence amply supports the verdict and points to the appellant's guilt. Under the circumstances of this case, the refusal to give the requested cautionary instruction did not constitute reversible error.

The judgment and order are, and each is, affirmed.

HOUSER, Justice.

I dissent.

By respective rulings in a host of adjudicated cases in this state, in proper circumstances a defendant is entitled as a matter of law and common justice to have a separate instruction given to the jury respecting his "defense" of alibi. And the same situation prevails with respect to the cautionary instruction regarding the testimony of the prosecuting witness in cases of the instant character. To rule herein that the refusal by the trial court to give such instructions, for the asserted reason that such refusal did no prejudicial harm to the defendant, simply means that this court is usurping the functions of the jury,—and amounts to a declaration that, although erroneous, trial courts may, with impunity, disregard the substantial rights of a defendant and refuse him a fair trial, especially in so-called "sex-perversion" cases.

16 Cal.2d 80

GIBSON et al. v. MENDOCINO COUNTY.

Sac. 5385.

Supreme Court of California.
Aug. 21, 1940.

Rehearing Denied Sept. 19, 1940.

1. Counties 🔑143
Municipal corporations 🔑847
Schools and school districts 🔑89
Towns 🔑45

The Public Liability Act imposing liability on a county, town, municipality, and school district for injuries caused by defective or dangerous condition of public property mentioned in act does not provide an exemption from liability where certain defects are patent, or where person suffering injuries is a licensee rather than an invitee. Gen.Laws 1937; Act 5619, § 2.

2. Counties 🔑143

Where it was general custom for residents to cross through county courthouse to reach streets lying at either side of the building, county was liable for injuries sustained by licensee who fell in courthouse as result of defective condition at courthouse entrance, although she was passing through courthouse merely as a convenience to herself. Gen.Laws 1937, Act 5619, § 2.

3. Appeal and error 🔑1008(1)

In action tried without a jury to recover for injuries suffered in a fall, question of weight to be accorded to testimony of plaintiff who was not able to state precisely her position on county courthouse steps immediately before she fell was a matter for determination by trial court.

4. Evidence 🔑591

An injured party whose testimony consisted of a narration of events as they appeared to her at or immediately prior to happening of accident causing injury was not conclusively bound by her own testimony as against circumstantial or other evidence bearing on question of proximate cause which the fact-finding body might fairly have believed.

5. Counties 🔑223

In action to recover for injuries suffered when licensee fell down steps of county courthouse, evidence warranted finding that defective self-closing apparatus on courthouse door which exerted a powerful thrust outward when door was closing, and smooth and sloping metal plate on threshold, was "proximate cause" of licensee's injuries. Gen.Laws 1937, Act 5619, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

6. Negligence 🔑66(1)

Forgetfulness of a known danger will not always operate to prevent recovery, since to forget is not negligence, unless it shows a want of ordinary care.

7. Counties 🔑224

In action by licensee to recover for injuries suffered from fall down county courthouse stairs, allegedly caused by self-closing door swinging shut and striking licensee, licensee was not contributorily negligent as a matter of law in turning back to door which she knew was equipped with a self-closing device, when her attention was momentarily diverted by sound of fire siren. Gen.Laws 1937, Act 5619, § 2.

8. Counties 🔑223

In action against county to recover for injuries caused by defective condition in county courthouse, which county failed to remedy after knowledge and notice thereof, evidence established that county had actual knowledge of the alleged defective condition. Gen.Laws 1937, Act 5619, § 2.

9. Counties 🔑223

In action against county to recover for injuries allegedly resulting from a defective condition in county courthouse, testimony of one member of county board of supervisors that he did not know and had no reason for concluding that entrance way of courthouse was dangerous, was not conclusive on question whether county had actual knowledge of the defective condition. Gen.Laws 1937, Act 5619, § 2.

10. Counties 🔑222, 223

In action by licensee to recover for injuries suffered in fall down county courthouse steps, issues as to dangerous and defective condition of county courthouse entranceway resulting from the sudden and powerful thrust outward of self-closing door, and smoothness and downward slope of metal plate on threshold of door, were tendered by the pleadings and the proof. Gen.Laws 1937, Act 5619, § 2.

In Bank.

Appeal from Superior Court, Mendocino County; W. D. L. Held Judge.

Action by Mary Gibson and John R. Gibson against the County of Mendocino to recover damages sustained as result of a fall. From a judgment for the plaintiffs, defendant appeals.

Affirmed.

Prior opinion, 96 P.2d 1005.

Mannon & Brazier and James E. Busch, all of Ukiah, for appellant.

Taft & Spurr, of Ukiah, for respondent.

PER CURIAM.

Under the provisions of section 2 of the Public Liability Act of 1923 (Stats.1923, p. 675; Deering's Gen.Laws of California, 1937, Act 5619, p. 2630), the plaintiffs, husband and wife, brought this action to recover damages for injuries sustained by the plaintiff Mary Gibson, an aged woman, when she fell down three cement steps at the south entrance of the Mendocino county courthouse, which is situated in the city of Ukiah, California. The case was tried without a jury and judgment was rendered in favor of the plaintiff wife in the sum of $7,000, and in favor of the husband for $406.75. The defendant's motion for a new trial was made and denied, and thereafter an appeal was taken from the judgment.

The injuries for which recovery is sought were incurred on April 13, 1938, on which day the plaintiff Mary Gibson intended to cross from the south through the county courthouse as a means of arriving at a street located on the north side of said building. After she had ascended the steps at the south entrance, and as she pushed open the door and stepped across the threshold, the fire siren sounded, whereupon she immediately turned about and faced toward the street because, according to her testimony, she wanted to hear and count the number of blasts, in order that she might determine the location of the fire, in view of the fact that she had previously suffered a loss through fire at her home. While her back was thus turned to the opened door, and as it swung to a close through the operation of a self-closing device, the door struck her back, or her right side, and she was thrown from the threshold landing down the three steps to the street level,—as a result of which fall she sustained serious and permanent injuries.

The trial court's findings were, in part, substantially as follows: That a steel floor plate, nineteen inches wide (the outer edge of which was flush with the outer edge of the building), was located immediately outside the door on a landing before the threshold; that the said steel plate had originally been of corrugated design to prevent slipping, but that the corrugations in the center thereof had been worn to such an extent that the worn part was smooth and slippery; that the landing on which the plate rested had a downward slope toward the sidewalk (which, together with the wearing of the corrugations on the steel plate, caused a total slope outward of one-half an inch at the place where the plate had worn smooth); also, that the self-closing apparatus which was situated on the inside of the door "exerted a sudden and powerful thrust outward" when the door was closing; that for a period of more than four years prior to the date of the accident the said entrance had been in a dangerous and defective condition, as described herein; that each of two members of the board of supervisors had personal knowledge of such defective condition for that period of time; that after such knowledge had been acquired by such members the said board had failed and neglected to remedy the same within a reasonable time thereafter; and that the injuries sustained by the plaintiff Mrs. Gibson while lawfully using the entrance were due to the dangerous and defective condition thereof, as hereinbefore described, and to the negligence of the defendant county in so maintaining the entrance.

The appellant county contends that by reason of the fact that Mrs. Gibson knew of the smooth condition of the metal plate, and also of the fact that the door was self-closing, those asserted defects were "patent defects" and, consequently, that if the injuries sustained by Mrs. Gibson were proximately caused by said patent defects the county would not be liable therefor; furthermore, that the county would not be liable for the injuries sustained by Mrs. Gibson by reason of the fact that at the time of the accident she was not in the act of entering the courthouse on a matter of business connected with the county and, therefore, she was not an invitee but a mere licensee, to whom the appellant owed no duty except to refrain from causing her wanton or wilful injury.

[1, 2] Although, according to her testimony, it is true that on the occasion of

the accident Mrs. Gibson intended to pass through the courthouse merely as a convenience to herself, it appears from the record that it was the general custom for the residents of that community to cross through the courthouse as a "short cut" to reach the streets lying to either side of the building. It is likewise true that Mrs. Gibson's testimony showed that she knew of the worn condition of the steel plate and of the fact that the door had a self-closing apparatus attached thereto,—although she testified that she did not know of the force which was exerted by the door in its "outward swing" as it closed. Moreover, a reading of the section of the act here involved discloses the fact that in connection with the liability imposed against a county, municipality or school district, no exemption therefrom is therein expressed where the asserted defects are patent, nor is any distinction indicated as between a licensee or an invitee who may sustain injuries by reason of a defective or dangerous condition of the public property mentioned in the act. In effect, it has been held that the rules with respect to the measure of care to be exercised by owners of private property toward invitees and licensees have no application to the duty imposed by the statute on a county, municipality or school district to maintain public property in a safe condition. Thus, in the case of Castro v. Sutter Creek U. H. S. Dist., 25 Cal.App.2d 372, 377, 77 P.2d 509, 513, where the issues involved the applicability of the same section of the act here concerned, the plaintiff, who had accompanied her two daughters to a dance held at an auditorium belonging to a school district, was shown to have received an injury because of having stepped into a hole as she was "crossing over" a parkway or strip of land lying between the sidewalk and the curbing adjoining a driveway which extended along the south side of the auditorium, which strip of land was owned by the school district, but was intended to be used only as a lawn plot or place for the planting of trees. In that case, where arguments were directed to the question whether at the time of the accident the injured person was a licensee or an invitee, the court ruled that the answer to that question was immaterial and not determinative of the liability of the defendants. The provisions of the section were there set forth to the effect that a county, municipality or school district is liable for injuries to persons and property resulting proximately from the dangerous or defective condition of public buildings, grounds, etc., in *all cases* where the government or managing board of such school district, county, municipality or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such buildings, grounds, etc., and within a reasonable time after acquiring such knowledge had failed to remedy such condition. The court in that case said that the provisions of the section "base liability upon any act which leaves a place or condition dangerous or defective and liable to cause some injury to the *general public*", and that the section was "directed not for the safety, particularly either of licensees or invitees, * * *". (Italics added.)

[3-5] In the present case the appellant also contends that the respondents failed to prove that the allegedly dangerous and defective condition was the proximate cause of the injuries to Mrs. Gibson. In that regard the appellant directs attention to the fact that Mrs. Gibson was the sole witness to the accident, and that her testimony was contradictory to the extent that it was impossible to determine therefrom what actually occurred at the time the accident happened. It is argued that under the state of her testimony the court could only guess whether immediately prior to the accident Mrs. Gibson had stood on the metal plate and, if so, whether the condition of the plate was the proximate cause of her fall, or what effect, if any, the closing door had in connection with the accident. On direct examination Mrs. Gibson testified that the accident happened in the following manner: "Well, I opened the door to go in and I pushed it back half way or more, and just as I stepped in, the siren blew and I stopped to count the whistles, because there was no one at home that afternoon, and I stepped inside one step, I think, and then when the siren blew I turned around right quick to see what I could see and hear, and I stepped forward, I think, *on to the plate,* and the door pushed to; it come to very slow, and then all at once it give me a push and pushed me off * * * Well, I think * * * I was standing pretty well on the out edge [of the metal plate], because I remember being at the edge of the building." (Italics added.) On another occasion her testimony was as follows:

"Q. You weren't on that iron threshold at the time, were you? A. I think I was.

"Q. You mean at the time the door struck you? A. Yes, I think I was standing right on it. * * * Of course, I could not swear that I was standing right square on it."

Additionally, on a photograph of the steps at the south entrance of the courthouse, Mrs. Gibson indicated the place where she was standing when she was struck as being a short distance out from the line of the doorway and near the left center of the metal plate. When asked whether she intended that mark to represent the "exact spot" where she was standing, she said, "Well, I couldn't say to that. * * * It was done so quick, you know, you couldn't really tell where you was." Mrs. Gibson was examined and cross-examined by counsel with unusual thoroughness regarding her exact position in or near the doorway at the time of the accident. And although in some instances her replies to such inquiries were vague, and in others inconsistent, in general they revealed merely an inability to remember the exact details with respect to her position immediately prior to the happening of the accident. But, in that regard, counsel for the respondents point out the fact that discrepancies in the testimony of laymen are not unusual nor are they always vital (Hollenbaugh v. Wickersheim, 114 Cal.App. 1, 3, 299 P. 90; Stephenson v. Brand, 122 Cal.App. 543, 546, 10 P.2d 476), particularly where, as here, it was shown that immediately before the accident Mrs. Gibson's attention was concentrated on the sound of the fire siren, and on intently listening in order to count the number of its blasts. It was no doubt due to those reasons and to the confusion which attended the happening of the accident that Mrs. Gibson was unable to relate in precise or accurate detail her exact position immediately before the accident occurred,—and, under such circumstances, the question of the weight to be accorded her testimony was solely a matter for determination by the trial court. However, in giving her testimony Mrs. Gibson was not making an admission or testifying to a fact peculiarly within her own knowledge,—she was merely giving a narration of events as they appeared to her at or immediately prior to the happening of the accident. She, therefore, was not conclusively bound by her own testimony as against circumstantial or other evidence bearing on the question of proximate cause which the fact-finding body might fairly have believed. Whicker v. Crescent Auto. Co., 20 Cal.App.2d 240, 243, 66 P.2d 749, and cases therein cited; Parker v. Manchester Hotel Co., 29 Cal.App.2d 446, 458, 85 P.2d 152. As was said in the last-cited case, it was the duty of the court to determine the proximate cause of the accident not alone from the testimony given by the injured party, but from all the evidence in the case. In the present case, although the evidence was conflicting in certain respects it nevertheless was sufficient to support the finding that the entranceway was in both a defective and a dangerous condition on the date of the accident. The witness Pearl, who was an "approved" building inspector, testified that about two years previously he had discovered that a hazard existed at the south entrance of the courthouse. In that regard his testimony was that, "* * * going through the door one day, I slid on the plate, and like Mrs. Gibson, I missed all the steps. However I did no damage and landed on my feet at the bottom;" and that "as I went through, the door swung to and helped me as I skidded on this plate, * * *". However, Pearl testified that it was raining at the time and that although he did not consider that his fall was entirely due to the condition of the entranceway, nevertheless he believed it was augmented by the force of the door in closing. The same witness testified that in May of 1938 he made an inspection of the entranceway; that he examined the operation of the self-closing device on the door and found that it was either out of adjustment or worn out, and that the check did not operate until the door was practically closed, or within approximately six inches of full closure. He further testified that when corrugations are worn smooth on a metal plate such as the one here in question, a hazard is thereby involved. Another witness testified that approximately in May, 1938, he was struck by the door in question; that in attempting to leave the courthouse through the door he was obliged to use both hands to pull it open sufficiently for him to pass through; that as he stepped outward, with one foot on the threshold and the other on the steel plate, the door swung to and struck him with such force that he was almost thrown off balance, but that by catching the door knob he prevented himself from falling.

Also, a county officer (not a supervisor) testified that he used the south entrance several times a day and that he went down it "pretty carefully" in the wintertime and especially at night.

Although the appellant county has presented much argument to the contrary, from a consideration of all the evidence bearing on the question of proximate cause, including the testimony of Mrs. Gibson as hereinbefore recited, it is clear that the trial court could have drawn the inference that immediately on hearing the siren she faced about and stepped outward on the metal plate—which, as before noted, was but nineteen inches in width; that in thus standing her body projected over the line of the doorway so that the door in swinging to a close with the unusual pressure occasioned by the defective closing device struck her with such force that she was thrown off balance—as well from the impact of the door as by reason of the fact that she was standing on the worn and sloping steel plate.

[6, 7] The contention is also made that Mrs. Gibson was contributorily negligent and in that regard the appellant relies on the rule that where one knows a condition to be dangerous, and is injured because of failure to take heed thereof, such conduct will bar a recovery. It is argued that by reason of the fact that Mrs. Gibson had knowledge of the slippery metal floor plate, and of the force exerted by the door in closing, she was negligent in turning her back to the closing door and in stopping at a point where the door could strike her. But, as hereinbefore indicated, although Mrs. Gibson knew of the worn place on the metal plate and also that the door operated by a self-closing device, she did not know of the unusual force that the door exerted in closing. Moreover, immediately preceding the accident her attention was momentarily diverted by the sound of the fire siren and—as she testified—due to the fact that she had been "burned out once" and because at the time when the accident occurred there was no one at her home, she quickly turned to listen in order to ascertain the number of blasts, so that she might determine the location of the fire. In that regard, it was said in the case of Rosella v. Paxinos, 110 Cal.App. 299, 302, 294 P. 39, 40, "* * * forgetfulness of a known danger will not always operate to prevent a recovery, for to forget is not negligence, unless it shows want of ordinary care, the question being one for the jury. Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078; Smith v. Southern Pac. Co., 201 Cal. 57, 255 P. 500; Hayward v. Downer, 65 Cal.App. 450, 224 P. 265." Under all the circumstances herein related, the question whether the conduct of Mrs. Gibson in turning her back to the self-closing door amounted to contributory negligence was for the determination of the trial court, and it cannot be said as a matter of law that Mrs. Gibson was contributorily negligent.

[8, 9] The appellant county further contends that there was no proof that it had actual knowledge of the allegedly dangerous or defective condition complained of. That contention may not be upheld. There was evidence adduced to show that at least two members of the board of supervisors had actual knowledge of the worn and slippery condition of the steel plate, and although one member testified that he did not know and had no reason for concluding that the entranceway was dangerous, the effect of that testimony was, of course, not conclusive. Moreover, the theory of the act here concerned is that liability is imposed "not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof". Watson v. City of Alameda, 219 Cal. 331, 26 P.2d 286, 287; Meyer v. City of San Rafael, 22 Cal.App.2d 46, 48, 70 P.2d 533.

[10] The appellant also argues that there was no pleading and no proof that the condition of the entranceway was dangerous. That contention is likewise untenable. The respondents in their complaint set forth allegations which described the condition of the metal plate with the corrugations worn smooth, its downward slope, and the action of the self-closing door. Those allegations were denied in the answer, so that thereby the issue as to the dangerous and defective condition of the entranceway was clearly tendered, and, as heretofore has been indicated, there was substantial evidence to show that the entranceway was in a defective and dangerous condition.

It follows from the foregoing that the judgment should be and it is affirmed.

16 Cal.2d 164

CARROLL v. CALIFORNIA HORSE RACING BOARD.

Sac. 5355.

Supreme Court of California.

Aug. 26, 1940.

1. Theaters and shows ⚷3

Under provision of Horse Racing Act that no license granted by racing board shall be revoked without "just cause," use of the words "just cause" implies that charges should be made and notice of hearing given and an opportunity to be heard afforded, and hence failure to give a licensee notice and hearing on charges for which he was suspended could not be justified on ground that statute regulates activity of racing and betting on races which is essentially dangerous to the public if not properly controlled. Gen. Laws 1937, Act 3421, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Just Cause".

2. Theaters and shows ⚷3

The Legislature in enacting provision of the Horse Racing Act that no license granted by racing board shall be revoked without "just cause" was deemed to have enacted the statute with knowledge of decisions construing "just cause" as implying the right to notice and hearing as a condition to the revocation of a license. Gen. Laws 1937, Act 3421, § 3.

3. Theaters and shows ⚷3

Where the horse racing board suspended horse trainer's license without notice or hearing, licensee did not "waive" his right to a hearing by signing application for license which purported to deny such right, since board in forcing the licensee to give up his statutory right was acting beyond its powers. Gen.Laws 1937, Act 3421, §§ 3, 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Petition by Thomas J. Carroll against the California Horse Racing Board for a writ of mandate requiring respondent to rescind certain orders, acts, and resolutions of the Board and an order and act of the Board of Racing Stewards. From a judgment for petitioner, respondent appeals.

Affirmed.

Prior opinion, 93 P.2d 266.

Earl Warren, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for appellant.

Leo R. Friedman, of San Francisco, T. B. Cosgrove and Homer N. Boardman, both of Los Angeles, Honorable Burton K. Wheeler, U. S. Senator from Butte, Mont., and John L. Wheeler, of Los Angeles, for respondent.

PER CURIAM.

The controversy which is before this court upon an appeal from a judgment ordering a writ of mandate to issue, concerns the right of the Horse Racing Board, established under the provisions of the California Horse Racing Act (Stats. 1933, p. 2046; Deering's Gen.Laws, 1937, Act 3421, p. 1634), to suspend the respondent's license as a trainer of horses. More specifically, the question is whether such action may be taken without affording the licensee a hearing.

On January 1, 1937, petitioner was granted a trainer's license for a period of one year, under the provisions of the Horse Racing Act, supra. His signed application contained an agreement to comply strictly with the statute and the rules and regulations of the board, and a further agreement that the license might be summarily revoked or suspended by it. The license recited that it might "at any time be revoked, canceled, temporarily suspended or withdrawn".

Pursuant to authority given by the statute, the board adopted various rules for the regulation of horse racing where bets are made. Under these rules, the officials of a race meeting include three stewards, employed by the association holding the meeting, with authority to determine all questions pertaining directly to racing. The stewards generally supervise the conduct of the race and the "owners, trainers, jockeys, grooms, and other persons attendant on horses". They have power to impose fines on such persons, or to suspend them for the duration of the race, reporting such fines or suspensions to the Horse Racing Board.

Another rule of the board provides that approved equipment for the administration of saliva test will be required at all meetings. "Should the chemical or other analysis of saliva sample taken prove positive, showing the presence of any narcotic, stimulant, chemical or drug of any kind or description, the Owner and Trainer of the horse, either or both, may be suspended or ruled off for life."

In a race run at the Santa Anita track on January 1, 1937, a horse named "Proclivity", owned and entered by Norman W. Church, won. The regular trainer of this horse was ill at the time of the race, and the respondent, an employee of Church, was substituting for him on that day. After the race, a saliva sample was submitted to chemists, who reported positive reactions to alkaloids, indicating the probable use of strychnine as a stimulant. The report was considered by the racing stewards at various meetings during January, 1937, as a result of which the respondent was ordered suspended pending further investigation. This action of the stewards was reported to the Horse Racing Board, which also held meeting, considered evidence, and on October 6, 1937, adopted findings that the horse had been drugged and that respondent was at that time its trainer. Upon these findings the board ordered that petitioner's license should be suspended to and including December 31, 1937. The present proceeding followed.

The issue is a narrow one. The superior court found, and its finding is not challenged, that the respondent was not notified of the fact that the Horse Racing Board was considering the suspension of his license, and he was given no hearing prior to its action. But the respondent, although contending that there is no credible evidence concerning the horse's drugging, does not rely upon its insufficiency as the ground of his attack upon the board's action. His basic contention is that, although, under the rules of the board, the trainer is responsible for the condition of a horse in his charge, a license may not be revoked without notice and hearing. This contention may, perhaps, raise a question of constitutional due process of law, but the petitioner rests his case squarely upon the language of the statute. The issue, as so presented, is whether the Horse Racing Act, supra, by its terms requires that notice and hearing be given before a license granted pursuant to its provisions may be suspended.

The relevant provisions of the statute may be briefly stated. Section 3 provides in part: "No qualified person shall be refused such license, nor shall such license be revoked without just cause." Section 9 provides that if a license is suspended or revoked, the board shall state publicly its reason for so doing and enter such reasons in its minute book; and that the propriety of its action shall be subject to review, on questions of law only by the superior court. Section 5 provides that the Governor may remove any member of the Horse Racing Board for cause, "giving him a copy of the charges against him and an opportunity to be heard."

The board's argument is that the statute makes an express requirement of notice and hearing in the case of the removal of a member of the board, but omits any such requirement where the suspension or revocation of a trainer's license is concerned. This omission is said to indicate a legislative intent not to require notice and hearing. The board also stresses the alleged need for summary action in these situations.

[1] This argument, while not without persuasive force, fails to give effect to the provision in section 3, that no license may be revoked "without just cause". This phrase is familiar in licensing statutes, and has been generally recognized as implying a right to notice and hearing. It would be difficult to give it any other interpretation, for the determination of "just cause" necessarily requires a fair consideration of any evidence offered by the accused. As the court said in State v. Louisiana State Boxing Commission, 163 La. 418, 112 So. 31, 33, holding that a license to conduct boxing matches could not be revoked without notice and hearing: "Since it is contrary to all legal principles and against the spirit of common fairness to condemn any individual upon any charge without giving him an opportunity to meet and disprove it, and, since the statute does not in express terms dispense with notice and hearing, we think by fair implication, when it restrains the right of revocation by the commission for cause only, it necessarily means for any cause which the commission may determine justifies such action after notice and hearing to the licensee to appear and answer any charge or complaint lodged against him."

This decision is clearly in point. A number of California cases, dealing with powers to act "for cause", are to the same effect. See Bannerman v. Boyle, 160 Cal. 197, 116 P. 732; Welch v. Ware, 161 Cal. 641, 119 P. 1080; Knights of Ku Klux Klan v. Francis, 79 Cal.App. 383, 249 P. 539; also, on the general question of the right to notice and hearing where licenses are involved, Wichita Council No. 120 v. Security Benefit Ass'n, 138 Kan. 841, 28 P.2d 976, 979, 94 A.L.R. 629; State v. Sullivan, Mont., 98 Mont. 425, 40 P.2d 995, 99 A.L.R. 321; Narragansett Racing Ass'n v. Kiernan, R. I., 194 A. 49; People v. Noggle, 7 Cal.App.2d 14, 45 P.2d 430; Martin v. Board of Supervisors, 135 Cal.App. 96, 26 P.2d 843. The board seeks to distinguish these cases upon the theory that they deal with occupations not inimical to the public welfare, or with public officers, while the present case involves a statute regulating the activity of racing and betting on races, which is essentially dangerous to the public if not properly controlled. This argument, however, is nothing more than an attempt to justify an express legislative denial of notice and hearing as consistent with the constitutional guaranty of due process of law. On the question of the constitutional power to authorize revocation of licenses in certain business involving dangers to the public without notice and hearing there is considerable uncertainty in the cases. But this question is not now before the court because the legislature has not denied the right to a hearing, and the issue is whether the statute, by its terms, gives that right.

[2] The authorities cited above indicate that statutory provisions requiring "cause" for revocation of licenses or removal of officers carry with them by implication the right to notice and hearing. The legislature must be deemed to have enacted the present statute with knowledge of these decisions (Estate of Moffitt, 153 Cal. 359, 95 P. 653, 1025, 20 L.R.A.,N.S., 207; Ex parte Nowak, 184 Cal. 701, 705, 195 P. 402), and therefore, by the use of the words "without just cause", to have intended to require notice and hearing as a condition to the revocation of a license issued under the Horse Racing Act, supra.

It is true that the opinion in State Board of Equalization v. Superior Court, 5 Cal. App.2d 374, 42 P.2d 1076, a case dealing with a liquor license, expresses a view contrary to the foregoing decisions, but without any consideration of them. But the conclusion reached in that case is contrary to both principle and authority, and it is disapproved to the extent that it is inconsistent with the present decision.

[3] Also, there is no merit in the contention that the respondent waived his right to a hearing by signing the application for a license. If the application and license issued upon it purport to deny this right, the board, in forcing petitioner to give up his statutory right, was acting wholly beyond its powers. An administrative board may not evade the provisions of a statute by any such method.

The judgment is affirmed.

GIBSON, C. J., deeming himself disqualified, does not participate in this opinion.

16 Cal.2d 175

YALE v. STATE BAR.

L. A. 17470.

Supreme Court of California.

Aug. 26 1940.

As Modified Sept. 25, 1940.

1. Attorney and client 🔑38

An attorney is not subject to discipline for acts of his partner in which he did not participate.

2. Attorney and client 🔑53(2)

Evidence showing that law firm of which petitioner was member collected an unconscionable fee for services rendered in a manner which amounted to a fraud upon a client failed to disclose any improper conduct on petitioner's part, so as to support imposition upon him of any disciplinary measures, where it appeared that petitioner's partner had handled the matter and petitioner had had no part in fixing the fee, and especially where petitioner was willing to have his civil liability fixed and to return to client so much of excessive portion of fee as he might have received as a member of the partnership.

3. Attorney and client ⚿53(2)

Evidence supported finding that attorney acted honestly, though erroneously, in computing his fees on settlement of estate of a decedent, and that he had made full restitution of the overcharge, so that there was no ground for discipline based on such count.

4. Attorney and client ⚿58

Evidence that petitioner's law partner was executor of an estate and that petitioner was his attorney as such executor, that petitioner negotiated a sale of contract for sale of realty, which was part of assets of estate, to petitioner's brother-in-law, that almost immediately thereafter petitioner arranged for a resale of contract by his brother-in-law to client of his law partner for a profit of $500, and that profit of resale was retained by petitioner, established improper conduct on petitioner's part, warranting suspension for one year.

◆

In Bank.

Proceeding by Don L. Yale to review the record in a disciplinary proceeding initiated when the State Bar of California issued its notice to the petitioner, an attorney, and his law partner to show cause why they should not be disciplined for asserted professional misconduct.

Petitioner suspended for one year.

Preston & Preston, of San Francisco, for petitioner.

Philbrick McCoy, of Los Angeles, Fred E. Lindley, Frank Downer, and Arthur F. H. Wright, all of San Diego, and Claude Minard, of San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review the record in a disciplinary proceeding initiated when the respondent State Bar issued its notice to the petitioner, an attorney, and his law partner to show cause why they should not be disciplined for asserted professional misconduct based on facts alleged in four separate counts, only three of which, however, had application to the petitioner herein. We are not presently concerned with the charges as they may affect petitioner's law partner. That is a matter for consideration in a separate review proceeding here pending.

At the conclusion of its hearings, at which considerable evidence was adduced, a local administrative committee made findings and recommended that petitioner be disciplined "but certainly not more than thirty days suspension". In the main, the board of governors adopted the findings as to the circumstances underlying the several charges, but deleted therefrom such portions thereof as tended to indicate innocence or good faith on the petitioner's part.

[1, 2] The evidence has been examined and we are satisfied that upon two of the charges made against petitioner no discipline should be meted out to him. As to these charges, it definitely appears that petitioner was free of reprehensible conduct, either because his partner had handled the matter or because the fault underlying his conduct was the result of an apparent honest error of law. To sustain our conclusion with respect to the so-called "Lockwood Fee" matter we need only refer to the brief of the respondent State Bar, wherein it is stated that: "The facts here are, in substance, that the firm of Stanford and Yale charged and collected an unconscionable fee for services rendered, in a manner which amounted to a fraud upon the client. The board found that petitioner had no part in fixing the fee, and is willing to have his civil liability fixed and to return to the client so much of the excessive portion of the fee as he may have received as a member of the partnership. The evidence here sustains those findings. We believe that petitioner correctly states the law to be that he is not subject to discipline for the acts of his partner in which he did not participate. In re Luce, 83 Cal. 303, 305, 23 P. 350. Accordingly, this matter calls for no further consideration here." We are in accord with what respondent states in its brief and, as indicated, we are of the view that the evidence addressed to the "Lockwood Fee" matter fails to disclose any improper conduct on petitioner's part and consequently will not support the imposition upon him of any disciplinary measures.

[3] Our conclusion must necessarily be the same with respect to the count directed to the "Hickox Estate Fee", wherein the petitioner was criticized for the method employed by him in computing his fees on the settlement of said estate. The local administrative committee found that he had acted honestly, though erroneously, in making such computation; that he had made full restitution of the overcharge, and

that there was no ground for discipline based on this count. The evidence was sufficient to support the finding and conclusion of the committee and no good reason appears why the same should be disturbed.

[4] We cannot, however, excuse petitioner's conduct on the count addressed to the sale of the "Broughton Contract". Examination of the evidence with respect thereto shows that petitioner's law partner was the executor of an estate and that petitioner was his attorney as such executor. As part of the assets of this estate there existed a contract for the sale of real property on which payments had been regularly made, there being a balance due thereon of $2,330.65, for which amount the contract had been duly appraised in the course of the probate proceeding. In March and April, 1936, the executor and petitioner, as his attorney, and who, as stated, were law office associates, negotiated for the sale of this contract to petitioner's brother-in-law for the sum of $1,100. As a result of a reappraisement at the latter figure (procured by petitioner or the executor from another appraiser), and the representation that a higher bidder could not be found, the probate court confirmed the sale to petitioner's brother-in-law on April 10, 1936. Almost immediately thereafter petitioner arranged with his law office associate, the executor of the estate, for a resale of the contract for $1,600 by petitioner's brother-in-law to a client of his law office associate, which client had deposited $1,500 with the latter for investment purposes. This deposit was so made at or about the time negotiations were pending for sale of the contract to petitioner's brother-in-law and certainly prior to the confirmation of such sale. If we accept petitioner's testimony, his brother-in-law advanced only $400 toward the purchase of the contract, which was repaid to him upon the resale to the client of petitioner's law associate. In effect, the $1,100 received by the estate for the contract came from the latter. And, while petitioner has contended throughout that the sale to his brother-in-law for $1,100 and the resale by him immediately thereafter for $1,600 represented bona fide transactions, it is significant that the $500 profit on the resale did not reach the pocket of petitioner's brother-in-law, but instead was and is retained by petitioner. True, petitioner testified and has maintained that he retained the $500 profit not as his own but only by way of satisfaction or partial satisfaction of an indebtedness owed to him by his brother-in-law. Considering in its entirety all the evidence addressed to this count, we are firmly of the view that it reflects discredit upon petitioner's conduct as attorney for the executor. In effect, he represented both the original buyer (his brother-in-law) and the seller (the executor, his law office associate) in a transaction which it must be concluded from a reading of the record was not for the best interests of the estate. We have no hesitancy in stating that the almost complete lack of knowledge by petitioner's brother-in-law (who appeared as a witness) as to the details of his asserted purchase and resale of the contract originally belonging to the estate raises a serious doubt as to the sincerity of the claim that they were bona fide transactions and negotiated for his benefit alone. A profit therefrom to petitioner, the attorney for the executor, whether direct or by asserted partial payment or satisfaction of an indebtedness owing to him by the original purchaser, may not under all the circumstances here present receive the approbation of this court. It may reasonably be inferred from the evidence that petitioner did not act in conformity with good practice or the rules of professional conduct.

For the foregoing reasons, petitioner is suspended from the practice of the law for one year, effective thirty days from the date of the filing of this opinion.

EDMONDS, J., not having been present at the argument of this case, did not participate in its decision.

16 Cal.2d 158

COMMERCIAL DISCOUNT CO. v. LOS ANGELES COUNTY et al.

L. A. 16375.

Supreme Court of California.

Aug. 26, 1940.

1. Taxation ⇨200

Trust receipts prepared under Uniform Trust Receipt Act, given by automobile dealer to finance company to secure repayment, by dealer, of money loaned to him to pay for automobiles purchased from manufacturer or distributor, were not "notes" so as to be exempt from solvent credits tax by virtue of lien income tax, where trust receipts did not contain an unconditional promise to pay a sum certain in money. Civ.Code, §§ 3012 to 3016.16, 3082; Pol.Code, § 3627a; St.1935, p. 1090; Const. art. 13, §§ 1, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Notes".

2. Taxation ⇨200

Trust receipts prepared under the Uniform Trust Receipts Law, and given by automobile dealer to finance company to secure repayment of money loaned to dealer to pay for automobiles purchased from manufacturer or distributor, were not "chattel mortgages" and as such relieved from taxation on adoption of Personal Income Tax Act. Civ.Code, §§ 2955 to 2978, 3012 to 3016.16, 3016.2; Pol.Code, § 3627a; St.1935, p. 1090; Const. art. 13, §§ 1, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Mortgages".

3. Chattel mortgages ⇨9

The Legislature by adopting the Uniform Trust Receipts Act intended to permit transactions thereunder to be uncontrolled by the recordation requirements and other formalities of chattel mortgage law. Civ.Code, §§ 3012 to 3016.16; Pol.Code, § 3627a.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Commercial Discount Company, a corporation, against the County of Los Angeles and others, to secure a refund of taxes. From an adverse judgment, plaintiff appeals.

Affirmed.

For prior opinion, see 100 P.2d 309.

Chapman & Chapman and Ward Chapman, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

SHENK, Justice.

This is an appeal from a judgment in favor of the defendants in an action to recover taxes paid under protest. The judgment was entered after a demurrer to the complaint had been sustained without leave to amend.

The plaintiff is a California corporation engaged in the business of lending money to finance the purchase and sale of automobiles. On March 4, 1936, it owned solvent credits in the admitted sum of $3,666,322.76 and had other obligations owing to it in the sum of $1,611,967.24, which were secured by trust receipts. The defendant county assessor assessed all these credits to the plaintiff as solvent credits. The plaintiff paid the tax on the total amount, but under protest as to the portion secured by the trust receipts. It filed its verified claim for a refund of that portion of the tax which amounted to $1,611.96. The defendants refused to make the refund and this action followed.

The question is whether the obligations owned by the plaintiff, secured by the trust receipts, and on which the disputed tax was paid, were taxable as solvent credits. It is conceded that if they were solvent credits they were subject to taxation.

It is the contention of the plaintiff that said obligations were not solvent credits and were therefore relieved from taxation under applicable constitutional and statutory provisions in effect at the time. In this connection it is urged that the "property" which the assessor included in the disputed assessment as "solvent credits" was the trust receipts owned by it; that those trust receipts were "notes" or "mortgages" and, as such, were relieved from the burden of taxation upon the adoption of the Personal Income Tax Act of 1935 (Stats.1935, p. 1090), and the amendment of section 3627a of the Political Code in the same year. Stats.1935, p. 2251.

It is the contention of the defendants that the property which the assessor assessed as solvent credits was the oral promises or parol obligations of automobile dealers to pay money to the plaintiff, which were secured by the trust receipts, and that even if the trust receipts were the property so assessed they were neither notes nor mortgages relieved from taxation as contemplated by law.

The Constitution (sec. 1, art. XIII) provides that "all property in the State except as otherwise in this Constitution provided * * * shall be taxed * * *." The word "property" is declared to include "moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership".

By amendment in 1933, section 14 of article XIII of the Constitution made important changes in the matter of the taxation of personal property. That section contains the following: "The Legislature shall have the power to provide for the assessment, levy and collection of taxes upon all forms of tangible personal property, all notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages, and any legal or equitable interest therein, not exempt from taxation under the provisions of this Constitution, in such manner, and at such rates, as may be provided by law, * * * and may exempt entirely from taxation any or all forms, types or classes of personal property."

In 1935, the legislature amended section 3627a of the Political Code to read, in part, as follows: "Notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages, and any legal or equitable interest therein, of the classes taxable to the owner thereof under the provisions of section 14 of Article XIII of the Constitution of this state, are hereby taxed upon their actual value at the rate of two-tenths of one per cent. Solvent credits, of the class taxable to the owner thereof, under the provisions of section 14 of Article XIII of said Constitution are hereby taxed upon their actual value at the rate of one-tenth of one per cent. The property aforesaid, except solvent credits, shall no longer be taxable under the provisions of this section if and when a net income tax shall be passed or adopted in this State. Upon the passage or adoption of such tax and from the time such income tax becomes effective such net income tax shall be in lieu of the tax herein provided for upon notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages and any legal or equitable interest therein."

Basing its argument, for the main part on the foregoing constitutional and statutory law in effect at the time the disputed assessment was made, the plaintiff contends that the property assessed was the trust receipts which were either "notes" or "mortgages" and therefore relieved from taxation, although taxed under the name of "solvent credits".

It becomes necessary to examine the nature and terms of the trust receipts, a copy of which is attached to the complaint and made a part thereof. It is readily apparent that those trust receipts were prepared for use and were used pursuant to The Uniform Trust Receipts Law as originally passed in 1935. Stats.1935, p. 1930; secs. 3012 to 3016.16, inclusive, Civ. Code. Under this law a trust receipt was given by the automobile dealer, called the trustee, to the plaintiff, called the entruster, to secure repayment by the dealer of money loaned to him by the plaintiff, which money enabled the dealer to pay for automobiles purchased from the manufacturer or distributor. The trust receipt recites that the trustee holds in trust for the entruster, as security for payment on demand of a stated amount, certain described motor vehicles in which "a security interest remains in or is hereby transferred to entruster as security for the payment of the sums mentioned herein, together with interest and charges thereon from date hereof as agreed". The trustee agrees to hold the motor vehicle in trust as the property of the entruster for the purpose of sale or exchange. The trustee is prohibited from lending, renting, mortgaging, pledging, encumbering, operating, using or demonstrating any of the motor vehicles, but may sell any of them for cash or on terms approved by the entruster and for amounts not less than the amounts due it, the cash and other considerations received to be paid to the entruster. The entruster is given the right to repossess any or all of the motor vehicles upon default by the trustee and to sell them after specified notice of intention to sell. The trust receipt provides that "The proceeds of any such sale or sales shall be applied, first, to payment of the expenses thereof; second, to the payment of the expenses of retaking, keeping and storing said motor vehicle or vehicles including a reasonable attorney's fee; and, third, to the satisfaction of the trustee's indebtedness hereby secured. The trustee shall receive any surplus and shall pay unto entruster upon demand any deficiency. * * * In the event of default by the trustee in the payment of any moneys hereunder due on the due date hereof, entruster may declare all moneys secured immediately due and payable. In event of such default entruster may at his option and in lieu of sale as hereinabove provided declare a forfeiture of the trustee's interest in any or all of said motor vehicles against cancellation of the then remaining indebtedness against said motor vehicle or motor vehicles in accordance with the provisions of section 3016.2 of the Civil Code of the state of California. No waiver of any existing default shall be deemed to waive any subsequent default and all rights hereunder are cumulative and not alternative."

[1] It is clear that a trust receipt authorized by the Uniform Trust Receipts Law and briefly above described cannot be classified as a note. It contains nothing that may be construed as an unconditional promise to pay a sum certain in money as contemplated by section 3082 of the Civil Code. The uniform law under which the trust receipts were prepared was intended to authorize a method of securing a debt and not of creating a debt. There is nothing in the law which would prevent the execution of a promissory note or notes representing the amounts secured by the trust receipts. It does not appear that the plaintiff took notes from the automobile dealers for that purpose and the case is presented on the theory that the obligations to repay the money loaned rested in parol. Promissory notes in the same amounts named in the trust receipts were taken by the lender in the transactions involved in Chichester v. Commercial Credit Co., Cal.App., 99 P.2d 1083.

[2] It is then to be considered whether the trust receipts were "mortgages" as contemplated by section 3627a of the Political Code, and as such relieved from taxation upon the adoption of the Personal Income Tax Act of 1935. Much argument is addressed to this question, the plaintiff contending that said trust receipts are chattel mortgages in substance and effect; that the lien on the automobiles described in said receipts is in the nature of a chattel mortgage lien, and that therefore the court should declare that they be classified as mortgages relieved from taxation. There is nothing in the law authorizing the issuance of such receipts that would indicate that they were intended to operate as mortgages on personal property authorized by sections 2955 to 2978, inclusive, of the Civil Code. It is not contended that said receipts were executed with the formality required by those sections, but it is insisted that the trust receipts lien is similar to a chattel mortgage lien and should be held to be effective as such between the parties, notwithstanding the informality of their execution. There are many cases in the United States dealing with the effect of trust receipts. In In re Boswell, D.C., Sept. 1937, 20 F.Supp. 748, 751, affirmed 9 Cir., 96 F.2d 239, it was said of a trust receipt that "credit and financial agencies of present-day activities associate it with a security instrumentality that resembles a pledge, a chattel mortgage, or a conditional sale contract, but which is exactly none of these mediums of trade and credit". In Re Fountain, Inc., 2 Cir., July, 1922, 282 F. 816, 821, 25 A.L.R. 319, referring to the nature of a trust receipt, it was said: "This arrangement seems more nearly to resemble a chattel mortgage than any other form of security." See, also, cases cited and discussed in 49 A.L.R. 283; 87 A.L.R. 305; 101 A.L.R. 453; In re James, Inc., 2 Cir., 30 F.2d 555; article on Trust Receipt as Security, 22 Columbia Law Review, 395.

In Chichester v. Commercial Credit Company, supra, the plaintiff sought to have it established that trust receipts issued under the Uniform Trust Receipts Law were chattel mortgages. The court properly refused to so hold and pointed out some of the distinguishing characteristics between such security interest documents and chattel mortgages. Other differences might be noted. In the case of a chattel mortgage title is found in the mortgagee prior to the mortgage. But the chapter on trust receipts, and particularly section 3014 of the Civil Code, found therein, provides: "The security interest of the entruster may be derived from the trustee or from any other person, and by pledge or by transfer of title or otherwise."

[3] It was the obvious intention of the legislature in adopting the Uniform Trust Receipts Act to permit the transactions thereunder to be uncontrolled by the recordation requirements and other formalities of the chattel mortgage law. To lay down a general rule to the effect that a

trust receipt is a chattel mortgage would be in effect to nullify the trust receipts law. Each instrument is issued under its own statutory authority. Each is covered by its own chapter in the Civil Code, and while in theory each has some of the characteristics of the other, they are not the same instrument in law. In other words, each is a thing in and of itself and must be considered as such. To declare a trust receipt a chattel mortgage for the purposes of taxation and not to be a chattel mortgage for purposes of trade and commerce would be unjustifiable and result in great confusion.

The defendants also take the position that even if these trust receipts be classified as chattel mortgages, they are not such mortgages as are relieved from the burden of taxation under the Constitution and the statutes. They call attention to the fact that the term "mortgage", used in the excepting clause of section 1 of article XIII of the Constitution declaring that "The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this State," was incorporated in the original section and was reenacted in the amendments of 1894, 1910 and 1914; and that the same term used in section 4, article XIII, prior to the repeal of that section in 1910, had exclusive reference to mortgages affecting real property. Bank of Willows v. County of Glen, 155 Cal. 352, 101 P. 13. And it is argued that the term "Mortgage" as first employed in the definition of "credits" in section 3617 of the Political Code in 1880 (amendment to codes, 1880, p. 5), and in subsequent amendments of the same section, should have the same exclusive reference to mortgages on real property. The argument is persuasive; but it is unnecessary to further explore the constitutional and statutory history of the use and significance of the term "mortgage" for purposes of taxation, in view of the conclusion that in any event a trust receipt is neither a note nor a chattel mortgage and that the parol obligation secured thereby is not relieved from taxation by the provisions of section 3627a of the Political Code.

The judgment is affirmed.

We concur: GIBSON, C. J.; CARTER, J.; EDMONDS, J.; SPENCE, Justice pro tem.; McCOMB, Justice pro tem.

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16 Cal.2d 169

GONSALVES v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Sac. 5384.

Supreme Court of California.

Aug. 26, 1940.

Rehearing Denied Sept. 25, 1940.

1. Dismissal and nonsuit ⟹60(2)

The statute providing for dismissal of action for failure to serve and return summons within three years from commencement of action gives a remedy for delay in prosecution of an action, and makes it mandatory upon the court to dismiss action after three years unless the defendant is absent or has concealed himself. Civ.Code, § 581a.

2. Dismissal and nonsuit ⟹60(1)

The statute providing for dismissal of action on motion of court for failure to serve and return summons within three years from commencement of action is "jurisdictional" in the sense that the court has no power to excuse delay, nor can it refuse to act merely because the party fails to make a motion for dismissal, and the court has power to act only by ordering a dismissal. Civ. Code, § 581a.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdictional".

3. Dismissal and nonsuit ⟹60(2)

The statute providing for dismissal of action for failure to serve and return summons within three years from commencement of action is a rule of procedure designed to encourage promptness in prosecution of actions, and dismissal is not based upon the absence of a good cause of action, nor upon any defect in the substantive right itself, nor is the statute one of limitation barring the remedy of action after lapse of a specified time. Civ.Code, § 581a.

4. Judgment ⟹570(5)

An order dismissing an action on a note for lack of prosecution was not "res judicata" in another action on the same note, since a dismissal for delay in prosecution is not a judgment on the merits. Civ.Code, § 581a.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

5. Banks and banking ⟹134(1), 136

The banker's lien provided by statute is a lien on securities such as commercial paper deposited with bank by customer in course of business, and the so-called lien of bank on a depositor's account or funds on deposit is not technically a "lien", since bank, as owner of deposited funds and debtor of depositor, cannot have a lien on its own property, and the right of bank to charge depositor's account with matured indebtedness is more correctly termed a right of "set-off" based upon general principles of equity. Civ. Code, § 3054.

See Words and Phrases, Permanent Edition, for all other definitions of "Lien" and "Set-Off".

6. Banks and banking ⚷134(1)

A bank's right to set off against a depositor's matured indebtedness an amount on deposit in bank to depositor's credit is not limited to the pleading of a counterclaim in an action brought by the depositor to recover deposit, but is enforceable by the bank's own act without the aid of a court. Civ.Code, § 3054.

7. Banks and banking ⚷134(1)

Where bank offset amount due on note against maker's deposit before action on note was dismissed pursuant to statute for failure to serve and return summons within three years after commencement of action, bank's right to set-off was not affected by dismissal of pending action, since bank was not limited in exercising right of set-off to pleading of a counterclaim in the action. Civ.Code, §§ 581a, 3054.

In Bank.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action to recover a bank deposit by Joe S. Gonsalves against the Bank of America National Trust & Savings Association, a banking corporation. From a judgment for the full amount of the deposit, defendant appeals, and from a judgment disallowing a claim for damages, plaintiff appeals.

Reversed.

Prior opinion, 96 P.2d 391.

Ferrari, Schilling & Bianco, Louis Ferrari, G. D. Schilling, C. H. White, and D. Bianco, all of San Francisco, for appellant.

Dennett & Zion, of Modesto, for respondent.

Probasco & McClean, of Oakland, amici curiæ.

GIBSON, Chief Justice.

This is an action to recover the amount of a bank deposit, with interest and damages. The facts are stipulated.

On June 18, 1929, plaintiff Joe S. Gonsalves and his wife made a demand note in the sum of $5,360 to defendant's predecessor. The note was secured by a chattel mortgage. In 1932 defendant sold the secured property and partially satisfied the obligation, leaving a deficiency of $2,238.60. The note was then assigned to H. C. Winklemen for the purpose of collecting the balance due.

On June 15, 1933, Winklemen filed his action on the note in the San Francisco superior court, against Gonsalves and his wife. No service of summons was ever made in this action.

On June 23, 1937, Gonsalves had on deposit in one of defendant's branches the sum of $1,308.91. The bank, on said date, notified him that it was exercising its right of set-off and appropriating the entire amount to apply on the indebtedness of the note. Thereafter Gonsalves presented a check for the amount on deposit, which was refused on the ground that the money had been properly taken by the bank.

On July 29, 1937, Gonsalves brought the present action in the superior court of Stanislaus county to recover the amount of the deposit, and damages for failure to pay the check. On April 21, 1938, while this action was pending, the San Francisco superior court, acting under the provisions of section 581a of the Code of Civil Procedure, dismissed the first action by the bank against Gonsalves and his wife for failure to serve and return summons within three years from the filing of the action. The said court made a finding that the defendants Gonsalves had not been absent from the state during the period.

The trial court in the present action concluded that when the three-year period of section 581a ran on the bank's action, the San Francisco court lost jurisdiction to render a judgment, and that no cause of action existed upon which the right of set-off could be exercised. Hence the purported set-off was held to be ineffective, and judgment was given in favor of Gonsalves against the bank. The defendant bank appealed from this judgment. Plaintiff also appealed from that part of the judgment denying him special damages.

Section 581a of the Code of Civil Procedure reads, in part, as follows: "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless * * * the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; provided, that, except in actions to partition or to recover possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the State, or while he has secreted himself within the State to prevent the service of summons on him."

Plaintiff points to the mandatory language of the statute, that no action "shall be further prosecuted", and actions "must be dismissed" by the court itself, without the necessity of any motion for dismissal. It is argued that the court can only follow the statutory command, and that upon the expiration of three years from commencement of the action, it loses jurisdiction to proceed further in the matter. The result, as plaintiff contends, is that when the set-off was attempted in 1937, more than three years after commencement of the action, the bank had no judicially enforceable claim, and consequently could not assert any such claim by action or by set-off.

[1, 2] This contention is, we believe, founded upon a double misconception, first of the effect of section 581a, and second of the nature of the banker's right of set-off. The dismissal statute gives a remedy for delay in prosecution of an action, and makes it mandatory upon the court to dismiss it after three years, unless the defendant is absent or has concealed himself. The statute is "jurisdictional" in the sense that the court has no power to excuse the delay, nor can it refuse to act merely because the party fails to make a motion for dismissal. It has power to act only in a certain way, that is, by ordering a dismissal. See People v. Southern Pacific R. Co., 17 Cal.App.2d 257, 61 P.2d 1184; Cook v. Justice's Court, 16 Cal.App.2d 745, 61 P.2d 357.

[3, 4] But this is nothing more than a rule of procedure, designed to encourage promptness in prosecution of actions. Dismissal under the statute is not based upon the absence of a good cause of action, nor upon any defect in the substantive right itself. The statute is not one of limitation, barring the remedy of action after lapse of a specified time. People v. Kings County Development Co., 48 Cal.App. 72, 191 P. 1004. Its nature and effect may be made clear by a simple illustration. Suppose that an action is brought two years after the due date of a note, and is later dismissed for failure to serve summons within three years. The only maintainable action would ordinarily be lost because the four-year statute of limitations would meanwhile have run on the note and have barred the remedy thereon. But suppose further that the note contains a valid waiver of the statute of limitations for a sufficiently long period. See Dexter v. Pierson, 214 Cal. 247, 4 P.2d 932. The action has been dismissed for lack of prosecution, but the obligation of the note remains, enforceable by a proper action in compliance with all governing procedural rules. To reach the contrary conclusion would be to hold that the order of dismissal is res judicata, that it not only terminates the particular action but constitutes a permanent bar to any other suit on the same cause of action. But it is a fundamental rule that a judgment is not res judicata unless it is on the merits, and a dismissal for delay in prosecution is not. Everts v. Blaschko, 17 Cal.App.2d 188, 61 P.2d 776; Matteson v. Klump, 100 Cal.App. 64, 279 P. 669; Goddard v. Security Title Ins. & Guar. Co., 14 Cal.2d 47, 52, 92 P.2d 804.

The second misconception of plaintiff is in his characterization of the banker's set-off as a "set-off or counter-claim", thus bringing it within the procedural requirements for the pleading of counterclaims by defendant in a pending action. His contention is that since the action by Winklemen, the bank's assignee, was subject to dismissal after three years, it could not thereafter be maintained, and that no counterclaim is permissible unless founded upon a cause of action which could at the time be the subject of an independent suit. The answer to this contention is that the bank, in appropriating the plaintiff's money in satisfaction of his debt, was properly acting without regard to the pendency or propriety of any action at law.

[5] To understand this exercise of the bank's right it is necessary to state briefly its nature. Section 3054 of the Civil Code provides: "A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business." The banker's lien described in this statute is, properly speaking, a lien on the securities such as commercial paper deposited with the bank by the customer in the course of business. The so-called "lien" of the bank on the depositor's account or funds on deposit is not technically a lien, for the bank is the owner of the funds and the debtor of the depositor, and the bank cannot have a lien on its own property. The right of the bank to charge the depositor's fund with his matured indebtedness is more correctly termed a right of set-off, based upon general principles of equity. See Pendleton v. Hellman Commercial T. & S. Bank, 58 Cal.App. 448, 208 P. 702; 11 Cal.L.Rev. 111, 112; 7 Cal. L.Rev. 341; 38 Harv.L.Rev. 800; Brown on Personal Property, p. 519.

[6] This right of set-off, however, is not limited in its exercise to the pleading of a counterclaim in an action. Despite the technical inaccuracy involved in calling it a lien, it is in the nature of a lien or security interest in the funds, similar to and enforceable in the same way as the lien against commercial paper. That is to say, it is enforceable by the bank's own act, without the aid of a court. Cases illustrating this exercise of the right of set-off without any action pending are readily found. See Pendleton v. Hellman Commercial T. & S. Bank, supra; Mt. Sterling Nat. Bank v. Green, 99 Ky. 262, 35 S.W. 911, 32 L.R.A. 568; 38 Harv.L.Rev. 800, 801. As observed by the note writer in 38 Harvard Law Review 800, supra, "The bank's right of set-off has transcended procedural significance, however, and despite the distinctions alluded to, courts and the commercial world treat it as substantially equivalent to a banker's lien." And in Pendleton v. Hellman Commercial T. & S. Bank, supra, the court said (58 Cal.App. at page 452, 208 P. at page 704): "But in the case at bar the defense presented is not in the nature of a counterclaim. Its allegations are, in effect, that there exists no indebtedness of the defendant to the plaintiff. The bank is not seeking to collect its note from the decedent's estate. * * * Appellant's claim here is that, by reason of the insolvency of Pendleton, it was entitled to apply the amount of the deposit pro tanto to the payment of the note."

[7] It follows from these principles that when defendant bank exercised its equitable right of set-off by appropriating funds of plaintiff in payment of his existing obligation to the bank, it acted fully within its rights, without regard to whether the pending Winklemen action against plaintiff was subject to dismissal.

No other points merit discussion. The judgment is reversed.

We concur: CARTER, J.; SHENK, J.; CURTIS, J.

40 Cal.App.2d 550

CHILWELL v. CHILWELL et al.

Civ. 2713.

District Court of Appeal, Fourth District, California.

Aug. 29, 1940.

Hearing Denied Oct. 28, 1940.

1. Insurance ⚷214

A property settlement incorporated in divorce decree requiring that a husband reinstate and keep in full force a life policy and that his two children be named beneficiaries thereof, effected an "equitable assignment" of proceeds of policy and children were entitled on their father's death to such proceeds, notwithstanding father's failure to name his children as beneficiaries.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Assignment".

2. Husband and wife ⚷278(5)

A property settlement providing in part that husband should name children as beneficiaries of life policy, which became part of a divorce proceeding and was included in the judgment, was supported by "consideration" irrespective whether premium payments came from community property or from separate property of insured.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

3. Divorce ⚷255

Where a husband was present at a divorce hearing and testified, and not only failed during his lifetime to attack judgment but affirmatively accepted it by remarrying, divorce judgment was binding on husband and his estate and could not be attacked on ground that property settlement entered into by parties, and which was included in the judgment, was signed by attorneys for respective parties and not by the parties themselves.

4. Judgment ⚷910(1)

An action to recover proceeds of a life policy brought by daughters of insured who had been directed in divorce decree to name daughters as beneficiaries of policy, but who had failed to do so, was not barred by the 5-year limitations on actions on judgments, where action was commenced more than five years after divorce decree, but less than five years after insured's death. Code Civ.Proc. § 336.

5. Appeal and error ⚷173(1)

A point raised for first time in appellant's final brief was raised too late.

6. Insurance ⚷214

In action to recover proceeds of life policy brought by children of insured who was directed in divorce decree to name children as beneficiaries of life policy but who failed to do so, fact that policy included a provision for disability benefits to insured during his lifetime was not material on the question of equitable assignment, where insured did not avail himself of such privilege.

Appeal from Superior Court, San Diego County; Frank Macomber, Judge.

Action by Gail Chilwell, a minor, by Neil C. Kemp, her guardian, and another against Ellen Chilwell, administratrix of the estate of Archibald Chilwell, deceased, and the New York Life Insurance Company on a life policy, wherein the insurance company offered to pay amount of policy to persons entitled thereto as might be determined by the court. From a judgment for the plaintiffs, defendant Ellen Chilwell, as administratrix, appeals.

Affirmed.

M. W. Conkling and Edgar G. Langford, both of San Diego, for appellant.

Fred O'Farrell and Wright, Monroe, Harden & Thomas, all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to recover the proceeds of a life insurance policy. The plaintiffs are the daughters of Archibald Chilwell and Mary Chilwell, who were married in 1917. In 1919 Mr. Chilwell took out the policy in question which named his wife, Mary, as beneficiary. In 1927, Mr. and Mrs. Chilwell separated and he went to Arizona to live. Subsequently he brought an action for divorce in that state under a statute which permitted the granting of a divorce where the parties had not lived together as husband and wife for a period of more than five years. His wife, Mary Chilwell, went to Arizona, employed an attorney, and negotiations for a property settlement were carried on, in the course of which this insurance policy was discussed. On December 26, 1931, a written stipulation was signed by the attorneys for the respective parties which provided that

Mr. Chilwell should pay $140 per month for the support of Mary Chilwell and the two children, and contained a further provision that the decree should provide that Mr. Chilwell should take immediate steps to procure a reinstatement of this life insurance policy and should have the two children, the plaintiffs herein, designated therein as beneficiaries, and requiring the plaintiff to keep the policy in force until it matured.

After this stipulation was signed Mary Chilwell came back to California. The stipulation was filed in the action on January 25, 1932, and on the next day, after a hearing at which Mr. Chilwell was present and testified, a divorce was granted to him. The decree contained all of the provisions of the stipulation to which we have referred, including the exact language used therein with reference to this insurance policy. This part of the decree reads as follows:

"It Is Further Ordered, adjudged and decreed that the plaintiff will take immediate steps to procure the reinstatement of the policy of insurance on his life and that upon such reinstatement he will procure said policy to designate said children, Mary Alberta Chilwell and Gail Chilwell as sole beneficiaries under said life insurance policy and that said plaintiff will keep said policy in force and for their benefit until the same shall mature."

Mary Chilwell died in November, 1933, but in the meantime Mr. Chilwell had married the defendant Ellen Chilwell. He failed to pay the premiums on the policy after November 6, 1933, and the policy was automatically converted into an unextended paid-up insurance. He died in July, 1938, while the insurance was still in force.

This action was brought against the estate of Mr. Chilwell, against Ellen Chilwell individually, and against the insurance company. The insurance company, by appropriate pleadings offered to pay the amount of the policy to the persons entitled thereto as might be determined by the court. The court found in all respects in favor of the plaintiffs, entering judgment accordingly, and the defendant Ellen Chilwell has appealed on behalf of the estate.

[1] The appellant contends that since the insured had not changed the beneficiary in the manner provided for in the policy and since the original beneficiary died before the insured, the insurance was payable to his estate, and that nothing in connection with a divorce proceeding changed this result or affected this legal situation. We are here concerned, however, not merely with the terms of the insurance contract, but with the terms and effect of a property settlement between parties to a divorce proceeding which was carried into and made a part of a judgment of divorce. The appellant relies upon McLaughlin v. McLaughlin, 104 Cal. 171, 37 P. 865, 43 Am. St.Rep. 83, in which it was said that the right to the proceeds of an insurance policy vests in the beneficiary at the death of the insured and that the insurer has no power, by stipulation or otherwise, to change or affect that right. While this is true, a question often remains as to the person or persons in whom the right vests and this question is often affected by equitable rules. While this insurance contract is controlled by the situation as it was at the death of the assured, the property settlement which the parties here made and which was reduced to judgment is still effective and controls the disposition of the proceeds of the policy. This property settlement agreement was entered into by all of the parties who had any interest in the proceeds of the policy, and the making of such an agreement has frequently been held to be, in effect, an equitable assignment of such insurance money.

In Mutual Life Ins. Co. v. Franck, 9 Cal. App.2d 528, 50 P.2d 480, 484, the court said: "But the insured may waive his right to change the beneficiary and by contract he may convert the contingent interest in the policy into a vested equitable interest which may not be subsequently defeated by an effort to change the beneficiary without his consent." In that case the insured had been directed by a decree of divorce entered by a Nevada court to pay all premiums on an insurance policy and to constitute his divorced wife the sole beneficiary of the policy. The insured remarried and, in violation of the property settlement agreement and of the divorce decree, attempted to make his new wife the beneficiary of the policy. The facts of that case are very similar to those now before us and the court there said that the decree entered in the state of Nevada was "competent evidence of the determination of that court with respect to the disposal of the property rights of the spouses as an incident to the divorce proceeding", and held that such disposition was entitled to full faith and credit in this state. In Mutual Life Ins. Co. v. Henes, 8 Cal.App.2d 306, 47 P.2d 513, 515, the circumstances are also very similar to those now before us. In that case, a prior divorce decree had ordered the insured to change the beneficiary in two policies of insurance from the divorced wife to a son and daughter of the parties. The insured attempted to do this but made the change through the medium of assignments rather than through the usual method of changing a beneficiary. Later he canceled these assignments and died without having named any beneficiaries other than the original designation of his divorced wife as such. His estate and his two children claimed the proceeds of the policies and the insurance company brought the action to have it determined who was entitled thereto. The court held that the children had a right to the proceeds of the policies derived from the property settlement agreement between the assured and his wife, saying: "Said agreement required the assured to name the children as the beneficiaries of said policies and clearly implied that the assured should not at any time thereafter have the right to change the beneficiaries. The assured failed to comply with the exact terms of the agreement, but we believe said agreement operated as an equitable assignment of the proceeds of the policy which were to become due upon the death of the assured." In Shoudy v. Shoudy, 55 Cal.App. 344, 203 P. 433, 436, under very similar circumstances, the court said: "it would seem to follow that the equitable right which the plaintiff herein acquired by virtue of her agreement with Dexter Shoudy was one of which she could not be deprived by any act of the insured in the way of an attemped substitution of the name of a merely voluntary beneficiary in the place and stead of her name in said policies." If an insured cannot defeat such an equitable right by changing the beneficiary named in the policy it would also seem to follow that he cannot defeat such a right by merely failing to act at all. He could not, in equity, be allowed to take advantage of his own wrong in breaking the property settlement agreement and in violating the terms of the divorce decree, and it reasonably follows that his estate is in no better position.

In seeking to avoid the effect of the decisions in the cases above referred to the appellant contends that the policy in question was the separate property of the assured and that the Arizona court had no jurisdiction to set over such property to the children of the couple; that there was no consideration for any agreement that the proceeds of this policy should be made payable to the children; and that there was, in fact, no agreement between the parties authorizing the Arizona court to enter a judgment requiring the assured to make a change of beneficiaries in favor of his children.

[2, 3] Not only does the record disclose evidence that the premiums on this policy up to the time of the divorce were paid by the insured from his earnings during the marriage, but where such a property settlement becomes a part of a divorce proceeding and is included in the judgment, it is immaterial whether such payments came from community property of the parties or from the separate property of the assured. Mutual Life Ins. Co. v. Franck, supra. The right of parties, in settling their property rights in contemplation of a divorce, to provide for their children and give property to the children as a part of that settlement cannot be questioned, and the mutual agreements of the parties, with the benefits mutually conferred and received, are, beyond question, a sufficient consideration. The contention that an agreement was not here made is based upon the fact that the stipulation filed in the action in Arizona was signed only by the attorneys for the respective parties and not by the parties themselves. While this is true, this stipulation was filed in that action and must have been presented to the court as the exact language used therein, with reference to the insurance policy, was included in the court's decree. The insured was present at the hearing and testified, and all presumptions are in favor of the judgment. The assured not only failed during his lifetime to attack the judgment in any way, but it affirmatively appears that he accepted it and acted upon it by remarrying. He could not accept and act upon one part while disputing and refusing to be bound by the other. Himmelmann v. Sullivan, 40 Cal. 125. Under the circumstances here appearing, it must be held to be binding not only upon the assured but upon his estate.

[4] Some contention is made that this action is barred by the provisions of section 336 of the Code of Civil Procedure. This contention is obviously without merit. Mutual Life Ins. Co. v. Franck, supra.

[5, 6] In her final brief the appellant attempts to raise for the first time an additional point to the effect that an equitable assignment could not have here taken place because this insurance policy included a provision for disability benefits to the assured during his lifetime. Not only is this point raised too late, but the matter thus suggested is fully covered by the principles set forth in Mutual Life Ins. Co. v. Henes, supra. Moreover, the insured in this case did not avail himself of the privilege given by this portion of the policy and it is neither material nor controlling here.

The judgment is affirmed.

I concur: GRIFFIN, J.

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40 Cal.App.2d 575

CASALEGNO et al. v. LEONARD et al.

Civ. 11157.

District Court of Appeal, First District, Division 1, California.

Aug. 31, 1940.

Rehearing Denied Sept. 30, 1940.

Hearing Denied Oct. 28, 1940.

1. Automobiles 🔑245(6, 43)

In action for injuries sustained by pedestrian when struck by automobile, conflicting evidence relative to speed of automobile, position of automobile on roadway, and as to whether motorist was driving without lights, presented question for jury as to whether motorist was negligent.

2. Appeal and error 🔑1011(1)

Where evidence is conflicting, appellate court cannot interfere with trial court's findings of fact.

3. Automobiles 🔑245(72)

In action for injuries sustained by pedestrian when struck by automobile, whether care used by pedestrian was commensurate with hazard of crossing road other than at intersection was for jury. Vehicle Code, § 562, St.1935, p. 188.

4. Automobiles 🔑217(3)

The statutory duty of pedestrian to yield right of way to motor vehicles while crossing street other than at regular crosswalk may call for higher degree of care on part of pedestrian than would be applied to pedestrian crossing at regular crosswalk. Vehicle Code, § 562, St.1935, p. 188.

5. Automobiles 🔑245(72)

The question whether pedestrian exercised required degree of care in crossing street at place other than regular crosswalk is for jury, unless pedestrian can be said to have been negligent as matter of law. Vehicle Code, § 562, St.1935, p. 188.

6. Negligence 🔑136(9)

Contributory negligence is a matter of law only when no other inference may be drawn from the facts.

7. Automobiles 🔑246(49)

In action for injuries sustained by pedestrian when struck by automobile, trial court was justified in instructing on statutory duty of motorist to drive on the right half of roadway as close as possible to the right-hand curb or edge, where evidence disclosed that, if motorist was not driving partly on left half of road, he was, just prior to impact, at least very near the middle thereof. Vehicle Code, § 525, St.1935, p. 181.

8. Appeal and error 🔑1066

In action for injuries sustained by pedestrian when struck by automobile, an instruction on statute regulating location of headlamps on motor vehicles, given in conjunction with instruction on statute setting forth conditions under which vehicles should be equipped with lighted lamps, was not prejudicial error, even though there was no real issue as to location or number of lamps on automobile, where question as to whether lamps were lighted was a vital issue. Vehicle Code, §§ 618, 619, St.1935, p. 201.

9. Trial 🔑296(3)

An instruction that it was motorist's duty to keep machine under control, so as to avoid collisions with pedestrians, and that motorist was required to be vigilant and, if necessary, slow down and stop, was not prejudicial to defendants, though deficient in failing to state that actions of motorist were to be tested by rule of ordinary care, where ordinary care instruction was given and was referred to in other instructions.

10. Automobiles 🔑217(3)

A pedestrian may recover for injuries caused by automobile, notwithstanding he was crossing street between intersections.

11. Automobiles ⚿160(1)

A motorist must so operate automobile as to prevent injuring pedestrians, if in exercise of due care it is possible to do so.

12. Automobiles ⚿217(3)

In crossing between intersections, pedestrian must exercise greater care than when using established crossing.

13. Automobiles ⚿246(31)

Trial court did not err in refusing defendants' requested instruction that pedestrian who crosses a street at other than a regular street crossing is required to exercise a greater quantum or amount of care in so doing than is required of one crossing at an intersection, in order to be free from negligence, since instruction confounded "intersection" with "crosswalk". Vehicle Code, §§ 85, 86, St.1935, p. 99.

14. Automobiles ⚿11

The words "highway" and "roadway" as used in Vehicle Code are not synonymous.

See Words and Phrases, Permanent Edition, for all other definitions of "Highway" and "Roadway".

15. Appeal and error ⚿1064(4)

That trial court, in giving instructions, in one instance improperly used word "highway" instead of "roadway", did not constitute prejudicial error, though words were not synonymous, where it did not appear that jury understood from instructions given that defendant motorist was under duty to drive his automobile on right-hand shoulder of road.

◆

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by Frank Casalegno, a minor, by his guardian ad litem, George Casalegno, and George Casalegno, against Wilfred A. Leonard, Jr., and others, to recover for personal injuries sustained by minor when struck by an automobile, and for consequential damages sustained by minor's father. From judgment for plaintiffs, the defendants appeal.

Affirmed.

Weinmann, Quayle & Berry, of Oakland, and Herbert Chamberlin, of San Francisco, for appellants.

Murphy & Hall, of Santa Cruz, for respondents.

WARD, Justice.

An appeal by defendants from a judgment awarding plaintiff Frank Casalegno, a minor, damages for personal injuries, and his father, George Casalegno, consequential damages.

The injuries were the result of an accident which occurred at about 8:15 p. m. on July 2, 1938, in Soquel, on the Santa Cruz-Watsonville road, the central concrete portion of which at the place of the accident was sixteen feet wide, with the usual marked dividing line in the middle, and abutting paved shoulders each approximately ten feet wide. The plaintiff minor, accompanied by a boy friend, had just been involved in a rear-end collision with another car, the driver of which had parked on the north side of the road, to which point plaintiff minor and his friend proceeded, from across the roadway where they had parked their car, for the purpose of talking to him about the matter. On their way back to their car, plaintiff minor was struck and injured by an automobile driven by Wilfred A. Leonard, Jr., also a minor, who had with him a young girl friend. On the date of the accident the sun set at 7:30 p. m.

The questions involved are as follows: Was the evidence legally sufficient to support a finding that the driver of the automobile was negligent? Was the pedestrian guilty of contributory negligence as a matter of law? Was the jury misdirected to the prejudice of the defendants?

[1,2] The contention of respondents that appellant minor was negligent is predicated upon the speed of his car, its position on the roadway, and that he was driving without lights. The evidence on all three of these points is conflicting. There is evidence that the car was operated at a speed of forty to forty-five miles an hour; it was admitted that it was operated at twenty-five miles an hour. There is evidence in the record regarding skid marks, from which an inference may be drawn that the car must have been at least slightly over on the left half of the road as indicated by the white line. This conclusion could be reached by extending the skid marks to a position the car must have occupied just prior to a swerve to the right made by defendant before the impact. Some of the witnesses were positive the lights were on; others equally positive they were not. It was the duty of the jury

to weigh the evidence relative to speed, the position of the car and the absence of lights, and to determine therefrom whether the defendant driver was negligent. If the evidence is conflicting, as appears in this case, the appellate court may not interfere.

[3-6] Appellants emphasize that a greater quantum of care was required of plaintiff minor due to the fact that he was not crossing the roadway at an intersection or marked pedestrian lane. Quantum of care is measured by the exigency of the occasion. Plaintiff minor testified that he looked both ways, before and while proceeding on his way across the road. If, as indicated by the implied findings, the oncoming car was operated partly on the wrong side of the road, or without lighted headlamps, or at a speed greater than was reasonable and prudent under the circumstances, then it was the duty of the jury to consider whether the care used by plaintiff minor was commensurate with the hazard of crossing the road other than at an intersection. An inference either way could be drawn from the evidence in the case. Under such a condition we may not say that plaintiff was guilty of contributory negligence as a matter of law. In Brannock v. Bromley, 30 Cal.App.2d 516, 524, 86 P.2d 1062, 1067, the court said: "The duty of a pedestrian to 'yield' the right of way while crossing a street other than at a regular crosswalk, as imposed by section 562 of the Vehicle Code, St.1935, p. 188, may call for a higher degree of care upon the part of such pedestrian than would be applied to one crossing at a regular crosswalk, but the question as to whether or not such care was exercised in a given case is one for the jury, unless he is so careless that it can be said he is negligent as a matter of law." Contributory negligence is a matter of law only when no other inference may be drawn from the facts. Flach v. Fikes, 204 Cal. 329, 267 P. 1079; Bushey v. Rigby, 34 Cal.App.2d 41, 92 P.2d 1032.

Prejudicial error is urged in the giving of instructions as to driving on the right half of the roadway as close as possible to the right-hand curb or edge (Vehicle Code, sec. 525, St.1935, p. 181); the location of headlamps on motor vehicles (Vehicle Code sec. 619, St.1935, p. 201); the quantum of care required of a pedestrian crossing at a point other than a street intersection. Appellants also complain that another instruction omits the test of ordinary care, thus placing the operator in a legal position where he must avoid all accidents, and taking away from the jury the determination of the question of negligence.

[7, 8] The evidence discloses that if the defendant minor was not driving partly on the left half of the road, he was, just prior to the impact, at least very near the middle thereof. Under such circumstances the court was justified in presenting the instruction under the provisions of section 525, supra. Section 619, supra, was given in conjunction with section 618 of the Vehicle Code setting forth the conditions under which vehicles shall be equipped with lighted lamps. Assuming that there was no real issue as to the location or number of lamps on the car, still the question as to whether they were lighted was a vital issue, and no prejudicial error appears as the result of apprising the jury how many headlights were required, and their proper positions on the vehicle.

[9] Relying upon Riggs v. Gasser Motors, 22 Cal.App.2d 636, 72 P.2d 172, appellants object to an instruction as to the duty of an operator of a vehicle to keep it under such control as to avoid collisions with pedestrians; that the driver must be vigilant and anticipate the presence of others upon the roadway, and, if necessary, slow down and stop. In the Riggs case, the court (page 639 of 22 Cal.App.2d, at page 174 of 72 P.2d) said: "* * * we may admit that the instruction is deficient", but a similar instruction was submitted by the defendant in that case and the court did not further discuss the objections. The instruction herein omits the clause that the actions of the driver are to be tested by the rule of ordinary care, but an ordinary care instruction was given and was referred to in other instructions. The rule enunciated in the instruction has been approved, in discussing factual situations, in Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125; Mathews v. Dudley, 212 Cal. 58, 297 P. 544; Flynn v. Kumamoto, 22 Cal.App.2d 607, 72 P.2d 248; Eastman v. Rabbeth, 128 Cal.App. 534, 17 P.2d 1009.

[10-12] The law applicable to this case is well stated in De Nardi v. Palanca, 120 Cal.App. 371, 375, 376, 8 P.2d 220, 221, where the court said: "A pedestrian is not precluded from recovering by reason of the fact that he was crossing the street be-

tween intersections * * *, and a driver of an automobile is bound to anticipate that he may meet pedestrians on the streets. He must keep a proper lookout and so operate his car as to prevent injuring them if in the exercise of due care on his part it is possible to do so. * * * On the other hand, pedestrians must exercise reasonable care for their own safety, and in crossing between intersections greater care must be observed than when using an established crossing. If they fail in the exercise of such care, and thereby contribute proximately to the cause of any injury they may sustain at the hands of one having an equal right to use the highways, they have no ground for complaint."

[13] Defendants requested, and the court refused, the following instruction: "A pedestrian who crosses a street at other than a regular street crossing is required to exercise a greater quantum or amount of care in so doing than is required of one crossing at an intersection, in order to be free from negligence." In this instruction, the defendants have confounded "intersection" with "crosswalk". As defined by Vehicle Code section 86, "'Intersection' is the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angles or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict." A "crosswalk", as defined by section 85, Vehicle Code, is either "That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of any such lines from an alley across a street," or "Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface." The care to be used by a pedestrian is ordinary care, and the amount thereof should be commensurate with the hazard undertaken.

Given in the form as tendered, the jury might have understood that more than ordinary care was required. Assuming that the court could have modified the instruction to conform with the view expressed in Mahoney v. Murray, 140 Cal.App. 206, 35 P.2d 612, that is "reasonable care", its failure to do so was not error. The court substantially covered the subject in other instructions.

The jury was instructed in substance that it was the duty of the plaintiff minor to yield the right of way to vehicles at any point other than within a marked or unmarked crosswalk; that the defendant driver had the immediate legal right to the use of the highway. In addition, the jury was instructed as follows: "If you find from the evidence that at any time before plaintiff Frank Casalegno collided with the automobile, that he could, by the exercise of ordinary care, have placed himself in a position of safety had he known of the approach of such automobile, and if you further find that he could have known of the approach of said automobile by exercising ordinary care and failed to do so, then your verdict in such event must be for the defendants, provided you further find that the failure of said plaintiff so to do proximately contributed in any degree to cause the accident and injuries, if any, to said plaintiff."

[14, 15] In their closing brief appellants stress the use, in respondents' brief, of the word "highway" instead of "roadway". An examination of the instructions shows that the court in one instance used the word "highway" instead of "roadway". As used in the Vehicle Code, "highway" and "roadway" are not synonymous. Mecchi v. Lyon Van & Storage Co., Cal.App., 102 P.2d 422. At times the distinction becomes important, but we are not convinced that the jury in this case understood from the instructions given that it was the duty of the defendant minor to drive his car on the right-hand edge of the road; that is, on the shoulder thereof. Such duty is imposed under certain conditions not necessary to mention here. It must be assumed that the jurors were persons of ordinary intelligence and that they were not misled by the misuse of the word "highway".

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

40 Cal.App.2d 474

MORROW v. MORROW.

Civ. 10998.

District Court of Appeal, First District,
Division 1, California.

Aug. 20, 1940.

Hearing Denied Oct. 17, 1940.

1. Husband and wife 🔑278(5)

Where husband and wife entered into property settlement agreement making no provision for support of wife, but which provided that agreement should not be construed as a waiver by wife of right to support or alimony, subsequent agreement in anticipation of divorce decree, providing that its terms should not modify property settlement agreement except in the matter of monthly payments for support which were set at $75 per month, subject to right of court of competent jurisdiction to increase the amount, was void as without "consideration", since trial court could in its discretion adopt or reject terms of agreement as to maintenance.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

2. Divorce 🔑199, 236, 238

California allows alimony in a suitable amount by way of compensation for a wrong done to the wife, and alimony is not awarded when divorce is awarded husband for fault of wife, but alimony will be awarded when found in a contract settling property rights. Civ.Code, § 139.

3. Divorce 🔑231

Under the Nevada statutes, a Nevada court in granting a divorce to a husband had jurisdiction to order husband to make monthly alimony payments to wife. Comp. Laws Nev. §§ 9463, 9465.

4. Divorce 🔑331

The Nevada rule permitting in a divorce suit allowance of alimony to guilty spouse is not against the public policy of California. Comp.Laws Nev. §§ 9463, 9465.

5. Courts 🔑23

Generally, jurisdiction may not be conferred by stipulation of the parties made in open court or filed in a proceeding.

6. Divorce 🔑331

A Nevada court, on awarding a divorce to husband, had jurisdiction to make decree and order directing payment to wife of alimony, regardless of stipulation by parties concerning payment of alimony, and prior agreements concerning a property settlement and support and maintenance and alimony decree would be given "full faith and credit" in a California action to recover arrearages due under the decree.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit".

7. Divorce 🔑331

Where a husband by written stipulation presented to Nevada court consented to the payment of alimony, and thereafter a divorce was awarded to husband with judgment ordering payment of alimony as stipulated, husband was "estopped" from attacking judgment except in absence of a clearly expressed intent or a legal obstacle to the contrary.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

8. Divorce 🔑331

On the question whether foreign state alimony decree be given effect, the signing by a wife, who had separated from her husband, of a written stipulation wherein husband consented to payment of alimony to wife, was not against public policy where stipulation was signed pending husband's divorce action in which the stipulation was presented to the court.

9. Divorce 🔑326

Where jurisdiction of Nevada court to render divorce judgment was established, regularity and validity of such judgment, when presented in California, was required to be settled by the laws of Nevada.

10. Courts 🔑8

A contract made in one state to be performed in another, whose public policy it contravenes, need not be enforced by its courts, but the law of another state or judgment of its courts stands upon a higher footing and the courts of one state cannot refuse to respect decision of courts of another state because it is founded upon a law which does not obtain in the former state, since a judgment of a sister state is entitled to respect and full faith and credit in other states, however different the law might be.

11. Judgment 🔑813

The purpose of the full faith and credit clause of the Constitution ought not lightly to be set aside out of deference to a local policy which is too trivial to merit serious consideration when, weighed against policy of constitutional provision and interest of the state, the judgment of which is challenged.

12. Courts ⚷8

Unless inconsistent with its own interests, one state should make effective the laws of another forum.

13. Estoppel ⚷79

Generally, one may be estopped by an agreement or stipulation made in a judicial proceeding, especially where stipulation has been acted upon and the adverse party would be injured if it were not given effect.

14. Stipulations ⚷14(7)

Evidence upon issues in a case may be limited in accordance with a stipulation of the respective parties.

15. Estoppel ⚷79

A husband and wife in a divorce proceeding, agreeing to an amount to be paid by the husband as support and maintenance, are "estopped" in a subsequent proceeding from denying the scope given by a divorce decree on the stipulation.

16. Judgment ⚷252(5)

Where a prayer in a complaint is imperfectly or incompletely framed, but allegations of the complaint are sufficient, the court may, where prayer contains phrase "such other and further relief as the court may deem proper", render a judgment beyond the specific relief requested, but the court will not do so if the allegations of the complaint do not raise an issue that justifies such finding and judgment.

17. Judgment ⚷251(1)

Where a complaint was one for a money judgment and did not allege in the body or mention in the prayer of complaint that plaintiff sought to have a Nevada divorce decree awarding alimony entered as a continuing judgment in California, and defendant's answer did not set forth new matter, or admit sufficient allegations to warrant entry of Nevada judgment in California, it was error for trial court to order that Nevada judgment be entered as a California judgment. Code Civ.Proc. § 590.

18. Judgment ⚷470

Where relief has been granted by a judgment beyond the prayer and beyond the issues, general rule that judgments of competent jurisdictions are accompanied with presumption of verity ceases.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Maybelle Morrow, also known as Maybelle M. Morrow, against George W. Morrow on a foreign divorce judgment and decree awarding alimony. From an adverse judgment, defendant appeals.

Reversed in part and affirmed in part.

John J. Taheny, of San Francisco, for appellant.

Joseph G. Gallagher, of San Francisco, for respondent.

WARD, Justice.

An appeal from a judgment ordering that a certain divorce judgment and decree rendered in the state of Nevada be entered as a foreign judgment with the same force and effect as if it had been granted by the superior court of the state of California, and that plaintiff herein be given judgment against defendant in the sum of $4,103, together with interest.

Chronologically the facts are as follows: On May 17, 1930, in San Francisco, Maybelle M. Morrow and George W. Morrow, at that time wife and husband, made an agreement for immediate separation whereby the wife obtained certain real and personal property, declared therein to be her separate property, and it was provided that all other property in the possession of, or thereafter acquired by, the husband, should be his sole and separate property. No other provision was made for maintenance or support of the wife, but it was agreed that the contract would not bar her in any future divorce action from claiming support money or alimony; and that the extent of such right should be determined by a court of competent jurisdiction.

In April, 1931, the husband having in the meantime become a bona fide resident of the state of Nevada, the same parties agreed in writing upon monthly payments of $75 by the husband for the support and maintenance of the wife, and $25 for their child. The wife waived any greater amount for a period of one year, and the husband agreed to pay any additional amount that should after such period be awarded by any court of competent jurisdiction. The agreement refers to the previous property settlement by designation and date and provides: "This agreement shall not modify the hereinbefore mentioned agreement of May 17th, 1930, save and except in the particular hereinabove set forth."

On the date of this second agreement, April 17, 1931, the parties entered into a stipulation, which was filed in a divorce proceeding in Nevada, providing that the custody of their child be given the mother; that $25 a month be paid by the husband for the child's support and maintenance, and that $75 a month be paid to the wife as and for alimony. The husband also agreed to pay the defendant wife's costs and attorney's fee. The wife stipulated that the trial should be had and final judgment entered on motion of the husband without further notice to her.

In the divorce action, heard on the same date, a decree in favor of the husband was granted, which refers to the stipulation on file, also to the property settlement of May 17, 1930, which was approved and adopted as a complete and full settlement of all property rights of the parties. While no mention was made therein of the agreement of April 17, 1931, which was not introduced in evidence, the terms of the decree are in accordance with the property settlement, the subsequent agreement and the stipulation.

The complaint in the present action, filed by the wife in the state of California, is in two counts. The first count alleges: "That at the time hereinafter mentioned the District Court of the Third Judicial District, County of Eureka, State of Nevada, was a court of general jurisdiction, duly created and organized under and by virtue of the laws and Constitution of the State of Nevada;" that defendant husband received a decree of divorce from plaintiff which provided for the payment of $75 a month as alimony for the wife; that the decree is still in full force and effect; that no part of the judgment awarded has been paid except the sum of $892, and that there is due the sum of $5,108, with interest. The second count alleges that on the 17th day of April, 1931, the husband and wife entered into a property settlement agreement providing for the payment of $75 a month for the wife's maintenance and support. Plaintiff prayed for judgment in the sum of $5,108, together with interest and costs, and for such other and further relief as the court might deem proper.

[1] At the outset it is proper to state that, independent of the Nevada decree, the judgment, so far as it applies to the alleged property settlement agreement set forth in the second cause of action may not be affirmed, being predicated upon the agreement of April 17, 1931, which is not in fact a property settlement, but a mere agreement that for one year $75 a month will be accepted by the wife as maintenance and support, subsequent to which period she shall not be barred or prevented from asking any court of competent jurisdiction to increase the amount. Fitch v. Tyler, 105 Cal.App. 306, 288 P. 74. The contract of May 17, 1930, was a property settlement agreement and contained no reference to a fixed amount for support or maintenance, provision being made only that should an action for divorce be commenced, the agreement should not be construed to be a waiver by the wife of her right to support or alimony.

Respondent contends that the two documents should be read together; that the second is a modification of the first. As above noted, the second specifically provides that its terms shall not modify the agreement of May 17, 1930, except in the matter of the monthly payments for support and maintenance, for which there was no provision in the first agreement. There was no duty imposed upon the husband, before the second agreement was signed, to support the wife. Respondent contends that the promise to forbear asking any amount in excess of the $75 a month for one year was a valid consideration for the second agreement. However, the agreement provides that a court of competent jurisdiction may increase the amount. The court could in fact decrease the amount, thus taking from the wife any practical advantage she might have obtained under the terms of the second agreement. The record discloses that the decree of divorce was signed on the same day that the agreement was made. Obviously the agreement was not made as a modification of the property settlement, but as an instrument reciting the intention of the parties in anticipation of the divorce decree. The trial court in its discretion could adopt or reject the terms of the agreement as to maintenance. The wife at any time could have withdrawn her promise to forbear and become entitled to a larger amount within the year had a court of competent jurisdiction so decreed. Under these circumstances we fail to find a good consideration, and the second cause of action must fail. The Nevada court did not have jurisdiction to pass upon the contractual rights of the parties except in connection with matters specifically referred to in the agreement of May, 1930, which is not the basis of the second cause of action.

We will now consider the judgment as based upon the first cause of action, namely, the statutory power of the court to make an order for support, maintenance or alimony. Ross v. Ross, 1 Cal.2d 368, 35 P.2d 316. The wife filed an answer to the complaint for divorce, but did not personally contest the proceeding. The husband obtained the decree, thus placing the wife in the position of the spouse "at fault". In California, the Civil Code, section 139, provides: "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects." Nevada, so far as we have been able to ascertain from the briefs on file, or from independent research, does not have a corresponding or even comparable statute. On the contrary, property is awarded "as shall appear just and equitable" (Nevada Compiled Laws of 1929, [Hillyer] sec. 9463, 9465), which leaves the matter entirely in the discretion of the trial court. Section 9463 provides in part: "In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it, for the benefit of the children. * * *" There is no restriction that support, maintenance or alimony is granted only for the fault of the husband. The nearest approach to such a rule is found in the above section 9463, providing that all rights connected with the children, not otherwise disposed of or regulated by the order of court, shall by such divorce be divested out of the guilty party and vested in the party at whose instance the divorce was granted. This provision is recognized by the highest appellate court in Nevada. In Blankenship v. Blankenship, 51 Nev. 356, 361, 276 P. 9, 10, 63 A.L.R. 1127, the court said: "Divorce is a remedy provided for an innocent party. A divorce for a guilty party is not contemplated by our statutes respecting this subject, which under certain conditions divest the guilty party of 'all property and pecuniary rights and interests, and all rights touching the children, their custody and guardianship.'" The "certain conditions", however, refer to matters not specifically mentioned in the decree. In the present case, the Nevada decree specifically provided for the payment of $75 a month "as and for alimony".

[2, 3] To summarize, California allows alimony in a suitable amount by way of compensation for a wrong done to the wife. Calif.Civ. Code, sec. 139; Ex parte Spencer, 83 Cal. 460, 23 P. 395, 17 Am.St.Rep. 266. Permanent allowance is granted only for the offense of the husband. Hogarty v. Hogarty, 188 Cal. 625, 627, 206 P. 79; Parker • Parker, 55 Cal.App. 458, 203 P. 420. Alimony is not granted when the divorce is awarded the husband for the fault of the wife (In re Nielsen, 19 Cal.App.2d 305, 65 P.2d 360; Lampson v. Lampson, 171 Cal. 332, 153 P. 238; McKannay v. McKannay, 68 Cal.App. 701, 230 P. 214); it will, however, be decreed when found in a contract settling property rights. Harwell v. Harwell, 26 Cal.App.2d 143, 78 P.2d 1167; Johnson v. Johnson, 104 Cal.App. 283, 285 P. 902; Marrs v. Superior Court, 137 Cal. App. 579, 30 P.2d 1030; Gaudio v. Gaudio, 138 Cal.App. 289, 32 P.2d 156. In Nevada, as we have seen, the question of property rights, and therefore support for the wife, is determined by the court as may appear just and equitable. Walker v. Walker, 41 Nev. 4, 164 P. 653, 169 P. 459. In a number of other states, wherein a restriction does not prevail, a guilty spouse may be awarded permanent alimony. If the statute does not contain a direct provision thereon, but an inference may be drawn from its language authorizing an allowance of alimony to the guilty spouse, it is legally sufficient. Thus the allowance may be based upon a just distribution of the property and may be awarded in gross or in installments. 17 Am.Jur., p. 478, sec. 615 and cited cases. No claim having been presented that the decree was obtained by fraud, we conclude that under the statutes of Nevada the trial court had jurisdiction to make the support,

maintenance or alimony order of $75 a month to the wife. Delanoy v. Delanoy, 216 Cal. 27, 13 P.2d 719, 86 A.L.R. 1321; Parnham v. Parnham, 32 Cal.App.2d 93, 89 P.2d 189; Nerland v. Nerland, 173 Wash. 311, 23 P.2d 24; Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351; Van Gelder v. Van Gelder, 61 Wash. 146, 112 P. 86; Pryor v. Pryor, 88 Ark. 302, 114 S.W. 700, 129 Am.St.Rep. 102; Mitchell v. Mitchell, 193 Iowa 153, 185 N.W. 62; Webber v. Webber, 157 Minn. 422, 196 N.W. 646; Vigil v. Vigil, 49 Colo. 156, 111 P. 833, 31 L.R.A.,N.S. 579; Ecker v. Ecker, 22 Okl. 873, 98 P. 918, 20 L.R.A., N.S., 421; Neville v. Neville, 220 Ala. 57, 124 So. 107; McFadden v. McFadden, 22 Ariz. 246, 196 P. 452.

[4] The cases principally relied upon by appellant (Marrs v. Superior Court, supra; Armstrong v. Armstrong, 132 Cal.App. 609, 23 P.2d 50 and In re McKenna, 116 Cal.App. 232, 2 P.2d 429), correctly state or uphold the California rule that an allowance to a guilty wife of alimony, maintenance or support, unless predicated upon a property settlement, is beyond the jurisdiction of a superior court. As stated, such a rule is not in effect in Nevada. However, there is no such inconsistency in the rules of the two states that the morals of the citizens of California would suffer detriment, neither can the Nevada rule be said to be against the public policy of this state, as borne out by our method of permitting the innocent husband to pay to the guilty wife under the terms of a judicial decree if the decree is based upon a property settlement. Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252; Ex parte Weiler, 106 Cal.App. 485, 289 P. 645; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749; Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536; Harper v. Carpenter, 24 Cal.App.2d Supp. 751, 67 P.2d 762. In Nevada the decree relative to the payment of alimony was valid without reference to the validity and effect of either or both of the agreements.

[5, 6] We desire to call attention to an additional reason why the Nevada decree should be recognized in California or any other state. The general rule is that jurisdiction may not be conferred by stipulation of the parties made in open court or filed in a proceeding. Marrs v. Superior Court, supra. This rule seems to have been modified under the circumstance stated in Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868. We are not interested in the question of jurisdiction by consent, but in a case wherein Nevada, under the laws of that state had jurisdiction to make the decree and the order directing the payment of $75 a month "as and for alimony", regardless of a stipulation. The recital in the decree that it had been stipulated by the parties that the husband would pay $75 a month was not necessary to the validity of the decree. However, a stipulation, not the property settlement of May 17, 1930, nor the agreement of April 17, 1931, which attempted to amend or modify the first agreement, but a third instrument, dated April 17, 1931, and filed in court with the record of the proceedings at the request of or with the consent of the husband, provided that the trial of the action and the final judgment might be entered at any time, and that in the event a decree should be granted, the husband should pay the wife $75 a month as and for alimony until her remarriage.

[7] Providing the court independently has jurisdiction over the proceedings we fail to find any good reason why a husband, who sought the entry of a decree and allowed it to become final, should thereafter in another jurisdiction be permitted to defeat the judgment. The theory of one-sided guilt in divorce actions does not always accord with reality. The fault is usually divided and the respective position of the parties as plaintiff or defendant may sometimes be determined by the chivalrous attitude of the husband or sometimes by sentimental or religious reasons of the wife, which induces him or her to adopt a passive role in the dissolution of the marriage. The failure of the wife to press a defense or a cross-complaint may be in reliance upon an understanding that the decree will provide for her support. When that understanding is in the form of a signed stipulation, filed in the proceeding, and the court otherwise has jurisdiction, the husband should be and in this instance is estopped from attacking the judgment except in the absence of a clearly expressed intent or a legal obstacle to the contrary. The amount may be the subject of revision to meet changed circumstances; if legally flexible, courts should grant relief, but not declare that portion of the decree invalid unless it is void as contra bonos mores. This last question as applicable to the instant case may be considered immediately.

[8] The stipulation was not obtained by the wife through fraud. It did not tend to interfere with the real, substantial status of their marriage contract as the parties were

already separated. They occupied the position of husband and wife in name only. It did not facilitate the divorce any more than the numerous valid property settlements which the courts of this state have recognized and approved. In fact, it was nothing more than a written statement made by the husband and presented to the court that he consented to pay to the wife the sum of $75 a month. Under all the circumstances, we cannot say that the signing of the stipulation by the wife was against public policy. This case is entirely different from Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A., N.S., 880, 134 Am.St.Rep. 107, wherein the wife sued the husband for divorce. The parties later became reconciled, resumed marital relations and the divorce action was dismissed. In pursuance of negotiations begun before such dismissal, but after the reconciliation, the parties entered into an agreement wherein the wife waived the cause for divorce but the agreement provided that should the wife establish new cause in a subsequent action for divorce, or maintenance, the husband would pay $10,000 to the wife who waived all further claims. The Pereira agreement was not a separation agreement and the parties were not separated at the time of its execution. The court in that case said, pages 4, 5 of 156 Cal., page 489 of 103 P., 23 L.R.A.,N.S., 880, 134 Am.St.Rep. 107: "The real effect of the contract to pay the $10,000, so far as the husband is concerned, would be to provide against liability for a contemplated wrong to be subsequently inflicted by him upon his wife, and to liquidate such liability in advance of the commission of the wrong. The evidence and findings show that the defenant was then possessed of property worth about $77,000, was engaged in a very lucrative business, and was receiving an income of about $11,000 a year which he had every reason to believe would continue. By this contract, if valid, he was left free to inflict upon his wife the most grievous marital wrongs, such as would compel her to obtain a divorce, secure in the protection of his contract that $10,000 would satisfy all her claims against him of a pecuniary nature or in relation to the community property. If he should, after its execution, be moved by evil impulse to commit anew the offenses against his wife which first gave her cause for divorce, or other acts having the same legal effect, the existence of a valid contract of this sort could not but encourage him to yield to his baser inclinations and inflict the injury. As it was obviously adopted to produce this result, it is to be presumed that this was one of the inducements which made him desire its execution."

[9-12] The jurisdiction of the state of Nevada having been established, the judgment rendered therein and presented in this state for the determination of its regularity and validity is to be settled by the laws of Nevada. "The judicial proceedings of a state are not susceptible of control or limitation by other states to the extent to which contracts are. A contract made in one state, to be performed in another, whose public policy it contravenes, need not be enforced by its courts; but the law of another state or judgment of its courts stands upon a higher footing. The courts of one state cannot refuse to respect the decision of the courts of another state because it is founded upon a law which does not obtain in the former state. A judgment of a sister state is entitled to respect and full faith and credit in other states, however different the law might be. . . ." 15 R.C.L., p. 916. See, also, 4 A.L.R. 968; Hieston v. National City Bank, 51 App.D.C. 394, 280 F. 525, 24 A. L.R. 1434; Kenney v. Supreme Lodge of the World, 252 U.S. 411, 40 S.Ct. 371, 64 L.Ed. 638, 10 A.L.R. 716; 15 Cal.Jur. 240; Bruton v. Tearle, 7 Cal.2d 48, 59 P.2d 953, 106 A.L.R. 580; Thomas v. Thomas, 14 Cal.2d 355, 94 P.2d 810; Spalding v. Spalding, 75 Cal.App. 569, 243 P. 445; Rinkenberger v. Rinkenberger, 99 Cal.App. 45, 277 P. 1096; Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 265 P. 190, 57 A.L.R. 696; Barns v. Barns, 9 Cal.App.2d 427, 50 P.2d 463; Palen v. Palen, 12 Cal.App.2d 357, 55 P.2d 228; Creager v. Superior Court, 126 Cal.App. 280, 14 P.2d 552; Dreesen v. Dreesen, 31 Cal.App.2d 479, 88 P.2d 223; Handschy v. Handschy, 32 Cal. App.2d 504, 90 P.2d 123; Cummings v. Cummings, 97 Cal.App. 144, 275 P. 245; Sistare v. Sistare, 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905, 28 L.R.A.,N.S., 1068, 20 Ann. Cas. 1061. "The purpose of the full faith and credit clause ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state the judgment of which is challenged." 12 Am.Jur., p. 382. See, also, Milwaukee County v. M. E. White Co., 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220. Unless inconsistent with its own interests, one state should make

effective the laws of another forum. 15 C. J.S., Conflict of Laws, § 4, p. 852.

[13-15] We may now consider the subject specifically under another phase, namely, estoppel. "As a general rule, however, one may be estopped by an agreement or stipulation made in a judicial proceeding. . . . The case for estoppel by stipulation is greatly strengthened, of course, where the stipulation has been acted upon and the adverse party would be injured if it were not given effect." 19 Am.Jur., pp. 715-716; Helpling v. Helpling, 50 Cal.App. 676, 195 P. 715. Evidence upon issues in a case may be limited in accordance with a stipulation of the respective parties. Bagley v. Ward, 37 Cal. 121, 99 Am.Dec. 256. A husband and wife in a divorce proceeding agreeing to an amount to be paid by the husband as support and maintenance are estopped in a subsequent proceeding from denying the scope given by a decree upon the stipulation. Dickey v. Dickey, 154 Md. 675, 141 A. 387, 58 A.L.R. 634. In Dean v. Dean, 136 Or. 694, 300 P. 1027, 86 A.L.R. 79, the parties entered into a valid contract for settlement of property rights. A decree based upon the agreement was made. The husband acquiesced therein by making payments in accordance therewith. Subsequently he instituted an action to set aside and vacate all of the decree except the part granting a divorce. At page 1029, of 300 P., the court said: "'A party cannot invoke the jurisdiction and power of a court for the purpose of securing important rights from his adversary through its judgment and, after having obtained the relief desired, repudiate the action of the court on the ground that it was without jurisdiction. The question whether the court had jurisdiction either of the subject-matter of the action or of the parties, is not important in such cases. Parties are barred from such conduct not because the judgment is conclusive as an adjudication, but for the reason that such a practice cannot be tolerated.' Bledsoe v. Seaman, 77 Kan. 679, 95 P. 576, quoted in 3 Freeman on Judgments (5th Ed.) p. 2963."

[16-18] The last point urged by appellant is that the complaint in its allegations is merely one for a money judgment and does not allege in the body or mention in the prayer that plaintiff sought to have the Nevada decree entered as a California judgment. This statement is correct. Though the prayer may be imperfectly or incompletely framed, if the allegations of the complaint are sufficient, the court in some instances, where the prayer contains the stereotyped phrase "such other and further relief as the court may deem proper", may render a judgment beyond the specific relief requested. But, not so, if the allegations of the complaint do not raise an issue that justifies such finding and judgment. The present judgment provides that it "be entered herein as a foreign judgment, with the same force and effect as if said Decree and Judgment had been granted in this Court. It is further ordered, adjudged and decreed that plaintiff herein be given judgment against said defendant herein in the sum of Four Thousand One Hundred Three ($4,103.00) Dollars, together with interest thereon from the date hereof at the rate of seven percent (7%) per annum." Respondent seeks to justify the first part of the judgment, that is, its entry as a continuing judgment in California, upon the theory that the word "issue", as used in Code of Civil Procedure, section 590, "is broader than the complaint where the answer enlarges the same by introducing new matter" (McAllister v. Union Indemnity Co., 2 Cal.2d 457, 42 P.2d 305, 306), and that when necessary allegations of the complaint are omitted, but supplied by the averments of the answer, the defect is cured. Williams v. Bullock Tractor Co., 186 Cal. 32, 198 P. 780. She does not, however, call our attention to the averments in the answer that supply the deficiency in the complaint. Upon examination of the answer we find, attached to it as exhibits, the Nevada decree, the property settlement agreement of May 17, 1930, the agreement of April 17, 1931 and the stipulation of April 17, 1931. The answer admits that the Nevada court had jurisdiction to grant the divorce but alleges that it did not have jurisdiction to make an order for the payment of money for support, maintenance or alimony. We cannot find that the answer sets forth new matter, or admitted sufficient allegations of the complaint to justify the order that the Nevada judgment should be entered in California with the same force and effect as if it had been granted in this state. When it appears that relief has been granted by the judgment beyond the prayer and beyond the issues, the general rule that judgments of competent jurisdictions are accompanied with the presumption of verity ceases. Remington v. Superior Court, 69 Cal. 633, 11 P. 252; Petition of Furness, 62 Cal.App. 753, 218 P. 61; Kredo v. Phelps,

145 Cal. 526, 78 P. 1044; 1 Black on Judgments, [2d ed.], sec. 242; 1 Freeman on Judgments, [5th ed.], sec. 355; Sache v. Wallace, 101 Minn. 169, 112 N.W. 386, 11 L.R.A.,N.S., 803, 118 Am.St.Rep. 612, 11 Ann.Cas. 348. The part of the judgment based upon the second cause of action cannot be sustained.

That part of the decree based upon the first cause of action and founded upon the full faith and credit clause of the Constitution, giving judgment for arrearages due under the Nevada decree, is affirmed; that part of the judgment which purports to establish in this state the Nevada judgment as a continuing judgment is reversed.

We concur: PETERS, P. J.; KNIGHT, J.

40 Cal.App.2d 556

NORTON v. FARMERS AUTOMOBILE INTER-INSURANCE EXCHANGE.

Civ. 10962.

District Court of Appeal, First District,
Division 1, California.
Aug. 30, 1940.

Rehearing Denied Sept. 28, 1940.
Hearing Denied Oct. 28, 1940.

1. Evidence 🔑452

Where liability policy provided that insurer should not be liable for loss while automobile was being driven by any person other than insured or a member of his immediate family unless such person was operating automobile with consent of insured, except that "the extension provided for in this condition shall not be available to" any public garage, whether policy extended coverage to insured's daughter-in-law who resided with insured presented a case of "latent ambiguity", and parol evidence of transaction between insurer's agent and insured which led up to the issuance of policy was admissible for purpose of showing that policy in addition to named insured, was intended to cover insured's daughter-in-law. Civ.Code, § 1647; Code Civ.Proc. §§ 1859, 1860.

See Words and Phrases, Permanent Edition, for all other definitions of "Latent Ambiguity".

2. Evidence 🔑460(4)

Where words of contract consistently admit of two interpretations according to subject-matter in contemplation of parties, parol evidence may be admitted to show circumstances under which contract was made and subject matter to which parties referred. Civ.Code, § 1647; Code Civ.Proc. §§ 1859, 1860.

3. Insurance 🔑435

Under liability policy providing that insurer should not be liable for loss while automobile was being driven by any person other than insured or a member of his immediate family unless such person was operating automobile with consent of insured, except that "the extension provided for in this condition shall not be available to" any public garage, use of term "extension" denoted intention on part of insurer to extend the coverage to persons in addition to named assured.

See Words and Phrases, Permanent Edition, for all other definitions of "Extension".

4. Insurance 🔑146(3)

Insurance contracts must be construed most strongly against the insurer.

5. Evidence 🔑461(1)

For purpose of determining what parties to an ambiguous insurance contract intended by language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for, and for that purpose the conversations between and declarations of the parties during negotiations at and before time of execution of contract may be shown. Civ.Code, § 1647; Code Civ.Proc. §§ 1859, 1860.

6. Insurance 🔑146(1)

Where an ambiguity is shown to exist in an automobile liability policy, it is not essential for one seeking to recover under the policy to establish which of two constructions is the more logical, but the contract must be interpreted in the sense in which the promisor believed at time of making it that the promisee understood it. Civ Code, §§ 1649, 1654.

7. Insurance 🔑155

Parol evidence as to conversations had between insured and insurer's agent leading up to the issuance of an automobile liability policy containing ambiguous provisions was admissible in action on policy as against contention that such evidence was incompetent because it involved the conversations of a soliciting agent of insurer which conversations were not binding upon the insurer. Code Civ.Proc. §§ 1859, 1860; Civ.Code, §§ 1647, 1649, 1654.

8. Insurance ⚷668(3)

In action on automobile liability policy, weight of parol evidence respecting insured's conversations with insurer's agent to explain ambiguous provision which on its face did not show that policy did not cover insured's daughter-in-law in addition to named insured was for trier of fact.

9. Insurance ⚷514½

Where insurer under automobile liability policy denied liability but offered as a matter of courtesy without assumption of any liability to defend action brought against party covered by policy, insured by declining insurer's offer did not violate the "co-operation" clause of the policy.

See Words and Phrases, Permanent Edition, for all other definitions of "Co-operation".

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Mrs. Frances M. Norton against the Farmers Automobile Inter-Insurance Exchange, to recover, under an automobile liability policy issued by defendant to W. P. Lyon, the amount of a judgment secured against Mrs. Mabel D. Lyon in an action for injuries arising out of an automobile collision. From a judgment for the defendant, plaintiff appeals.

Reversed.

Hearing denied; EDMONDS, J., dissenting; TRAYNOR, J., not participating.

R. G. Wilkins, of San Jose, A. Dal Thomson, of San Francisco, for appellant.

James W. Hughes, of Los Angeles, and Frank V. Campbell, of San Jose (Walter E. Rankin, of San Jose, and Robert E. Hayes, of Santa Clara, of counsel), for respondent.

KNIGHT, Justice.

The plaintiff, Mrs. Frances M. Norton, obtained a judgment for damages in the sum of $8,000 against Mrs. Mabel D. Lyon, on account of personal injuries sustained in an automobile collision between a car driven by Mrs. Lyon and one in which Mrs. Norton was riding. Thereafter Mrs. Norton brought the present action against the defendant insurance company to recover the amount of the judgment under a policy of insurance issued by said company to Mrs. Lyon's father-in-law, W. P. Lyon, who from the date of the issuance of the policy until his death, which occurred six weeks prior to the accident, was the owner of the car Mrs. Lyon was driving when the accident happened. Judgment was given for the defendant company and plaintiff appeals. The principal ground urged for reversal involves a ruling of the trial court rejecting certain parol evidence introduced by plaintiff with respect to the question of the construction of the terms of the policy.

The policy was issued to W. P. Lyon on April 14, 1931, and he was named therein as the assured. Besides insuring his automobile against loss by fire and theft it provided property damage insurance not exceeding $5,000 and public liability coverage to a maximum of $100,000. The term of the policy was six months, and premiums for one year were paid in advance. Under the general heading "Property Damage and Liability" the policy insured "Against legal liability imposed upon the insured resulting solely and directly from an accident by reason of the ownership, maintenance, and/or use of the automobile described herein, while the policy is in force, not exceeding the amount specified in Clause F and G, respectively, on account of * * * Clause G—Liability. Bodily injury and/or death suffered or alleged to have been suffered by any person, other than the Insured or those in his household, service or employment, to an amount not exceeding * * *", etc. And under the next general heading, "Terms and Conditions Forming a Part of This Contract" and the sub-head "(1) Risks Not Assumed By This Exchange" it provided: "The Exchange shall not be liable for loss or damage * * * (D) Caused while the said automobile is being driven or operated by any person other than the Insured or a member of his immediate family or his paid driver; unless said person, otherwise qualified hereunder, is temporarily operating said automobile with the consent of the Insured except that *the extension provided for in this condition shall not be available to:* (1) any public garage, automobile repair shop, automobile sales agency, automobile service station or the agents or employees thereof. * * *" (Italics ours.)

On the date of the issuance of the policy Mrs. Lyon and her husband were and for some time prior thereto had been making their home with W. P. Lyon, and they continued to live with him up to the time of his death, which occurred on November 13, 1931; and during all of that time Mrs. Lyon with her father-in-law's permission drove his automobile. By his will he bequeathed the automobile as part of the residue of his estate to three testamentary trustees, one of whom was Mrs. Lyon's husband; and following W. P. Lyon's death Mrs. Lyon and her husband continued to live in the decedent's home and with the permission of the testamentary trustees she continued to drive said automobile. The accident happened on January 1, 1932, shortly before the appointment by the probate court of the testamentary trustees, and thereafter Mrs. Norton filed two actions for damages. In the first Mrs. Lyon alone was sued; but that action was by Mrs. Norton subsequently dismissed. She then filed a second action in which Mrs. Lyon and the testamentary trustees were joined as parties defendant. It was tried before the court without a jury, and judgment given against Mrs. Lyon, from which no appeal was taken. The ground upon which it was held that the testamentary trustees were not liable does not appear from the record before us.

At the trial of the present action plaintiff claimed that in applying for the policy and during all of the negotiations which led up to the issuance thereof W. P. Lyon insisted upon a form of contract of insurance that would give public liability coverage not only to him but also to Mrs. Mabel D. Lyon, and that at the time of the making of the contract it was understood and agreed between the parties that the policy to be issued would so provide; that in writing the policy the company, while not naming Mrs. Lyon specifically as an additional assured, employed certain ambiguous words, to-wit, those above italicized, which indicate an intention to extend the coverage of the insurance to Mrs. Lyon in conformity with the previous understanding and agreement of the parties; and that when the provision of the policy in which the ambiguous words were inserted is read as a whole and construed most strongly against the company and in the light of the circumstances attendng the making of the contract, it is fairly susceptible of the interpretation that the insurance coverage was available to Mrs. Lyon and to the other members of the immediate family of the named assured; and that therefore plaintiff was entitled to introduce parol evidence, not for the purpose of varying, altering or contradicting the wording of the policy, but, as permitted by section 1860 of the Code of Civil Procedure, to show "the circumstances under which it was made, including the situation of the * * * parties to it * * * so that the judge be placed in the position of those whose language he is to interpret". In short, plaintiff claimed that a case of latent or extrinsic ambiguity was presented, and that therefore she was entitled as provided in section 1856 of the Code of Civil Procedure to introduce parol evidence "to explain" such extrinsic ambiguity. Such evidence was received subject to defendant's objection that it tended to vary the terms of a written instrument; but subsequent to the submission of the cause the trial court made an order sustaining the defendant's objection thereto and striking out all of said parol evidence; and the basic findings upon which the court subsequently gave judgment for defendant were that the public liability coverage of the policy of insurance was restricted to W. P. Lyon, and that in any event said policy was terminated by his death.

The following was the substance of the parol evidence so introduced and stricken out: Rena Musser testified that in April, 1931, she was the secretary of W. P. Lyon; that she saw Mr. Keller, "the agent of the defendant", at Mr. Lyon's office and that in addition to Messrs. Lyon and Keller, she and Miss Lyetta Hayes were present; that Mr. Lyon stated very definitely that he wanted Mabel Lyon insured as well as himself; that he didn't drive the car and didn't want to know how to drive the car and that she (Mabel D. Lyon) "must be fully covered as well as he was"; that Mr. Keller came back several times and each time it was very definitely stated that he (Mr. Lyon) "wanted Mabel covered as well as himself", that he didn't drive the car and that she was not a very careful driver, and that "he wanted to be sure that she was covered"; that at each of the conversations this same topic was discussed and Mr. Lyon stated that "he wanted his daughter-in-law to be insured and covered the same as he was", to which Mr. Keller replied, "That is all right, I will take care of that." On cross-examination this witness testified that on the first visit of Mr. Keller to the office of Mr. Lyon the latter stated to Mr. Keller, "My daughter-in-law, Mabel Lyon, is doing the driving now, I have no chauffeur. I want her in the same as myself, that is the way I have been covered, I want her covered the same as myself" and stated that "he wanted her to have every protection he had" and stressed on that and repeated it; that Mr. Keller replied, "I will see this is all taken care of in the policy"; that about the third or fourth visit, Mr. Keller brought in the application, which was already filled in from information given by Mr. Lyon previously; that Mr. Lyon then signed the application; that some days later Mr. Keller brought in the policy for the first time and handed it to Mr. Lyon. The testimony of Lyetta Hayes, who had a desk closely adjacent to Mr. Lyon, is in accord. This witness testified that she heard the conversations when Mr. Lyon had said to Mr. Keller that he wanted to be sure that Mabel Lyon was covered in every way and that "if she has an accident there will be no possibility of a misunderstanding about it", to which Mr. Keller replied that he "would guarantee that since Mr. Lyon didn't drive the car, of course she would be covered".

[1, 2] We are of the opinion that, as plaintiff contends, the language employed by the company in writing provision "D" of the policy presented a case of latent or extrinsic ambiguity, and that therefore the parol evidence rejected by the court was admissible for the limited purpose for which it was introduced. As stated in California Jurisprudence (vol. 10, p. 939), in discussing the distinction between patent and latent or extrinsic ambiguities, "Some authorities, however, also recognize a third and 'intermediate class of cases, which partakes of the nature both of patent and latent ambiguities; and that is, where the words are all sensible and have a settled meaning but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties'. But this latter class may, in many instances, be treated as involving latent ambiguities." The authority cited in support of the text is the early case of Jenny Lind Co. v. Bower, 11 Cal. 194, wherein it was said: "The language of every instrument should be so construed, if possible, as to effectuate the intentions of the parties; and to ascertain the meaning attached to particular words, when such words are used in various senses, parol evidence is perfectly legitimate. And this evidence is received to explain, and not to contradict or vary the written language. The patent ambiguity, which according to the rules of Lord Bacon cannot be aided by averment, arises from uncertainty upon the face of the instrument in the application of the terms used, and not from uncertainty in the meaning of the terms themselves, when those terms are susceptible of two meanings. (See 2 Parsons, 69, and note.) In the present case the ambiguity lies in the word north; and yet it is not within the rule laid down by Bacon. It belongs to that 'intermediate class of cases,' of which Mr. Justice Story speaks in Peisch v. Dickson [Fed.Cas. No. 10,911], (1 Mason [9], 11) 'which partake of the nature both of patent and latent ambiguities; and that is,' where the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties. 'In such a case, I should think,' says the Justice, 'that parol evidence might be admitted, to show the circumstances under which the contract was made and the subject matter to which the parties referred. For instance, the word "freight" has several meanings, in common parlance; and if by a written contract a party were to assign his freight in a particular ship, it seems to me that parol evidence might be admitted of the circumstances under which the contract was made, to ascertain whether it referred to goods on board of the ship or an interest in the earnings of the ship; or in other words, to show in which sense the parties intended to use the term.'" The doctrine of that case has since been repeatedly restated and applied by the courts of this state. One of the recent cases is Ferris v. Emmons, 214 Cal. 501, 6 P.2d 950, 951, wherein it was held that the use of the word "block" presented an extrinsic ambiguity which justified the admission of parol evidence. The court there said: "We find no merit in the contention that the parol evidence above referred to was improperly admitted. Contrary to appellant's claim, the evidence neither altered nor varied the terms of the written instrument. It was offered by the respondent, and received by the court below, not for the purpose of changing or adding to the deed, but for the sole purpose of explaining the language therein contained. That parol evidence is admissible for such a purpose cannot be denied. If the word 'block,' as used by the com-

mon grantor in the subdivision map and several deeds executed pursuant thereto, was intended by him to have a particular and peculiar meaning, it was competent for the court below to permit the introduction of parol evidence to establish that meaning. Section 1861, Code Civ.Proc.; 6 Cal.Jur. 276, 278; Jenny Lind Co. v. Bower & Co., 11 Cal. 194; Higgins v. California Pet. & Asphalt Co., 120 Cal. 629, 52 P. 1080. Such evidence merely explains the instrument, without varying or adding to it, and serves to give effect to the intention of the parties."

A more recent case is Wachs v. Wachs, 11 Cal.2d 322, 79 P.2d 1085, 1087, involving the use of the word "transaction". In holding parol evidence there admissible the court said in part: "Perhaps the word 'transaction' is such a word as was in the mind of Mr. Justice Holmes when he said, 'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.' (Towne v. Eisner, 245 U.S. 418, 425, 38 S.Ct. 158, 62 L.Ed. 372, L.R.A.1918D, 254.) * * * It cannot be said from a reading of the contract whether the word 'transaction' was intended to convey the first or second meaning above suggested. It is one of those contracts where the words 'consistently admit of two interpretations, according to the subject matter in contemplation of the parties' and in which 'parol evidence might be admitted to show the circumstances under which the contract was made and the subject matter to which the parties referred'. Jenny Lind Co. v. Bower & Co., 11 Cal. 194, 198; see, also, McNeny v. Touchstone, 7 Cal.2d 429, 60 P.2d 986; Civ.Code, sec. 1647; Code Civ. Proc., sec. 1860. The trial court should therefore have permitted appellant to plead and prove the surrounding circumstances, not for the purpose of varying the terms of the written instrument, but for the purpose of aiding the court in interpreting the contract of the parties as embodied in the written instrument." Another case to the same effect which may be cited is Auzerais v. Naglee, 74 Cal. 60, 15 P. 371.

[3-5] Here, as stated, the defendant company did not name Mabel D. Lyon as an additional assured, but in writing the policy it employed the term "extension", which, when used in connection with public liability insurance, denotes an intention on the part of the insurer to extend the coverage to persons in addition to the named assured. Swift v. Zurich Gen. A. & L. Ins. Co., 112 Cal.App. 709, 297 P. 578; Firkins v. Zurich Gen. A. & L. Ins. Co., 111 Cal.App. 655, 295 P. 1051; Votaw v. Farmers Auto. Inter-Ins. Exchange, Cal.Sup., 97 P.2d 958, 126 A.L.R. 538; and it will be noted that in the provision in which the term "extension" was used, three different classifications of persons are mentioned, the first of which includes the members of the immediate family of the named assured, and the last being a group headed "any public garage", etc. And it will be noted also that said provision specifically declares that "the *extension* provided for in this condition shall not be *available* to" the last group headed "any public garage", etc. (Italics ours.) In that situation, and applying the rule that all insurance contracts must be construed most strongly against the insurer, it would appear that as plaintiff contends the provision in which the clause in question is used may be fairly construed as meaning that "the extension provided for" therein was "available" to members of the immediate family of the named assured, and that they were deemed by the parties to be additional assureds thereunder, provided it was first established by satisfactory evidence that at the time the policy was issued it was the intention and agreement of the parties that the policy should so provide. That being so, under the well-settled judicial doctrine above mentioned, and certain statutory rules (Civ.Code, sec. 1647; Code Civ.Proc., secs. 1859, 1860), the plaintiff was entitled to invoke the aid of parol evidence to explain the sense in which the ambiguous words were employed. As said in Balfour v. Fresno C. & I. Co., 109 Cal. 221, 41 P. 876, for the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversations between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown.

The defendant company has offered no definite explanation for the use in said clause of the term "extension", nor attempted to analyze the meaning thereof as there used, more than to argue what it contends the entire provision means. But it would seem that the argument so made only tends to strengthen the plaintiff's contention that the use of the term does present a case of extrinsic ambiguity. However, in support of its position that no extrinsic ambiguity arose from the use of said term, it relies principally upon the decision in the case of Schoefer v. Farmers Auto. Inter-Ins. Exchange, 13 Cal.App.2d 289, 56 P.2d 977, wherein it was held that this same provision did not extend liability coverage to a person "otherwise qualified" who became involved in an accident while driving the assured's automobile with his consent, and that since no judgment was shown to exist against the assured owner of the car, the insurer could not be held liable under the policy. But, as pointed out by appellant, the situation there cannot be said to be the same as the one here presented, for the reason that in that case no question of extrinsic ambiguity was urged or considered; whereas here it is the main determining factor in the case. Other differentiating features of lesser importance are pointed out by the plaintiff herein, but it would seem that the difference above mentioned is sufficient to show that the decision in that case cannot be deemed to be here controlling. It is true that in the policy here, as in the policy there, only the owner of the automobile was named as the assured, but no particular significance may be attached thereto because even in contracts of liability insurance embodying the standard omnibus clause, the owner of the car alone is named as the assured.

The defendant also cites in support of its position several cases from other jurisdictions, among them being Baxter v. Continental Cas. Co., 8 Cir., 48 F.2d 467, appeal dismissed, 284 U.S. 578, 52 S.Ct. 2, 76 L.Ed. 502; State Farm Mut. Auto. Ins. Co. v. Burwell, 232 Ala. 11, 166 So. 598; Graham v. American Employers Ins. Co., La. App., 171 So. 471; Slattery v. Merchants Mut. Cas. Co., 125 Conn. 507, 7 A.2d 383. But an examination of those cases shows that none of the policies considered therein contained the clause on which the plaintiff here chiefly rests her claim as showing an extrinsic ambiguity.

[6] Nor where, as here, an ambiguity is shown to exist in a liability insurance contract, is it essential for a plaintiff to establish which of the two constructions is the more logical. The contract "must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it" (Civ. Code, sec. 1649), and in case of uncertainty "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party" (Civ.Code, sec. 1654). In this respect the court in Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 300 P. 34, in restating with approval the principles declared in Pacific etc. Co. v. Williamsburg, 158 Cal. 367, 111 P. 4, goes on to say that while a policy of insurance must be construed according to the language and terms used therein to arrive at their true sense, and courts will not undertake to relieve parties from the plain stipulations of the policy, still the rule is well established that provisos and exceptions must be strictly construed against the insurer, who was bound to use such language as to make the conditions, specifications, and provisions thereof clear to the ordinary mind, and in case it fails to do so, any ambiguity or reasonable doubt must be resolved against the insurer.

[7] The defendant contends that regardless of the question of the ambiguity, the parol evidence introduced by plaintiff was incompetent because it involved the conversations of a soliciting agent of the defendant company, which were not binding upon the company. The rule of exclusion thus sought to be invoked by the defendant, and the cases cited in support of the rule, doubtless apply when the testimony concerning the conversations of the soliciting agent is introduced for the purpose of varying, altering or contradicting, or showing a waiver of the provisions of an existing contract; or when, as in the case of Toth v. Metropolitan Life Ins. Co., 123 Cal.App. 185, 11 P.2d 94, emphasized by defendant, the conversations are relied upon as constituting an oral contract between the soliciting agent's principal and the person with whom the conversations are had. Here, however, as above pointed out, the purpose of the parol evidence introduced by the plaintiff as to the conversations had with the soliciting agent was to show the circumstances under which the contract was made, "so that the judge be placed in the position of those whose language he is to interpret" (Code Civ.Proc., sec. 1860): and necessarily those circumstances could be established only by

the conversations had with the one who carried on the negotiations leading up to the execution of the contract, which in the present case was the soliciting agent who admittedly was duly authorized by the company to negotiate the contract and secure the application for the issuance thereof. For the purpose stated, the parol evidence introduced by plaintiff was competent. Edwards v. Masonic Mut. Life Ass'n, 86 W. Va. 339, 103 S.E. 454; Cooley's Briefs on Insurance, 2d ed., vol. 1, p. 471; Schultz v. Benefit Ass'n etc., 175 S.C. 182, 178 S. E. 867.

[8] In concluding the discussion on the point of the admissibility of the parol evidence, it may be well to state that we hold merely that it was admissible, and that the plaintiff was entitled to have the same considered by the court in construing the meaning of the provision of the policy over which the controversy arose. The weight to be given to the testimony is, of course, a matter for the trial court's determination.

[9] We are unable also to agree with the defendant company's further contention that the evidence shows a breach on the part of Mabel D. Lyon of the cooperation clause of the policy which bars plaintiff's recovery. This contention is based on the claim that in violation of the provisions of the policy she refused to allow the defendant company to proceed with the investigation and defense of the action. Briefly stated, the facts are these: The company's attorneys appeared for Mabel D. Lyon in the first tort action without knowing of the death of W. P. Lyon. Following the filing of the second tort action, wherein Mrs. Lyon and the testamentary trustees were sued considerable discussion took place between counsel for Mrs. Lyon and the trustees, and the defendant company and its attorneys, as to whether the company was liable under the terms of the policy; and eventually as shown by the correspondence which passed between the parties, counsel for Mrs. Lyon informed the company and its attorneys that if they denied all liability under the policy he believed that the company and its attorneys should step out of the case, and he requested the company to state definitely its position in the matter. In response to the letters so written by him he received certain replies, one of which read as follows: "This will advise you that I have received word from the Farmers Automobile Inter-Insurance Exchange that they have completed their investigation in this case and that their investigation discloses that Mabel D. Lyon, also known as Mrs. W. P. Lyon, Jr., was not at the time of the accident insured by their company or in any way protected under the policy issued to W. P. Lyon, Sr. While the company is willing as a matter of courtesy and advertising, without the assumption of any liability on their part, to defend this suit, if you still insist or desire that the defense of the case be turned over to you in accordance with your letter of February 1st, we will be pleased to make such arrangements at your convenience." Several months later the attorneys for the defendant company again wrote counsel for Mrs. Lyon as follows: "The company is still of the opinion that neither Mabel D. Lyon or any of the defendants named in the new suit were covered by any insurance in said company at the time of the accident, and that the policy thereafter issued to W. D. Lyon Sr. does not cover this action or any of the parties named therein. I am authorized, however, to again offer you as a matter of courtesy without the assumption of any liability on their part, and under a nonwaiver agreement which I would wish to have signed before we took any part in the suit, defense by the company. Needless to say, as the company claims that they have no insurance on this accident, in reply to your inquiry about the collision claim, I must state that the company denies liability." In view of the position thus taken by the company as stated in its letters, counsel for Mrs. Lyon declined the offer of the company to defend the action brought against her and the trustees. Under the circumstances we are unable to sustain the trial court's finding in defendant's favor relating to the cooperation clause.

Several other points are presented by the appeal relating to the question of the termination of the policy by reason of the death of W. P. Lyon and the effect of his death upon the rights of the respective parties under the policy; but in view of the conclusion we have reached upon the question of the admissibility of the parol evidence it is unnecessary to inquire into and determine those additional points.

The judgment is reversed.

We concur: PETERS, P. J.; WARD, J.

40 Cal.App.2d 520

LOUIS RICHARDSON RANCH, Inc., v. GIBSON et al.

Civ. 11303.

District Court of Appeal, First District, Division 1, California.

Aug. 29, 1940.

1. Mines and minerals 🔑78(1)

Under oil and gas lease requiring that drilling operations be commenced within a certain date and thereafter prosecuted with due diligence, the measure of obligation of due diligence was to be determined by the facts of the particular case, having regard for both interests of lessor and lessee.

2. Appeal and error 🔑1008(1)

Under oil and gas lease requiring that drilling operations be commenced within a certain date and thereafter prosecuted with due diligence, whether due diligence required that lessee carry on drilling operations continuously was a question for trial court.

3. Mines and minerals 🔑78(7)

Evidence supported finding that assignee of lessee of oil and gas lease, by reason of lack of proper financing, which he concealed from lessor, had been unable to proceed with diligence in the drilling operations and that such inability was likely to continue, so as to justify lessor in declaring lease forfeited under provision of lease requiring that drilling operations be commenced within a certain date and thereafter prosecuted with "due diligence". Civ.Code, § 1511.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Diligence".

4. Mines and minerals 🔑78(7)

In action to forfeit an oil and gas lease for noncompliance with provisions of lease requiring that drilling of well be commenced within a certain date and thereafter prosecuted with due diligence, where it was alleged that there had been a lack of due diligence, that those operating under lease had not in good faith complied with its terms, and that they had willfully delayed operations without any intention of drilling, evidence of misrepresentation by lessee's assignee of his financial status was admissible as bearing on assignee's good faith.

5. Mines and minerals 🔑78(7)

In action to forfeit an oil and gas lease for noncompliance with provisions of lease requiring that drilling of well be commenced within certain date and thereafter prosecuted with due diligence, where evidence of misrepresentation by lessee's assignee of his financial status was admissible as bearing on assignee's good faith, trial court properly refused to limit evidence as to assignee's financial status to period between date on which drilling operations were required to be commenced under terms of extension granted by lessor and date on which action was filed.

6. Mines and minerals 🔑78(2)

Under oil and gas lease requiring that drilling operations be commenced within certain date and thereafter prosecuted with due diligence, and authorizing lessor to cancel lease upon failure of lessee to commence actual drilling operations within time specified without allowing lessee time to remedy default, where it appeared that extensions of time to commence drilling were procured by misrepresentations of lessee's assignee as to his financial status, and that, although drilling was started within the last extension, it was not started in good faith, trial court properly found that drilling did not comply with obligation of lease in regard to commencement of drilling, and that lessor could declare forfeiture without allowing time to remedy default.

7. Mines and minerals 🔑78(3)

Where oil and gas lease provided that all notices and communications addressed to lessee should be mailed to a certain party designated in lease, lessee afterwards directed lessor not to send communications to person named in lease but to send them directly to him, and thereafter lessor sent communications directly to lessee and after assignment of lease also sent communications to lessee's assignee in care of his attorney, notices of forfeiture of lease for failure to comply with obligation of lease in regard to commencement of drilling sent to lessee and assignee were sufficient compliance with lease, especially where lessee and assignee admitted receipt of notices.

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Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Louis Richardson Ranch, Incorporated, against Frank J. Gibson and Ruth Gibson, his wife, and others, to establish a forfeiture of an oil and gas lease for noncompliance with provisions of the lease requiring that drilling of a well be commenced by a certain date and thereafter prosecuted with due diligence. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Lawrence Hall, Havelock Fraser, and Wm. H. Cree, all of Long Beach (Cree & Brooks, of Long Beach, of counsel), for appellants.

W. Cloyd Snyder, of Los Angeles, for respondent.

KNIGHT, Justice.

Plaintiff brought this action to establish a forfeiture of an oil and gas lease for noncompliance with provisions of the lease requiring that drilling of a well be commenced by a certain date and thereafter prosecuted with due diligence. From a judgment for plaintiff, defendants appeal. They contend that grounds for forfeiture did not exist and that the lease is still in effect.

The lease was executed on May 6, 1936, by plaintiff Louis Richardson Ranch, Inc., as lessor, and defendant Frank J. Gibson as lessee, and covered one hundred acres in Ventura county. Gibson was also given a lease on adjoining property owned by Meda K. Richardson. On July 20, 1936, both leases were assigned to defendant George Duty, Gibson retaining a four per cent royalty interest. Defendant Sherrod had introduced Gibson to the lessor and thereafter worked for Duty, but was not shown to have any interest in the lease.

The lease provided that it should terminate unless drilling was commenced within ninety days from its date, provided that if commenced within thirty days, the sum of $500 paid upon execution of the lease should be returned to the lessee, and if not commenced within thirty days, but within sixty, $250 of this sum should be repaid. Drilling was not commenced within ninety days, but on August 2 an extension was granted to August 9. Subsequently time was extended to August 16, and thereafter to August 21. At the time of granting the extension to August 21, the lessor agreed to extend the time to September 3 if Duty would release the south forty acres of the lease, and the south forty acres of the Meda K. Richardson lease, but Duty did not avail himself of this offer. Defendant Duty represented to Mr. Snyder, president and attorney for plaintiff, that his delay was due to the fact that work was being done on his drilling equipment at Long Beach.

Actual drilling commenced about midnight on August 20, but the lessor contends that it was not prosecuted with due diligence in that the derrick was not wired for electric lights and therefore continuous drilling could not be maintained. On September 5, the board of directors of plaintiff corporation held a meeting upon the property, and according to the testimony of Mr. Snyder, president of plaintiff, he informed the man in charge for defendant Duty that unless there was a showing of diligence it might be necessary to cancel the lease. Snyder suggested that since there had not been due diligence, Duty should put up a $10,000 bond to assure performance.

On September 10, Snyder wrote to Gibson and Duty that there had been a breach of the obligation of diligent performance, and any further work would be done at their peril; that upon his return from his vacation he would ask the board for cancellation of the lease. No reply was received to this letter. On September 26, Snyder wrote to Gibson and Duty that on the preceding day the board had cancelled the lease. Action was filed on September 29.

The court found that actual drilling had commenced on August 21, within the last extension, but that it had not been commenced in good faith, in that Duty did not have the financial ability to carry on and complete the well, and had obtained the extensions by falsely representing his financial ability. It further found that drilling had not been carried on with due diligence, or with any diligence, and that on or about September 6, 1936, defendant ceased operations without sufficient cause or reason.

Defendants' contention is, in effect, that the evidence is insufficient to support the findings which are adverse to them. Defendants further contend that under the lease the plaintiff was required to give notice allowing time to remedy any breach of the obligation of due diligence before declaring a forfeiture.

Defendants take the position that diligent operation did not require continuous drilling; that it would have delayed further the commencement of drilling if the derrick had been wired for night work. Defendants point to the fact that between August 21 and September 5, 1936, the well was drilled to a depth of between 280 and

290 feet. During that period the conductor pipe developed a leak three times, and it had been necessary to stop drilling and recement it, according to testimony on behalf of defendants. The cementing of the first two repair jobs, permitted to set over night, had not held, and on September 5, when the board of directors came to the lease, it had been recemented a third time. The intent was to let it set several days before starting again. Defendants also offered evidence of other mechanical trouble due to a twist-off.

As a justification for not resuming operations after the shutdown of September 5, defendants rely on the statements of the board of directors when they visited the lease on September 5 and the letter of September 10, in which Snyder informed the defendants that work thereafter done was at their peril, and that on his return from his vacation he would ask the board to cancel the lease for breach of the obligations of the lease in respect to drilling. Drilling was not thereafter resumed. The position of defendants is that there was no lack of due diligence prior to September 5, and that they were not required to continue operations after that date in order to hold the lease, in view of plaintiff's notice that it proposed to cancel. Sec. 1511, Civ.Code. The derrick and drilling equipment were still on the property at the time of trial. Defendants' contention is that the lease is still in effect.

The court found, as noted above, that drilling was not commenced in good faith and that Duty did not have financial ability to carry on and complete a well. A number of workmen employed by Duty on the well were not paid in full until after they had filed claims with the labor commissioner. Payments of wages were made as late as December. Mr. Taylor, who furnished water from his pump on the Meda K. Richardson property to Duty, was not paid until October 31, after he had filed a claim with the labor commissioner. Mr. Boswell, who supplied mud used in drilling the well at a charge of $218, received his last payment in January, 1937.

Defendant Duty testified that the derrick had cost $2,500 and that he owed $1,200 on it at the time of trial. His drilling equipment, except for a few small tools, was rented on an unwritten contract to pay $50 a day rent from oil produced. From Duty's own testimony the trial court was clearly warranted in concluding that he was without adequate means to finance drilling of an oil well with due diligence.

The theory of plaintiff was that Duty was deliberately "stalling", awaiting the outcome of a well being drilled about a mile distant by the Honolulu Oil Co. If that well was a success, he would have no difficulty financing his well. If the Honolulu well proved dry, he could surrender the lease under a provision giving such right at any time.

Plaintiff lessor, on the other hand, was anxious that drilling proceed with dispatch. It wished a test of its land to be made without regard to the outcome of the Honolulu well. It had other offers to lease. If Duty was not going forward diligently, it wished to accept one of these offers, which likely would be withdrawn if the Honolulu well proved dry. According to the testimony of Snyder, he had explained the situation to Duty when granting extensions of the time to commence drilling and had received assurances from him that the lessor need not worry about his financial responsibility, that he had plenty of money to go ahead and not only drill this well, but all other wells that had to be drilled on the property. The court found that Duty procured these extensions by misrepresenting his financial status. Conflicts in the evidence on this point were resolved by the court in favor of plaintiff.

[1-3] The measure of the obligation of due diligence is to be determined by the facts of the particular case, having regard for both the interests of lessor and lessee. In the present case it cannot be said that the court's findings as a matter of law are without support in the evidence.

The evidence shows, without dispute, that the derrick was not equipped with lights for night drilling. Whether, in the circumstances shown, due diligence required that drilling operations be carried on continuously was a question for the trial court. There had already been delay in commencing drilling, and although extensions of time to start had been allowed, the importance to the lessor of diligence had been emphasized. The sufficiency of the lessee's operations may depend on whether he is acting in good faith. That is, conduct which might be sufficient if the lessee is acting in good faith, may not satisfy the lease if good faith is lacking. In the circumstances the court was warranted in concluding that the defendant Duty, by reason of lack of proper financing, which he concealed from the lessor, had been unable to proceed with diligence, and that this inability was likely to continue.

It appears from the evidence that all extensions were granted by Snyder, acting for the lessor, when he visited the property and observed that drilling could not commence by the times agreed on; that Duty did not seek out the lessor and request time when he must have known that his equipment would not be ready to start drilling by the time fixed in the lease or within the first two extensions. Sherrod testified that after the board of directors of plaintiff visited the property on September 5, in the absence of Duty, he talked with Duty on the telephone and told him that if lights were installed for night drilling he thought the lessor would be satisfied. But it does not appear that Duty made any attempt to communicate with the lessor with a view to adjusting the situation. Nor did Duty reply to the letter of September 10, in which Snyder charged him with lack of diligence, but stated that action would not be taken until he returned from his vacation. The court was entitled to consider Duty's conduct as above outlined in connection with plaintiff's contention that he was not acting in good faith. It may be that Duty honestly wished to carry on, that he hoped to obtain funds, but was disappointed. But his own testimony shows that he did not have any reasonable expectations which warranted a belief that he could proceed with proper diligence.

[4, 5] Defendants contend that evidence of Duty's misrepresentation of his financial status was inadmissible under the pleadings, which did not allege fraud, and that in any event evidence as to his finances before August 21 or after September 29 was immaterial. The complaint alleged that there had been a lack of due diligence, that those operating under the lease had not in good faith complied with its terms, and that they had wilfully delayed operations without any intention of drilling. Under these allegations evidence of Duty's misrepresentation of his financial status was admissible as bearing on his good faith.

The court properly refused to limit the evidence to the period between August 21 and September 29. Evidence as to matters before August 21 was relevant to show that the extensions were not procured in good faith, and the evidence as to matters which took place after September 29, when plaintiff filed suit, such as the filing of claims by Duty's employees with the labor commissioner, was admissible as revealing his financial status before the forfeiture.

We conclude on this phase of the appeal that the evidence supports the trial court's finding of grounds for forfeiture for failure to commence drilling in good faith and prosecute it with diligence. This brings us to defendants' contention that even if Duty was in default, plaintiff was required under the lease to give notice of breach and time to remedy it before declaring a forfeiture.

[6] Paragraph 17 of the lease includes the following: "Upon the violation of any of the terms or conditions of this lease by the Lessee excepting the payment of royalties in the manner herein provided and excepting the failure to commence or prosecute the actual drilling of any oil or gas well hereunder, and if the Lessee fails to remedy the same within sixty (60) days after written notice from the Lessor so to do, then, at the option of the Lessor, this lease shall forthwith cease and terminate, and all rights of the Lessee in and to said land be at an end, save and except as to any and all wells producing or being drilled and in respect to which Lessee shall not be in default * * *. No time for remedying default, before cancellation, shall be allowed after failure to pay any royalties or rentals as herein provided, or for failure to commence actual drilling of any oil well within the time herein provided for the commencement of drilling of such well."

Note that the provision for a sixty-day notice is expressly made not applicable to a failure to commence or prosecute drilling operations. But the concluding sentence of the paragraph, which expressly provides that no time before cancellation shall be allowed after failure to pay royalties or rentals, or for failure to commence actual drilling within the time provided, does not include failure to prosecute drilling. From this omission defendants argue that time to remedy such a failure must be allowed, and since the sixty-day notice provision is not applicable in view of the first sentence of the paragraph, a reasonable time must be allowed. In defendants' analysis the forfeiture herein rests on the failure to prosecute drilling with due diligence, rather than any breach of the obligation to commence drilling.

We have heretofore referred to paragraph 4 of the lease, which provided that it should terminate unless the lessee should commence drilling within ninety days and thereafter prosecute drilling with due diligence. In Scheel v. Harr, 27 Cal.App.2d 345, 80 P.2d 1035, it was held that such a provision must be read with a paragraph providing for notice and time to remedy default, which in that case made no exceptions, and that an automatic forfeiture did not arise.

Paragraph 17 of the lease herein differs from the analogous provision in Scheel v. Harr, supra, in that it expressly provides that no time for remedying default before cancellation shall be allowed after failure to pay royalties or rentals, or for failure to commence actual drilling within the time provided, where as in the cited case no exceptions were made.

In the case herein the court found that the extensions of time to commence drilling were procured by misrepresentations of Duty as to his financial status, and that although drilling was started within the last extension, it was not started in good faith in that Duty did not have financial ability to carry on and complete drilling of the well. The trial court properly concluded that drilling started under such circumstances did not comply with the obligation of the lease in regard to commencement of drilling, and that the lessor could declare a forfeiture under paragraph 17 without allowing time to remedy default. In the notice of September 26, 1936, declaring a forfeiture, failure of the lessee to commence drilling as provided in the lease was included in stating the grounds of forfeiture.

In Scheel v. Harr, supra, the court found that drilling was not commenced in good faith, but in that case the lease made no exception to the requirement of sixty days' notice where the default consisted in failure to commence drilling within the time provided. The court accordingly held that a forfeiture could not be declared without allowing the sixty-day period.

[7] Defendants further contend that notice of forfeiture did not comply with the lease. The lease provided: "All notices and communications addressed to the Lessee shall be mailed to Jack B. White, 16½ Pine Avenue, Long Beach, California." Defendant Gibson testified that before Duty commenced drilling he requested Snyder, president and attorney for plaintiff, not to send communications to White, but to send them directly to him, Gibson. White, according to Gibson, was a broker. Snyder complied with Gibson's request and after assignment of the lease to Duty also sent communications to Duty, in care of his attorney, addressed to the attorney's office. No claim is made that all communications did not reach both Gibson and Duty. In their answer they admitted receipt of the notice of forfeiture of September 26, and the evidence shows their receipt of other communications. It was not shown that defendant Sherrod had any interest in the lease which would require notice to him. The notices sent to Gibson and Duty were sufficient.

The parties have argued at some length whether the rule that forfeiture provisions are strictly construed against the party entitled to their benefit applies to oil and gas leases on a royalty basis. Appellants insist that the exception, if it exists, should apply only where the lease covers proven territory. It is said that the threat of loss of oil through drainage if the remedy of prompt forfeiture is circumscribed explains the exception. John v. Elberta Oil Co., 124 Cal.App. 744, 13 P.2d 538; Slater v. Boyd, 120 Cal.App. 457, 8 P.2d 182; Hall v. Augur, 82 Cal.App. 594, 256 P. 232. This danger is also present where, as in the instant case, another well is being drilled nearby in unproven territory. If the other well is a success it may draw oil from nearby land to the prejudice of owners who are tardy in drilling. Furthermore, while the parties concede that plaintiff's land was wildcat in that it was beyond the known limits of a proven field, the evidence shows that on the leases adjoining plaintiff's land on the east there were a number of wells, including a well about one hundred yards distant from Duty's well. In the present case we need not resolve the question as to whether an exception to the rule of strict construction of forfeiture provisions should be made as to royalty oil leases under all or some conditions, for it is not necessary to indulge in liberality of construction to support the trial court's reasonable interpretation of the lease herein. The lease was prepared in the office of Mr. Snyder, president of plaintiff corporation, with the result that uncertainties would be resolved against the lessor. But we are of the view that there is no uncertainty in the lease as to the right of the lessor to forfeit without allowing time to remedy default where there is a failure to commence drilling in good faith as shown by the evidence herein.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

40 Cal.App.2d 529

CHURCH et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 11951-S.

District Court of Appeal, Second District, Division 1, California.

Aug. 29, 1940.

Rehearing Denied Sept. 23, 1940.

1. Trusts 🔑**372(3)**

In proceeding by remaindermen under express trust against a bank which was a stranger to the trust, and life tenant who had assigned leases on trust property to bank as security for life tenant's obligations, to enforce trust and recover for damages to trust corpus and for alleged conversion of trust income by bank, evidence supported findings against remaindermen.

2. Trusts 🔑**104**

Where life tenant, who was entitled to net income from trust property and who, although not a trustee, was permitted to manage trust property, assigned, as security for life tenant's obligations, leases to a bank, a stranger to trust, which life tenant, as lessor, had outstanding on trust property, and bank accepted leases in good faith and without knowledge of legal status of property described therein, and bank did not undertake to act as a trustee under trust, bank did not, by reason of assignment, become a "constructive trustee" and was not liable to remaindermen for damages to trust corpus and alleged conversion of trust income.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trustee".

3. Trusts 🔑**348**

In proceeding by remaindermen under an express trust against life tenant and a stranger to trust to enforce trust and recover for damages to trust corpus and alleged conversion of trust income by stranger, whether remaindermen sued as assignees of life tenant, or as beneficiaries under trust in default of original and new trustees, did not affect stranger's liability, since test of such liability was relation that stranger had to trust estate at time of stranger's acts or omissions claimed to constitute conversion. Civ.Code, § 863.

4. Trusts 🔑**280**

If a trust estate disbursed more for benefit of life tenant, who was entitled to net income, than life tenant was entitled to receive, trustees were authorized to withhold payments to life tenant from net income of estate until estate had been reimbursed in an amount equal to excessive payments.

5. Trusts 🔑**348**

Even if a life beneficial interest in a trust estate was assignable and, by reason of assignment, remaindermen became direct, as well as contingent, beneficiaries, remaindermen acquired no added advantage by reason of assignment from life tenant in proceeding against a bank, which was a stranger to trust, to enforce trust and recover for damages to trust corpus and for alleged conversion of trust income by bank. Civ.Code, § 863.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding by Henry Arthur Church and others, all minors, by Lucia Luella Church, their guardian ad litem, against the Security-First National Bank of Los Angeles, a national banking association, H. A. Church, Jr., also known as Harry Church, and another, for money and an accounting and declaratory relief concerning an express trust. From an adverse judgment, plaintiffs appeal.

Affirmed.

A. V. Falcone, of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for respondents.

DORAN, Justice.

This action for money, and accounting and declaratory relief, was instituted on July 22, 1937. Appellants' description of the appeal herein and the theory of plaintiffs' cause of action are as follows, quoting from appellants' briefs: "This is an appeal, from an adverse judgment, by minor plaintiffs, beneficiaries under an expressed trust who sued to enforce the said trust and to recover for damages to the trust corpus and to recover for conversion of trust income, said suit being directed against a stranger to said trust, the defendant bank, who converted said trust income and damaged said trust corpus, under the circumstances hereinafter set forth. * * * Throughout its brief, and in fact throughout the entire history of this litigation, respondent has either failed or refused to understand and acknowledge the true status of appellants in this action. *They do not sue to enforce any specific right of theirs as assignees or remaindermen.* They sue to enforce the trust for the violation thereof by the trustee, another beneficiary, and a stranger. * * * Conceding that beneficiaries under trusts, in this state, *receive no estate or interest at all in the trust* * * * *nonetheless he may enforce the performance of the trust.*" (Italics included.)

The record reveals the facts, from which the litigation herein arose, to be as follows:

One of the defendants, H. A. Church, Jr. (hereinafter referred to as Harry Church), is the father of the four minor plaintiffs, and is the husband of Lucia Luella Church, the guardian ad litem herein of said minor plaintiffs.

It appears from the record that on April 19, 1917, a written declaration of trust was executed by H. A. Church and Margaret Church, husband and wife, in which three of their children, namely, R. O. Church, C. M. Church and Hattie May Cottle, were named as trustees, affecting improved, income-bearing property, represented by a legal description thereof and known in the Church family as the Montebello property; a beneficial estate was thereby established for their third son, Harry Church, above mentioned, in the form of a life tenancy (defeasible earlier upon specified conditions) to the extent of the net income therefrom, payable monthly, after the payment of the expenses of upkeep, repair, insurance and all taxes and assessments levied on said property. Provision therein was made for remainders unto their children, the original trustees. All of the aforesaid persons executed the document, which was recorded in the office of the county recorder of Los Angeles county.

On December 15, 1922, an amendment was executed to the declaration of trust, in which the life tenancy was continued and its quantum remained substantially the same. The remaindermen, however, were changed, that is, the named, living children of the trustors were replaced by the children of the defendant life tenant, Harry Church, which children as heretofore noted are the plaintiffs in the within action.

R. O. Church (referred to as Ralph Church), and C. M. Church (referred to as Clyde Church), two of the original trustees, testified in substance that after the original trust agreement was executed they allowed their brother, Harry, to consider the trust property as his property and to look after it, that is, to manage it and to collect the rents; that their father instructed them to allow their brother Harry to do so, but not to allow him to sell the property or to lose it.

The defendant life tenant, Harry Church, likewise testified that during the period of his father's lifetime (H. A. Church died in the year 1924, and Mrs. Church died in 1928), and until the year 1930, he entered into the active management of the trust property, and that his father must have known of this fact; that they were in the same office together.

Commencing with the year 1930, said Harry Church began to spend the major portion of his time away from Los Angeles. He arranged with a Mr. E. T. Cochrum, a friend, to assist him in the collection of the rent from the trust property.

Prior thereto, namely on September 10, 1929, said Harry Church borrowed the sum of $5,000 from the Montebello branch of the defendant bank, on a note (which debt had been paid down to $4,000 principal by March 10, 1930); and the sum of $3,000 was lent to Mr. Cochrum, on his note, which sum of money was turned over by Cochrum to Harry Church. Mr. Cochrum's note was recognized by said Harry Church as his obligation. In connection with the above transaction and as a part thereof, Harry Church executed a financial statement for the attention and consideration of the aforesaid bank in which he set up as his personally owned realty certain of the trust property.

Although R. O. Church and C. M. Church, the two original trustees, were vice-presidents of the defendant bank and branch managers thereof, they were not located at its head office, nor at the Montebello branch thereof.

Defendant bank, in due course, desired these obligations paid and to secure and bring about such payment, Harry Church, on March 13, 1930, executed assignments to the Montebello branch of the defendant bank, of certain leases which he, as lessor, had outstanding on portions of the trust property.

The manager of the Montebello branch of the defendant bank, William F. Johnson, testified that at the time of the assignment of the leases to the bank he had no knowledge of any trust affecting the property covered by such leases, and further, in answer to the question: "To your knowledge, did either Clyde Church or Ralph Church have anything to do with the arrangements whereby H. A. Church, Jr., executed these assignments to pay off his obligation to the Bank?", Mr. Johnson replied: "Not that I know of. * * * As a matter of fact, the whole matter of paying off the loans in which we were interested in the bank, was referred to our central credit department and the arrangements for the assignment of those leases were made in our central credit office."

Defendant Harry Church testified that in the year 1926 he had discussed with his brothers Clyde and Ralph, and also with his sister Hattie, the matter of executing the leases on the trust property, and that he was told they did not care to sign the leases but that it was satisfactory to them to have him do so; he also testified that about two or three weeks prior to March 13, 1930, on which date the leases were assigned to the bank, he had had a conversation with Ralph Church in which it was suggested by the latter that he, Harry, assign his interest in said leases to the bank and that he, Ralph Church, would "arrange to have the Security carry" Harry's note; that a similar conversation was had by him with Clyde Church.

Both Clyde and Ralph Church denied that they had advised Harry to assign his interest in the leases to the bank, and testified in substance that their brother Harry had told them of these assignments after said assignments were made.

It appears that after assigning the aforementioned leases Harry Church notified the tenants to pay the rent to the Montebello branch of the defendant bank; these payments were made either by the tenants directly, or through Harry Church or Mr. Cochrum, and were credited by the bank to a commercial account in Mr. Church's name.

On May 8, 1930, Harry Church and his wife, the latter being the guardian ad litem of the plaintiffs herein, directed the bank to pay from the rentals received certain notes of theirs to third parties "only after your loan represented by $3,000 note of E. T. Cochrum in your favor, and also your loan represented by our $4,000 note in your favor, have been paid in full, including interest to date of payment".

By September 13, 1932, the debts to the bank were paid off by means of said rentals, and the transaction was closed. The total sum received by it from these leases amounted to $9,363.82. From the rents turned over to it, the defendant bank made certain disbursements for repairs ordered by Harry Church.

On September 22, 1933, an action numbered 360,868, was pending in the superior court of Los Angeles county, in which the remaindermen under the amended declaration of trust (plaintiffs herein), were the plaintiffs, appearing by their guardian ad litem, W. L. Stevens, and in which the original trustees were the defendants, the gist of which action was for non-, mis-, and malfeasance of the original trustees as such. Before the filing of said action, to wit, on June 21, 1933, said life tenant, Harry Church, had executed an assignment to the remaindermen, his children, of all of his interest in the trust. The original trustees resigned as such, in said court action, and the plaintiffs' guardian ad litem therein, Stevens, a nominal codefendant herein, was appointed trustee in the place and stead of the original trustees. By a stipulated judgment the account of the trustees was confirmed, and they were ordered to disburse a balance of $382.60 which they then had on hand. The defendant bank was not a party to said proceeding. The judgment therein is final and has not been set aside. With the proceeding above mentioned the matter rested of record until this action was commenced on July 22, 1937.

The record reveals, as the evidence heretofore noted indicates, that immediately after the execution of the declaration of trust, Harry Church managed and controlled the trust property, which included generally the renting, the collection of rents, repairing, and other attention to details ordinarily incident to the ownership of property, and continued in such management for approximately thirteen years. It was during such management of the aforesaid trust property that the leases heretofore mentioned were executed by Harry Church. It is noteworthy that the trustees, apparently neither assumed responsibility nor performed the duties of their office as such trustees at any time, probably due to the fact that their brother, Harry Church, being the life tenant and entitled to the net income from the estate created by the declaration of trust, was believed by them to be capable and trustworthy.

It should be noted also that the moneys that came into the possession of defendant bank and were by the bank applied on Harry Church's debt to said bank, were moneys to which, under and according to the terms of the declaration of trust, Harry Church was lawfully entitled, to the extent that the same represented the net income of the estate.

It is contended by appellants that as to the first cause of action thirteen of the enumerated findings of fact are either unsupported by the evidence or otherwise defective. As to the other four causes of action the findings are likewise assailed as well as the findings relating to the answer and affirmative defenses. Appellants' position is declared to be "that the evidence supports all the allegations of the complaint and that therefore, unless any of the affirmative defenses are factually established by Respondent and then are sufficient in law to constitute affirmative defenses to the complaint or any part thereof, a judgment for Appellants is inevitable". It is argued by appellants that "Throughout these premises defendant life tenant" (Harry Church) "must be considered in his true light, as a trust-violating beneficiary, inimical to the trust and, a fortiori, so because of his natural status as the son of the trustors and the father of Appellants."

In particular, it is urged by appellants that Harry Church was without authority to execute leases of the trust property and that such leases were void ab initio; that the assignment therefore of said leases to the defendant bank to secure his, Harry Church's, personal loans, conveyed no interest or rights in said property to defendant bank nor authority to act in connection therewith and that the surrender by the trustees of their control over the trust property was wrongful and in violation of the trust. It is argued by appellants that as a result of the aforesaid acts, the defendant bank became a "constructive trustee" with relation to the trust property and that the application of the moneys received by defendant bank, as above described, to the satisfaction of Harry Church's debt was a "conversion of the trust income and an interference with and damage to the trust corpus". In this connection appellants rely on England v. Winslow, 196 Cal. 260, 237 P. 542, 545. There the court reaffirmed the familiar rule that "One who has assumed the relation and undertaken to act in the capacity of a trustee and who has thereby come into the possession and control of the money or property of another cannot be heard to deny the validity of the trust under which he has admittedly acted and the benefits of which he has received and holds."

Without going into further detail it is sufficient to note that the trial court found against plaintiffs and appellants on all of the issues involved.

There is no conflict in the evidence as above noted.

The appeal is without merit, as indeed plaintiffs' purported causes of action were revealed to be, by evidence adduced at the trial.

[1] The findings are abundantly supported by the evidence and the trial court's conclusions are correct as a matter of law.

The fallacy of appellants' contentions appears to result from the extravagant and exaggerated importance sought to be attached to the so-called invalid leases and the assignment thereof to defendant bank by Harry Church. It is about these acts that appellants most bitterly complain and which, in addition to the action of defendant bank in connection therewith, in effect, are regarded by appellants as perniciously evil. An impartial review of the record will not support appellants' asserted conviction in this regard.

[2] It may be conceded that Harry Church was without authority to execute such leases and it may be further conceded that the trustees were blameworthy in the failure to give attention to the trust estate, but the record is entirely destitute of any evidence direct or indirect that points to any culpability on the part of defendant bank. To the contrary, the record reveals the defendant bank to have acted in entire good faith at all times. So far as its relation to the trust is concerned, the de-

fendant bank is in no different position than if the so-called invalid leases had never been executed and assigned. It is in precisely the same position that would have resulted from a resort to the identical procedure to collect the promissory note without the security. The security, that is, the so-called invalid leases, accepted by the defendant bank were accepted in good faith and without actual knowledge of the legal status of the property described therein. Even though charged with constructive knowledge, as contended by appellants, the result would be no different, for the effect of such acceptance was but an incident, trivial in its relation to the true state of affairs, that by no process of reasoning could be elevated to the dignity of controlling importance. The legal significance of such leases and their assignment, in the circumstances, is of no consequence.

The only parties to the transaction involving the settlement of Harry Church's debt to defendant bank were Harry Church and the bank. At no time did defendant bank assume the relation of or undertake to act as trustee under the trust in question. Appellants' contention to the contrary, namely, that a trust by operation of law was established and that by reason thereof defendant bank became a "constructive trustee" is not sustained by the record. In this connection, it is important to bear in mind that defendant bank was at all times dealing with the beneficiary and not with a trustee. The evidence does not reveal the familiar situation of a third party receiving trust property from a trustee. The trust property here considered was actually under the control of the beneficiary and the disposition of the income therefrom was by such beneficiary, who was not only authorized to take the same into his keeping but was entitled to keep for himself the net income thereof.

As heretofore noted, plaintiffs originally, and for a number of years, were merely remaindermen, with the life beneficial interest of the estate in their father, Harry Church. During this period, Harry Church, figuratively speaking, overdrew his account in and with the trust and contrary to the terms and limitations of the declaration of trust in the manner hereinbefore described. Manifestly, such acts on the part of Harry Church gave rise to no cause of action in his favor against defendant bank. The transaction between Harry Church and defendant bank, as above noted, was closed September 13, 1932. Nine months later, viz.: June 21, 1933, Harry Church assigned all of his rights, titles, interests, claims and demands in the trust to the remaindermen, his children, the plaintiffs herein. Four years later, namely, on July 22, 1937, the action herein was commenced.

[3-5] Appellants also argue as follows: "Appellants do not sue as assignees of the defendant life tenant. They sue as beneficiaries under the trust in the default of the original trustees and the new trustee," citing Civil Code section 863. The argument is untenable, for in what capacity the appellants sue is beside the issues here involved. As pointed out by respondents, if the trust estate disbursed more for the benefit of Harry Church than he was legitimately entitled to, then the trustees had authority to withhold payments to him from the net income of the state until such time as the estate had been reimbursed in an amount equal to the excessive payments. Such procedure was approved by the court in Estate of Eilert, 131 Cal.App. 409, 21 P. 2d 630, and, as pointed out by respondents, if the new trustee has neglected to restore the estate during the period from September 13, 1932, to July 22, 1937, with funds the evidence shows to have been available, such neglect is no fault of defendant bank. Moreover, assuming, but not deciding, that the life beneficial interest in the estate was assignable and that by reason of the assignment the remaindermen become direct as well as contingent beneficiaries, nevertheless, the plaintiffs acquire no added advantage thereby, for the test as to defendant bank's liability in the circumstances is not the legal status that plaintiffs bear with relation to the trust estate but the relation defendant bank bore to the trust estate at the time its acts or omissions assertedly constituted a conversion of the trust income. In that regard, as above noted, in substance and effect the evidence established no relation between defendant bank and the trust estate at any time, either directly or by operation of law.

It is unnecessary to give consideration to the several additional defenses relied upon by respondents. There are no prejudicial errors in the record and for the foregoing reasons the judgment appealed from is affirmed.

We concur: YORK, P. J.; WHITE, J.

40 Cal.App.2d 570

COLTMAN et al. v. CITY OF BEVERLY HILLS et al.

Civ. 12623.

District Court of Appeal, Second District.
Division 2, California.

Aug. 30, 1940.

Hearing Denied Oct. 28, 1940.

1. Appeal and error 🔑1010(1)

Appellate court must sustain findings of trial court if there is substantial evidence in their support.

2. Automobiles 🔑244(16)

Evidence that two police vehicles had been sent out by radio call to investigate an accident and had been told to call station if an ambulance was necessary, and that regulation of city police department required that such a call be treated by officers receiving the message as an emergency call, sustained finding that officers operating vehicles were responding to an "emergency call", so that questions of speed, right of way, and other rules of road were immaterial in determining whether city was liable for pedestrian's death when vehicles collided.

See Words and Phrases, Permanent Edition, for all other definitions of "Emergency Call".

3. Automobiles 🔑175(1, 3, 4)

The test for determining whether a publicly owned motor vehicle is at a given time an authorized emergency vehicle responding to an emergency call, so as to be excluded from restrictions of speed, right of way, and other rules of road, is not whether an emergency in fact exists at the time, but whether the vehicle is then being used in responding to an emergency call.

4. Automobiles 🔑175(1)

The public employer of emergency vehicle operator, giving statutory notice of his approach, is not liable for injuries to another, unless operator arbitrarily exercised his statutory privileges.

5. Automobiles 🔑175(1, 3, 4), 245(19)

The questions of authorized emergency vehicle's speed, right of way, or other rules of road, are immaterial in action against public owner thereof for injuries to another as alleged result of operator's negligence; the only fact questions being whether there was emergency call, whether statutory warning of vehicle's approach was given, and whether operator arbitrarily exercised his statutory privileges.

6. Automobiles 🔑175(1)

Recovery could not be had against city for death of pedestrian who was struck by police automobile after automobile had collided with a police motorcycle at intersection, even though pedestrian was entirely free from negligence, where it appeared that both police vehicles were responding to an emergency call, that statutory warning was properly given by driver of each vehicle, and that there was no arbitrary exercise of statutory privileges accorded police vehicles.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by William J. Coltman and Agnes Coltman against the City of Beverly Hills, California, and others, to recover damages for death of plaintiffs' daughter, Jane Coltman, who was struck by a police vehicle, owned and operated by defendant city. From a judgment for defendants, the plaintiffs appeal.

Affirmed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for respondents.

WOOD, Acting Presiding Justice.

Jane Coltman, 23 years of age, was struck by a police vehicle owned and operated by defendant City of Beverly Hills and died as a result of injuries received. This action was commenced by her parents and heirs at law to recover damages for her death. The action proceeded to trial against defendant city alone and, a judgment having been rendered in favor of the city, plaintiffs have prosecuted the present appeal.

Miss Coltman rode on a bus to the intersection of Wilshire boulevard and Beverly drive in the City of Beverly Hills and disembarked from the bus at about 1 p. m. on December 26, 1938. She walked north on the sidewalk intending to go to a theatrical performance and as she was in front of the theatre two vehicles owned by defendant city and operated by its police officers collided at the street intersection while responding to an emergency call.

One of the vehicles, a sedan, having been knocked by the force of the collision onto the sidewalk, "pinned" Miss Coltman against the building in such manner that the injuries she received resulted in her death.

The siren on the police sedan was being sounded audibly, as was also the siren on a motorcycle, the other police vehicle involved in the accident. The driver of each of the two police vehicles testified that the sounding of his own siren prevented his hearing the noise made by the siren on the other vehicle. The trial court found that both drivers were at the time of the accident engaged in responding to an emergency call; that both had been sounding sirens on their vehicles in a manner reasonably necessary and were operating their vehicles with due regard to the safety of all persons using the highway and without the arbitrary exercise of any of the privileges accorded such vehicles. Respondents contend that these findings are not supported by the evidence.

[1] Bearing in mind the rule that the findings of the trial court must be sustained if there is substantial evidence in their support, it must be held that the attack upon the court's finding that the vehicles were responding to an emergency call is without merit. Officer McCartney testified that it was his duty to take all emergency calls coming into the police department and that at about 12:45 p. m. in the afternoon in question, when he answered the police desk telephone, "a man in a very excited voice said to send some officers to Lomitas and Camden right away, that there had been a very bad crash". Officer McCartney relayed this information to Sergeant Mannagh, who testified that he immediately sent out a radio call to police cruiser car 4 and police motorcycles 3 and 7 to investigate the accident and instructed car 4 to call the station if an ambulance was needed. Sergeant Mannagh further testified that the regulations and directions of the Beverly Hills police department provided that such a call as he gave over the radio was to be treated by the officers receiving the message as an emergency call. The radio messages were received by officer McBride, who was operating motorcycle 7, and by officer James, who was operating police cruiser car 4. Both officers immediately directed their vehicles toward the intersection of Beverly drive and Wilshire boulevard, both sounding their sirens and both traveling, according to their testimony, at a speed of from 35 to 40 miles per hour. As they approached the intersection all visible traffic was standing still. As the automobile and the motorcycle collided in the intersection the two sirens blended so that the driver of neither vehicle could hear the siren on the other.

[2, 3] We are satisfied that there is ample evidence to sustain the court's finding that the officers were responding to an emergency call. The test for determining whether a publicly owned motor vehicle is at a given time an authorized emergency vehicle responding to an emergency call is not whether an emergency in fact exists at the time but rather whether the vehicle is then being used in responding to an emergency call. Whether the vehicle is being so used depends upon the nature of the call that is received and the situation as then presented to the mind of the driver. Head v. Wilson, 36 Cal.App. [2d] 244, 97 P.2d 509. From the information received at police headquarters there had been a "very bad crash" which required investigation. Specific instructions were given by radio to "call the station if an ambulance is needed". The drivers of the police vehicles who received the radio message were informed that the matter was sufficiently serious to call for the dispatching of two motorcycles and a sedan to the scene. Under the rules of the police department the officers receiving the message were required to consider it as an emergency call and they undoubtedly treated it as such. The trial court under these circumstances was justified in finding that at the time of the accident they were responding to an emergency call.

[4-6] A complete answer to appellants' contention that the evidence is insufficient to warrant the finding that the police vehicles were being driven with due respect to the safety of all persons using the highway is to be found in the decision in Lucas v. City of Los Angeles, 10 Cal.2d 476, 75 P.2d 599, 603, a decision that is controlling in the present litigation. In the Lucas case the plaintiff was a guest passenger in an automobile as it was being driven across a street intersection on the right side of the street, at a lawful rate of speed and in response to a mechanical "Go" signal. In the middle of the intersection a police automobile, operated upon authorized emergency business, traveling at a high rate of speed and disregarding the traffic "Stop"

signal, crashed into the automobile in which the plaintiff was riding. In reversing a judgment for the plaintiff the reviewing court ruled: "Since the vehicles are excluded from the restrictions of speed and right of way, negligence cannot be predicated on those elements if proper warning has been given. * * * Our conclusions from the foregoing are that when the operator of an emergency vehicle responding to an emergency call gives the statutory notice of his approach the employer is not liable for injuries to another, unless the operator has made an arbitrary exercise of these privileges. In such cases speed, right of way, and all other 'rules of the road' are out of the picture; the only questions of fact, in so far as the public owner is concerned, are first, whether there was an emergency call within the terms of the statute; second, whether the statutory warning was given; and third, whether there was an arbitrary exercise of these privileges." In the case now under review the three questions of fact enumerated in the Lucas decision have all been resolved in favor of defendant city by the trial court, which based its findings upon sufficient evidence. As above shown the police vehicles were responding to an emergency call and the statutory warning was properly given by the driver of each vehicle. It cannot be successfully contended that the finding of lack of the arbitrary exercise of the privilege accorded the police vehicles is without evidentiary support. In the Lucas case it is suggested that examples of the arbitrary exercise of the privileges accorded police vehicles would include instances in which the vehicle was returning from instead of going to the scene of an accident, or where it would be making only a routine run, or where the driver of the police vehicle has given the required warning but sees that another has not heard or heeded it. No circumstance was shown in the present case which would support a finding of the arbitrary exercise of the police car privileges.

Miss Coltman's conduct at the time of the accident was entirely free from negligence. While innocently standing upon the sidewalk her life was crushed out by a police vehicle has given the required warnother police vehicle without the intervention of any other contributing agency. Yet under the prevailing statutes enacted by the legislature as interpreted by the highest court in California, the plaintiffs can obtain no redress whatever in the courts. Such a condition is much to be deplored. If justice is to be done to those receiving injuries under similar circumstances in the future the remedy must be provided by the legislature. The Supreme Court apparently held this view at the time of the Lucas decision, where it is said: "It has always been the law that, when a subject-matter is purely legislative, the courts will not decry the wisdom or policy of the enactment because they are not in accord with the views of the lawmaking body."

The judgment is affirmed.

I concur: McCOMB, J.

FRENCH v. FRENCH.*

Civ. 2389.

District Court of Appeal, Fourth District, California.

Aug. 24, 1940.

Hearing Granted Oct. 22, 1940.

1. Divorce 🔑249(3)

Pay which husband was to receive in the future as a member of the Fleet Reserve of the United States Navy for future services, and the right to which was subject to cancellation in event of a number of contingencies, was not compensation for past services rendered during the marriage, nor "community property" one-half of which, to accrue after final judgment in wife's divorce action, could be granted to wife. 34 U.S.C.A. § 751 et seq.; Naval Reserve Act of 1938, 34 U.S.C.A. § 852 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

2. Divorce 🔑249(3)

"Retired Pay" to be received by husband after and in event that he should serve in the Fleet Reserve of the United States Navy for 14 years was not "community property" so as to entitle wife to one-half thereof in divorce action as "community property". 34 U.S.C.A. § 751 et seq.; Naval Reserve Act of 1938, 34 U.S.C.A. § 852 et seq.

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* Subsequent opinion 112 P.2d 235.

3. Divorce ⚷184(2)

Where respondent did not appeal from certain portions of divorce decree, she was bound thereby.

4. Divorce ⚷286

Where District Court of Appeal determined that trial court erred in granting certain property to wife in divorce action as community property, that portion of the decree could not, in absence of any appeal by wife, be sustained on ground that an equivalent amount might have been awarded to her as allowance for support. Civ.Code, § 139.

5. Divorce ⚷249(3)

Husband's earnings during the time between entry of interlocutory decree and entry of final judgment of divorce were "community property" when such earnings were so treated and adjudicated to be such in the interlocutory decree.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action for divorce by Maxine K. French against Charles Edward French. From that portion of the judgment in favor of the plaintiff which adjudicated that defendant's pay for service in the Fleet Reserve and his possible future retired pay were community property, and which awarded one-half thereof to the plaintiff, the defendant appeals.

Judgment affirmed in part, and reversed in part.

Adam Thompson and Renwick Thompson, both of San Diego, for appellant.

Morris Binnard, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for divorce. The parties were married on September 17, 1923. The defendant reenlisted in the United States Navy in May, 1925, and continued in active service therein until July 10, 1939, when, upon his application, he was transferred from active service to the Fleet Naval Reserve.

This action was begun on June 29, 1939, and the interlocutory decree was entered on November 21, 1939. In addition to awarding the plaintiff for her support a monthly payment for three years and declaring that certain real property was held by the parties as joint tenants, the interlocutory decree declared that various items of personal property were community property and divided them between the parties. Among other things the "Reserve Pay, Pension or Retired Pay" to be thereafter received by the defendant "from the United States Government for services in the United States Navy * * * at present reserve pay * * * for the period of fourteen (14) years hereafter" and the "then increased" pay to be received by the defendant after the expiration of fourteen years was adjudicated to be community property and as such was divided between the parties, one-half to each, "upon payment by the United States Government to said defendant".

The defendant has appealed from that portion of the judgment which adjudicated that his pay for service in the Fleet Reserve and his possible future retired pay, in the event of his retirement after fourteen years' service in the Fleet Reserve, were community property and which awarded one-half thereof to the plaintiff.

The main question presented is whether, where the property rights of the parties are being settled in an interlocutory decree of divorce, the pay subsequently received by a member of the Fleet Reserve is and may be treated as community property and awarded to the wife as such. The respondent relies upon Crossan v. Crossan, 35 Cal.App.2d 39, 94 P.2d 609; and Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 59 P.2d 104. In the first of these cases, the defendant had an interest in the State Employees' Retirement Fund, which interest had been acquired through deductions from his earnings during marriage and, aside from other benefits, he was entitled to withdraw his portion of the fund at any time his employment was discontinued. The trial court, having found that this interest was of a certain value, awarded it to the defendant and awarded to the plaintiff an equivalent amount of other community property. It was held that the interest in the fund was a valuable right which had been purchased with community funds, and that it was proper, under these circumstances, to treat this interest as community property. In the Dryden case the question of community property was not involved, although it was held, under certain provisions of the Los Angeles city charter requiring members of the police department to pay

4 per cent of each salary check received into a pension fund, that the pension provided for was not a gratuity but was an integral portion of the contract of employment, and that the right to receive such a pension became vested when the employment began. While the principles of these cases are applicable where vested rights have accrued which have been acquired by payments from community funds, we have a somewhat different situation before us in the instant case.

The original naval reserve force was established by the act of August 29, 1916, 39 Stats. at Large, chap. 417, p. 587. It was largely amended by the Act of Congress of February 28, 1925, U.S.C.A., title 34, sec. 751 et seq., and by the Naval Reserve Act of 1938, U.S.C.A., title 34, sec. 852 et seq. In the former statutes, the compensation of members of the Naval Reserve was frequently referred to as "retainer pay." In discussing such pay, although in connection with a different problem, the court in Sawyer v. United States, 2 Cir., 10 F.2d 416, 421, said: "Retainer pay is the compensation paid to enlisted men retained in the service, but not rendering active service, although liable, to be called into active service by the President, and when so called they no longer receive 'retainer pay,' but 'pay.' The act of 1916 enacts that 'men enrolled in the Fleet Naval Reserve shall be "paid" at the rate of * * * per annum, such pay to be considered as "retainer pay" for the obligation on the part of such members to serve in the Navy in time of war or national emergency.' "

In Crawford v. United States, D.C., 291 F. 801, it was held that retainer pay was not to be regarded as pay for services which had been rendered, but as an allowance for holding oneself in readiness to render service if called on.

In the Naval Reserve Act of 1938, the expression "retainer pay" has been dropped and the act throughout refers to the compensation of members of the Fleet Reserve as "pay". U.S.C.A., title 34, sec. 853 et seq. It appears from the language of the statute that one of the purposes thereof is to build up a body of trained and qualified officers and men who shall be available if needed; that a member of this reserve assumes an obligation to serve in the Navy in time of war or during a national emergency; that he may be required to perform not more than two months' active duty in each four-year period and shall submit to a physical examination at least once during each four-year period; that he subjects himself to the laws and regulations provided for the Navy; that he may be ordered to active duty at certain times, in which event his pay as a member of the Fleet Reserve would cease; that he is subject to certain training duty, during which his reserve pay would also cease; that he is subject to discharge for a good reason; that his pay may be withheld if he fails to perform any of the duties imposed upon him by law; and that it is mandatory upon him to comply with all of the obligations he has assumed in order to be entitled to continue to receive his pay.

[1] It seems clear that the pay which a member of the Fleet Reserve may thus receive after the dissolution of his marriage, is something quite different from a vested interest which was acquired during the marriage and which was paid for with community funds. Compensation for service in the Fleet Reserve is provided in the form of "pay" for services to be performed while a member thereof. If it can be said that the right to membership or a position in the Fleet Reserve was acquired through service in the Navy during the marriage, it cannot be said that the compensation for such future service was earned during the time of the marriage. In a real sense, the pay here in question is compensation on a part-time basis for services currently performed, including the keeping of oneself on call for active duty at any time. This compensation is not something fixed and certain which existed when the appellant went into the Fleet Reserve or when the divorce was granted. The right to a place in this service is not a property interest which could be presently valued, and whether such service will continue and whether or not any such compensation will be paid depends upon many uncertainties. The only existing right is to keep the position upon certain conditions, and if the requirements are complied with, and to receive compensation in the future for services to be thereafter and continuously rendered. The right to such pay is not vested and is subject to cancellation in a number of contingencies, with a resulting complete loss of any further compensation. The mere right to future employment does not make the subsequent earnings community

property, the right thereto was not purchased with community funds, and the future services are to be paid for entirely with federal funds. In our opinion, the pay here in question is, under the federal statutes, compensation for future and continuing services as a member of the Fleet Reserve and not compensation for past services rendered before becoming a member of such Reserve.

It may be further observed that the Fleet Reserve is maintained by the federal government as a part of the system of national defense. Aside from other considerations, the effectiveness of that branch of our defense system should not be undermined and its efficiency impaired by destroying, in large measure, the compensation which makes the system possible, through a strained construction of local community property laws.

[2] The respondent raises three additional questions. It is first urged that in so far as that portion of the decree which is appealed from relates to the "retired" pay which the appellant may eventually receive, the judgment may be sustained. The appellant will not be entitled to such retired pay until and unless he completes a service of fourteen additional years in the Fleet Naval Reserve and complies with all of the requirements of such service. Assuming that such pay, when and if it is eventually received by him, will then be pay for past services the right thereto did not vest and the same was not earned or acquired during this marriage. His right to receive any such pay is still contingent upon many things and it cannot now be known whether or not he will ever receive such pay. If and when he does receive such pay it will come to him as a result of both his active service in the Navy and of his service hereafter with the Fleet Reserve. It would seem to follow that there was no vested right or interest in this regard which existed at the time the judgment was entered which was community property or which could be thus divided at that time.

[3, 4] It is next argued that even if the future earnings of the appellant as a member of the Fleet Reserve are not community property the portion of the decree awarding one-half of such earnings to the respondent may be sustained "as an allowance for support under Civil Code, section 139". This portion of the decree was not an allowance for the support of the respondent. It purported to be a part of a division of existing community property between the parties and the court made other allowance for the support of the respondent for a limited time. It may be assumed that the court, in its discretion, could have made a different division of the community property which the parties actually possessed and that it could have made a different and other provision for the support of the respondent, but this was not done. The respondent has not appealed from the portions of the decree which cover such matters, and she is bound thereby. Kane v. Eastman, 110 Cal.App. 753, 295 P. 63. The portion of the decree here in question is one purporting to divide community property which was at the time owned by the parties, and the order appealed from cannot be sustained on the ground that an amount of an equivalent value might have been awarded to the respondent in another way or for another purpose.

[5] Finally, it is contended that the money which may actually be received by the appellant as pay for services in the Fleet Reserve during the period between the entry of the interlocutory decree and the entry of the final judgment is, in fact, the community property of the parties, and that the portion of the judgment appealed from should be sustained to that extent. We think this contention must be sustained. The interlocutory decree purported to adjudicate the community property rights of the parties and the matter of support for the respondent. In doing this it treated the appellant's earnings from a particular source, his service in the Fleet Reserve, as community property. This the court had a right to do in so far as it affected these earnings up to the time of final judgment. London G. & A. Co. v. Industrial Acc. Comm., 181 Cal. 460, 184 P. 864, 867. In the case just cited, in speaking of an interlocutory decree which had not covered the matter of community property, the court said that this decree had no effect "upon the statutes declaring the status of the property acquired by him during the marriage, because, until the final judgment, the marriage status continues". If this be true, it must also be true that the earnings of a party to a divorce between the entry of an interlocutory decree and the entry of a final judgment are community property when such earnings have been so treated

and adjudicated to be such in the interlocutory decree. Leavitt v. Leavitt, 134 Cal.App. 145, 24 P.2d 910.

The portion of the judgment appealed from is affirmed to the extent and in so far as it affects the "Reserve Pay" to be received by the appellant during the period between the date of the interlocutory decree and the entry of a final judgment. In so far as the portion of the judgment appealed from affects the reserve or retired pay to be received by the appellant after the entry of final judgment it is reversed. The appellant to recover costs on appeal.

I concur: GRIFFIN, J.

S. A. GERRARD CO. et al. v. INDUSTRIAL ACC. COMMISSION et al. *

Civ. 12641.

District Court of Appeal, Second District, Division 2, California.

July 11, 1940.

Hearing Granted Sept. 4, 1940.

1. Workmen's compensation ⊂=361

A finding that claimant, who was injured while picking melons on leased land, was an "employee" of lessor when injured, was not authorized, although lease was for growing of melons "as may be directed", where lessee had the right to hire and discharge workmen engaged in picking melons and to control their activities while so engaged, and lessor was interested only in results of work.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

2. Workmen's compensation ⊂=233, 235

In order to sustain an award of compensation, it must be shown that claimant was an employee of person against whom award was made and that such person had a right to control method and manner in which claimant performed his work, and test of control means complete control.

Proceeding by the S. A. Gerrard Company and another against the Industrial Accident Commission of the State of California and others, to review an order of the Commission awarding compensation for personal injuries sustained by an employee.

Award annulled.

Donald Gallagher, of San Francisco, and Marguerite Arnold, of Los Angeles, for petitioners.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

WOOD, Acting Presiding Justice.

Macerio Valdez was injured in the course of his employment while picking melons on land leased by petitioner Gerrard Company to respondent Hanaoka. He filed a claim with respondent commission and obtained an award against respondent Hanaoka and the State Compensation Insurance Fund, insurance carrier for petitioner Gerrard Company. The State Compensation Insurance Fund and the Gerrard Company have filed a petition to annul the award.

Petitioners contend that the finding of the commission that Valdez was at the time of his injury employed by the Gerrard Company is not supported by the evidence. Three written instruments executed by Hanaoka and the Gerrard Company were received in evidence. By one of the instruments, the "agreement of lease" the Gerrard Company leased to Hanaoka 80 acres of land for a specified term for a total rental of $3,200 for the purpose of growing melons "as may be directed" by the Gerrard Company. The lease incorporates and refers to the other two instruments, called the "distributing agreement" and the "crop mortgage". The crop mortgage makes the crop security for the payment of the rental. The distributing agreement contains detailed provisions for growing, picking and shipping the melon crop, specifying certain acts to be done by the Gerrard Company as follows: To perform all engine work necessary to prepare the premises for planting melons; to haul said melons when picked and gathered from said premises to the Gerrard Company's packing shed, and there to sort, pack and load the same onto cars and truck; to market and distribute the melons until a date specified. The grower (Hanaoka) specifically agreed to prepare the premises for planting and to plant the same with such crops as should be directed by the Gerrard Company; after such planting to care for and gather the melons into field crates and load them onto equipment to be furnished by the Gerrard Company. The grower further specifically agreed to furnish all labor, material, equipment and supplies necessary for proper farming of the premises at his own cost and expense.

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* Subsequent opinion 110 P.2d 377.

Petitioners rely upon Winther v. Industrial Accident Comm., 16 Cal.App.2d 131, 60 P.2d 342, a case in which the facts bear a striking similarity to the facts of the present proceeding and which must be determinative of the issue now before us. In that case Winther entered into an oral contract with Rueda whereby Rueda agreed to pick the entire crop of Winther's olives and to haul them to the packing house at the rate of $16 per ton. Rueda hired a number of men to assist him in the picking and paid them for their work at the rate of 26 or 27 cents per box. One Robles who had been hired by Rueda was injured while picking the olives. Before the injury Winther walked through the orchard and told several of the workmen, including Robles, to pick the olives clean and to take the leaves from the boxes in which the olives were deposited when they were removed from the trees. Winther testified that "the understanding was that if I didn't want the men he would not bring them back". Rueda testified that Winther had the right to discharge Robles if he did not like his work and that "Winther had told him which men to fire but he just hired them". Robles testified that before he commenced work on the morning of the accident Winther directed that he take the leaves from the boxes, pick the olives clean and watch the boxes. On these facts the court annulled an award which had been made against Winther, holding that the relationship existing between Winther and Rueda was not that of employer and employee and that Rueda was an independent contractor.

[1, 2] In attempting to distinguish the present case from the Winther case respondents point to the fact that the lease provides that Hanaoka was bound to grow "cantaloupes, honeydews or honeyballs as the party of the first part (Gerrard Company) may direct"; and that the distributing agreement provided that "all picking shall be under the supervision, and in accordance with the directions of the Gerrard Company". Respondents also refer to the statement of the representative of the Gerrard Company, who testified that "if the fruit wasn't picked in accordance with the standards we have set up, I call that to the attention of Mr. Hanaoka". We are satisfied that the facts shown in evidence are not sufficient to sustain the finding that Valdez was an employee of the Gerrard Company. Hanaoka had the right to hire and to discharge the workmen engaged in picking the melons and had the right to control their activities while they were so engaged. This cannot be said of the Gerrard Company, which was interested in the result of the work performed by the employees of Hanaoka. The representative of the company testified that if the fruit was not properly picked he took the matter up with Hanaoka, thus negativing the claim that the company had the right to control the pickers. In order to sustain the award against the Gerrard Company it must be shown that Valdez was its employee and that the company had the right to control the method and manner in which he performed his work. "The test of 'control', however, means 'complete control.'" Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 811, 159 P. 721, 723. No such showing was here made.

The award is annulled.

I concur: McCOMB, J.

40 Cal.App.2d 539

TROWER et al. v. YOUNG et al.

Civ. 2712.

District Court of Appeal, Fourth District, California.

Aug. 29, 1940.

Hearing Denied Oct. 28, 1940.

1. Specific performance ⚷86

When specific real estate has been given by promisees in consideration for promisor's promise to make promisees residuary beneficiaries of promisor's estate by will, and promisor does not perform promise, such fact may be considered in determining whether legal remedy available to promisees would be adequate and do complete justice, or whether exclusive jurisdiction of equity to grant relief by way of specific performance of a contract should be exercised.

2. Specific performance 🔑114(1)

A complaint, alleging that intestate, prior to death, made a written agreement with heirs of intestate's husband whereby intestate promised that intestate, by will, would leave heirs one-half of property owned by intestate at time of death in consideration of heirs releasing their interests in husband's estate, and that heirs had executed a deed quitclaiming their interests to intestate, and had assigned their interests in intestate's estate to plaintiffs, stated a cause of action in equity, irrespective of fact that heirs did not present a creditors' claim against estate during probate proceedings. Probate Code, § 92; Civ.Code, §§ 953, 954.

3. Appeal and error 🔑917(1)

On plaintiffs' appeal from judgment and order sustaining a special and a general demurrer to plaintiffs' complaint in equity suit without leave to amend, District Court of Appeal was bound to assume truth of plaintiffs' allegations.

4. Trusts 🔑257
Wills 🔑67

Where contract executed by intestate was addressed to heirs of intestate's husband and contained a promise by intestate to "devise to you, the heirs of my late husband, in equal shares, one-half of my entire estate", and consideration for promise was the relinquishment of property interests by heirs to intestate, contract did not lapse upon death of husband's heirs, and hence plaintiffs, to whom heirs had assigned their interests, were "proper parties" to maintain a proceeding to impress a trust upon intestate's property and to quiet title. Civ.Code, §§ 953, 954.

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Parties".

5. Contracts 🔑311

Generally a contract inures to benefit of heirs of promisee, especially where promise is not of a purely personal nature and does not involve performance of services by promisee himself, but is made pursuant to a consideration which is paid and received.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Proceeding to impress a trust upon property and to quiet title by Frank W. Trower and another, against Lillian B. Young, as administratrix of the estate of Libbie J. Blake, deceased, and others. From an adverse judgment, plaintiffs appeal.

Reversed with directions.

A. R. Trower, of Napa, and Wright, Monroe, Harden & Thomas, of San Diego, for appellants.

Von Seggern & Hawkes, of Escondido, for respondents.

GRIFFIN, Justice.

This appeal is taken by plaintiffs and appellants from the judgment and order of the superior court of San Diego county sustaining both a special and general demurrer to plaintiffs' amended complaint without leave to amend, and from the judgment thereon entered in favor of defendant and respondent Lillian B. Young, individually.

The amended complaint alleged that one William R. Blake died intestate on February 26, 1916, leaving as his heirs at law his wife, Libbie J. Blake, two brothers, Robert Blake and John Ross Blake, two sisters, Matilda Blake Munro and Annie Blake Leavitt, and certain nephews and nieces who were the children of Richard Blake, a deceased brother. William R. Blake and Libbie J. Blake had no children. In the course of settling up the estate of the deceased William R. Blake, his widow, Libbie J. Blake, about March 27, 1916, entered into an agreement in writing with his other heirs. The substance and general effect of the agreement was that in consideration of the release and quitclaim by these particular heirs of all of their interest in her husband's estate, she would by her own last will and testament leave to them one-half of such property as she might own at the time of her death. The writing read in part:

"To the heirs of W. R. Blake, Deceased:

"* * * Since you have been so kind as to assure me that you would relinquish your claim to the estate, my lawyer has prepared a deed of relinquishment and it is enclosed herewith. In showing my appreciation of your kindness, I will, in my last Will and testament, bequeath and devise to you, the heirs of my late husband, in equal shares, one-half of my entire estate. This will then give you each 1/10th of the property, instead of the 1/20th which you would get according to law, in the distribution of Mr. Blake's estate. Further, I have made arrangements to pay Robert Blake all that is due him from my late husband, and have prepared and will give to him a promissory note, for the amount due him, upon his execution of the enclosed deed. * *"

A deed of relinquishment was executed by the parties, delivered to Libbie J. Blake, and duly recorded on January 4, 1917. By its terms there is quitclaimed to her all their interest in certain real estate theretofore owned by her husband. This deed was acknowledged at different times by different individuals, in March, April and May of 1916, one of the acknowledgments being taken in London and one in Scotland. There is set forth in the complaint in detail the fact of the subsequent death of some of the parties who executed the release and quitclaim and the relationship of other parties involved in the litigation to the interested parties so deceased. One of the brothers, Richard Blake, Sr., predeceased William R. Blake, without executing a will, and left four children, viz., Richard Blake, Jr., Annie Blake Aitken, Jessie B. Dalrynple, and Madge Blake Woolard. The quitclaim deed was signed by all of the children except Richard Blake, Jr., who died testate in 1917.

It is further shown in an amendment to the complaint that prior to the commencement of the action and subsequent to the death of Libbie J. Blake, certain heirs assigned their interests to the plaintiff and appellant Frank W. Trower and certain of them assigned their interests to the plaintiff and appellant A. R. Trower. Other of the claimed successors in interest were made parties defendant. It is further alleged that although Libbie J. Blake from time to time and upon various occasions represented and stated for the benefit of the interested parties that she confirmed and reiterated her agreement to execute a will in their favor, and that the agreement was for the benefit of the heirs and distributees of the parties who signed such deed of relinquishment but who had since died or who died prior to her death, that nevertheless she failed to comply with such agreement and died intestate on January 3, 1937.

The action is in the nature of one to impress a trust upon the property of the decedent Libbie J. Blake, and to quiet title. The inventory and appraisement in her estate shows that of the fifteen separate parcels of real estate listed as part of the assets of her estate, thirteen of those parcels were likewise included in the description of the property contained in the quitclaim deed executed by the heirs of William R. Blake, deceased.

Several attacks were made upon plaintiffs' pleading. Apparently there was but one ground upon which the trial court based its ruling and decision. The complaint contains no allegation that a claim was filed by the heirs in the probate proceeding. It was contended by the respondent and it was held by the court that the interest of the appellants under the written agreement to make a will was not such as necessitated the intervention of a court of equity for granting relief; that the appellants and the parties interested under such agreement had an adequate remedy at law by way of a claim for damages by reason of the breach of the contract; that the proper remedy was therefore by way of a claim against the estate and that an action for specific performance or to impress a trust upon the property of the estate therefore did not lie. Upon this basis the court sustained the demurrer without leave to amend.

It is conceded that no claim was filed against the estate as provided by the Probate Code, and that therefore if the only proper or available remedy was by the presentation of such claim, that plaintiffs would be entitled to no relief, for the reason that the time for the filing of such claim had expired and accordingly there would have been no reason to permit an amendment. The demurrer contains many allegations in reference to uncertainty and ambiguity. These were apparently not passed upon by the court and obviously, if any of them were found to have been well taken, permission no doubt would have been granted to amend the complaint. No useful purpose could be served in discussing these grounds of demurrer.

It is the position of the plaintiffs and appellants that the allegations of the amended complaint made out a good cause for equitable relief and one in which the plaintiffs had no plain, speedy nor adequate remedy at law, and contend that the presentation and filing of a claim against the estate was neither necessary nor proper.

Respondent, in support of the court's ruling, not only argues that a claim should have been filed, but contends, among other things, that in view of the fact that the brothers and sisters of William R. Blake predeceased Libbie J. Blake, the heirs of the deceased sisters and brothers, the original promisees, are not authorized to bring an action to impress a trust upon the property of decedent Libbie J. Blake. She contends this proceeding is in the nature of an action to compel specific performance of a contract. It is further argued that they, as heirs at law of the promisees, have no vested enforceable interest in such a contract. In support of the first argument respondent particularly relies upon Morrison v. Land, 169 Cal. 580, 147 P. 259, 263, wherein it was said: "An ordinary action at law for breach of the contract would bring him the very thing to which he is entitled under the allegations of his complaint—afford him full and adequate relief. In such an action the measure of damages would have been the value of the property agreed to be bequeathed, for that was the amount in which he was damaged by the breach."

To the same effect respondent also cites Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Etchas v. Orena, 127 Cal. 588, 60 P. 45; De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522; Verdier v. Roach, 96 Cal. 467, 31 P. 554; Maddock v. Russell, 109 Cal. 417, 42 P. 139; Roy v. Pos, 183 Cal. 359, 191 P. 542; and Flood v. Templeton, 148 Cal. 374, 83 P. 148.

As to the second point, it is argued that no enforceable contract rights vested in any of the plaintiffs' assignors; that the plaintiffs' assignors have established no connection with the agreement sued on; that they are not parties to the contract; that there is no inheritable property right in a contract to make a will as such, and even if such right exists they have not shown that such right vested in them; that such a right could have been lost or dissipated in some manner; that the obligation to make a will lapsed with the death of the original promisees, there being no intention expressed in the documents relied on that parties other than the original promisees were to benefit by the will, citing O'Neil v. Ross, 98 Cal.App. 306, 277 P. 123; 68 Cor. Jur., pp. 584-585, sec. 201; Hillman v. Shannahan, 4 Or. 163, 18 Am.Rep. 281; Casady v. Scott, 40 Idaho 137, 237 P. 415; Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 274 P. 959; sec. 92, Prob.Code, and Everdell v. Hill, 58 App.Div. 151, 68 N.Y.S. 719.

Appellants point out that they have not elected to bring an action for damages for breach of a contract to make a will and although the action is not actually one for specific performance because the party who has made the contract is now dead, it is claimed that it is an action to impress a trust upon the property of a decedent and as it is in the nature of an action for specific performance it is governed in the main by the rules governing such proceedings. They concede that in this type of an action, where the party has a plain, speedy and adequate remedy at law, resort may not be had to equity, but contend that the trial court erred in holding, under the facts pleaded, that these parties had such plain, speedy and adequate remedy, and insist they may apply to equity to enforce their rights and that therefore the demurrer should have been overruled.

It is further argued that the trial court overlooked the essential nature and character of the contract involved and of the demands which appellants were seeking to enforce; that it was the very gist and essence of the contract sued upon that the heirs of William R. Blake were to be placed in the position of distributees of the estate of the decedent; that in exchange for their interest as heirs in the real estate and personal property left by William R. Blake, they were to become beneficiaries in one-half of the estate of his widow and that they were not in the position of selling an interest for a specified sum and not in the position of parties to an agreement whereby they were to receive either a certain sum or a certain value for the interest they relinquished; that it was the very essence of the agreement that they were to receive but a portion of the property that might remain in the estate of Libbie J. Blake after the debts and costs of administration were paid; that there is a vast difference between the status of one who by contract is in fact a creditor of the deceased and one who by contract or other relationship becomes an heir or distributee or the owner of a share of the property remaining after the payment of debts; that a creditor is allowed to be paid along with other creditors regardless of whether anything be left for the heirs or distributees; that a distributee is to receive nothing until all debts and costs of administration have been paid.

It is argued that these principles have been repeatedly recognized, citing Fred v. Asbury, 105 Ark. 494, 152 S.W. 155; Oles v. Wilson, 57 Colo. 246, 141 P. 489; and Brickley v. Leonard, 129 Me. 94, 149 A. 833, 836, wherein it is said: "* * * this is not a claim against the estate * * * but a claim against and for certain property, real and personal, which, impressed with a trust in favor of the plaintiff, does not and cannot be said to form any part of the estate of the deceased."

The case of Furman v. Craine, 18 Cal. App. 41, 121 P. 1007, it also cited in support of this contention.

Appellants rely principally upon the case of Stewart v. Smith, 6 Cal.App. 152, 91 P. 667, 671, in which a hearing by the Supreme Court was denied. That action was brought for the purpose of enforcing contractual provisions for the disposition of property by will. There the plaintiffs, at the request of their mother, conveyed to her all their interest in the estate of their deceased father upon her agreement to will all of the residue of the estate remaining at her death to them or their heirs. The contract was oral. The court after reviewing prior California decisions and many decisions from other states held that specific performance might be had and the action might be maintained. Among other things the court said:

> "* * * assuming, as we must, that all the facts alleged in the complaint are true, only one conclusion can be reached in consonance with the principles of equity and justice and in harmony with the best considered cases. * * * There is no uncertainty as to the intention of the parties, and as to Mrs. Stewart the contract was eminently fair, just and reasonable. She received property more than 30 years ago from each of the children, of the value of nearly $1,000, upon the promise that she would leave to the promisee an indefinite amount—* * * at some uncertain period. * * *
>
> "Again, the mother received *real* property as a part of the consideration, and the *peculiar* value of such property is a decisive element in actions for specific performance. If the children had parted simply with personal property, under the decisions it might be that application would have to be made to the law side of the court; but here no such contention can be maintained. If the plaintiffs did not present a case for specific performance, then it is idle to assert that it is ever proper to decree specific performance of an oral agreement to devise property to a particular individual. The decision of the court below upon the admitted facts was just and equitable, and a contrary view is intolerable in contemplation of fair dealing and good conscience."

In the case at bar interests in real property were conveyed to the decedent upon her undertaking that the parties so conveying the property would be made beneficiaries under her will to the extent of one-half of her property. It is true that there was no express agreement to leave a specific interest in any specified real property, but it is also true that by the terms of the agreement the heirs were to receive a one-half interest in any real property which the deceased might own at the time of her death. It should be noted that in the case of Stewart v. Smith, supra, in determining that an equitable remedy in the nature of specific performance was a proper remedy, the decision was primarily based upon the fact that the parties seeking such specific performance had given to the mother and the mother had received real property as a part of the consideration and that, as always, the peculiar value of such property is a decisive element to be considered. The heirs of William R. Blake did transfer to the decedent their interest in a great number of parcels of real estate and it is because of the peculiar value which the courts generally ascribe to individual tracts of real estate that equitable actions of this sort have been held to be the proper remedy. It is quite apparent that under the contract involved in this action it was the very essence of the understanding of the parties that they were to occupy the status of distributees under the estate and not that of creditors.

In Erwin v. Mark, 105 Mont. 361, 73 P. 2d 537, 540, 113 A.L.R. 1064, an action was brought in the nature of specific performance to enforce an alleged agreement whereby in consideration of certain peculiar and personal services the decedent had agreed to leave a bequest of $4,000 to the plaintiff. It was contended that such action could not be maintained and that a claim should have been presented. The court considered the cases of Morrison v. Land, supra, and Zellner v. Wassman, supra, upon which respondents herein rely, and held that they did not apply to the facts involved. Among other things, the court said: "The difference between a 'demand against the estate,' within the meaning of the statute, and the rights of the claimant under a contract like the one at bar, is radically and sharply defined. The former is a demand against the estate which must be paid or satisfied in advance of distribution; while the latter is a right or interest in the estate, an equitable ownership therein, after the claims against the estate have been allowed and paid. * * * According to the allegations of the complaint, plaintiff is not a creditor of the estate, in the sense that her claim would have to be paid ahead of bequests in case a will were left by deceased. By the very terms of the contract she was to become the beneficiary of a bequest in the sum of $4,000. Whether she would actually get that amount of money would depend upon, first, the amount of debts owing by the deceased, and, second, whether, after the debts were paid, there was sufficient property in the estate to pay all legacies in full. These issues could not be settled in an action at law for damages."

In commenting on Morrison v. Land, supra, the court pointed out that there was involved in that case a contract of such nature that services could readily be compensated for in money and there were not involved extraordinary or peculiar services.

It appears to us from the pleadings in the instant case that the heirs parted with an interest in specific real property, in return for which it was agreed that they were to be placed in the status of distributees or part owners, entitled to a one-half interest in any real or personal property owned by the deceased at the time of her death and that they were not compelled to assert a claim for a specified sum of money in lieu of their interests in those specific properties.

[1, 2] It is true that in many of the cited cases the fact that real estate is involved was held not to be decisive or determinative of the question whether a creditor's claim should or should not be filed. Owens v. McNally, 113 Cal. 444, 45 P. 710, 33 L.R.A. 369. However, when specific real estate has been given by the parties in consideration for an agreement that the promisor may use it and enjoy its benefits and she agrees to make the promisees residuary beneficiaries of her estate by will, that fact may well be considered in determining whether the legal remedy would be full and adequate and do complete justice, or whether the exclusive jurisdiction of equity to grant relief by way of specific performance of a contract should be exercised and whether the legal remedy of compensatory damages would be sufficient under the circumstances of the case, in the opinion of the court, to do complete justice between the parties. Morrison v. Land, supra. So far as the question of the necessity of presenting a creditor's claim is concerned, we are unable to distinguish, in principle, the facts and reasoning applied in Stewart v. Smith, supra, from the facts pleaded in the instant case. See, also, Rogers v. Schlotterback, 167 Cal. 35, 138 P. 728. We therefore conclude that, at least, the pleadings give rise to a cause of action in equity.

The remaining question presented involves the right of appellants as proper parties interested to maintain the action. It will be observed in Stewart v. Smith, supra, that two of the plaintiffs seeking to impress a trust upon the estate of their deceased mother were children of the decedent. The two other plaintiffs were daughters of a deceased child of decedent. Although the question of the right of the heirs of the deceased daughter to bring the action was not in issue in that case, the court nevertheless upheld a judgment in their favor. The only difference noted in this regard in the claimed oral agreement there construed and the writings here sought to be construed is this: By the terms of that oral agreement the decedent agreed to leave the property to her ten children share and share alike, *or to the heirs of any deceased child by right of representation.* The document before us, signed by Libbie J. Blake, is addressed to the "heirs of W. R. Blake, deceased" and provides that she "will, in my last Will and testament, bequeath and devise to you, the heirs of my late husband, in equal shares, one-half of my entire estate". The question then presented is this: Do the heirs of the promisees (i. e., the heirs of the deceased brother and sisters), and the heirs of the deceased nephew and nieces, which nephew and nieces were children of the deceased brother, have a vested enforceable interest in the contract? It is respondent's contention that the contract was personal and was an agreement to will property to the individuals themselves, and lapsed upon their death. Reliance is placed upon the case of O'Neil v. Ross, supra. It will be observed and was pointed out by the trial court, that in the O'Neil case, the consideration for the promise to make the will did not emanate from those in whose favor she agreed to make such provision. The question there presented turned upon the power of appointment. In the instant case the consideration for the promise was the conveyance and relinquishment of specified property interests by those persons to whom the promise was made.

[3-5] Detailed allegations are contained in the amended complaint for the purpose of showing the interests of the present plaintiffs and other parties involved as successors in interest of those who signed the

original deed of relinquishment. Whether appellants can sustain their allegations by proof is not before us. For the purpose of this appeal we must assume the truth of them. The prayer of the complaint is not for money damages but seeks to have Frank W. Trower, by reason of the assignments, declared to be the owner of 3/10ths and A. R. Trower the owner of 3/40ths of all the property belonging to Libbie J. Blake, deceased. The parties plaintiff have shown by the pleadings a right to maintain the action. Secs. 953, 954, Civ.Code. It is the general rule that under the circumstances here pleaded the contract inures to the benefit of the heirs of the promisees. This is particularly true where the promise is not of a purely personal nature and does not involve the performance of services by the promisee himself, but is made pursuant to a consideration which is paid and received. The further allegation that the promisor recognized and confirmed the obligation as surviving the beneficiaries' death and that it extended to the heirs must be considered. 68 C.J., pp. 584-585, sec. 201; Stewart v. Smith, supra; Chase v. Stevens, 34 Cal. App. 98, 166 P. 1035; Carstairs v. Bomar, Tex.Civ.App., 48 S.W.2d 786.

For the reasons expressed, the judgment is reversed with directions to the trial court to overrule the demurrer as to the grounds here considered and allow appellants a reasonable time in which to answer.

I concur: BARNARD, P. J.

COMFORT v. COMFORT. *

Civ. 11293.

District Court of Appeal, First District, Division 1, California.

Aug. 28, 1940.

Hearing Granted Oct. 24, 1940.

1. Injunction 🔑1

An "injunction" operates on the person of the defendant by commanding him to do or desist from certain action.

See Words and Phrases, Permanent Edition, for all other definitions of "Injunction".

2. Judgment 🔑17(3), 818(2)

Constructive service on a nonresident is not effective so as to permit a court to render a valid judgment in personam which will be within the protection of the full faith and credit clause, or be valid in the state where rendered.

3. Judgment 🔑818(2)

Where husband was not personally served in a suit in New Jersey to enjoin further prosecution of a divorce action in California and husband was at no time a resident of New Jersey, wherein wife resided, New Jersey decree enjoining husband from prosecuting divorce action in California was not entitled to full faith and credit under the Constitution and would not be recognized as a matter of comity as against husband who was a California citizen, as against contention that New Jersey injunction operated upon marital status and that personal service was not necessary.

4. Divorce 🔑326

A New York separate maintenance decree granted to wife who subsequently established residence in New Jersey did not deprive California court of jurisdiction of husband's action for divorce on ground that the New York decree conclusively established that wife was innocent party and that the marital domicile followed that of the innocent party, where wife appeared in California action, objected to jurisdiction of court and also answered on merits and requested affirmative relief.

5. Divorce 🔑141

Where wife obtained separate maintenance decree in New York and subsequently established residence in New Jersey, in subsequent divorce action in California by husband, California court had jurisdiction to ascertain whether after separation wife had committed a marital offense and whether circumstances were such that husband could lawfully secure independent domicile which would also be the marital domicile, notwithstanding that marital domicile may have followed domicile of innocent party in separation proceedings.

6. Divorce 🔑12

A husband under some limited circumstances may secure a divorce from his wife for causes arising after the wife has separated from him.

7. Divorce 🔑326

Finding of New York court in separate maintenance proceedings that husband sought annulment of marriage on ground of epilepsy and of disloyalty to United States, based on false, malicious and unjustified charges and resulting in great mental anguish, pain and suffering, established that at time decree was entered wife under California law had a cause of divorce against her husband on ground of "extreme cruelty". Civ.Code, §§ 94, 122.

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* Subsequent opinion 112 P.2d 259.

See Words and Phrases, Permanent Edition, for all other definitions of "Extreme Cruelty".

8. Divorce ⚷150(2)

The failure to follow precisely the terms of statute setting forth extreme cruelty as ground of divorce is immaterial where the acts found are such that as a matter of law they establish extreme cruelty. Civ.Code, § 94.

9. Action ⚷63

"Laches" implies a failure to do something that a party should have done.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

10. Divorce ⚷53

Where wife obtained separate maintenance decree in New York, based on facts sufficient to establish extreme cruelty under California law, and thereafter husband and wife lived apart, and there was nothing to show connivance, collusion or condonation of the offense on which the separate maintenance decree was based, wife was not barred by "laches" from setting up the acts of cruelty committed by her husband as a recriminatory defense in husband's suit in California for divorce brought some 10 years after the separation decree. Civ.Code, §§ 94, 122, 124–127.

11. Divorce ⚷53

The "recrimination doctrine" is based on the concept that he who seeks redress for the violation of a contract resting upon mutual and dependent covenants must himself have performed the obligations on his part. Civ.Code, § 122.

See Words and Phrases, Permanent Edition, for all other definitions of "Recrimination Doctrine".

12. Constitutional law ⚷70(3)

It is not for the courts to determine the rightness or wrongness of a doctrine declared by legislature, since such function is for the legislature and not for the courts.

13. Divorce ⚷326

Where findings of New York court in separate maintenance proceedings were sufficient to establish that wife at the time decree was entered under California statute had a cause for divorce against her husband on ground of extreme cruelty, and there was nothing occurring after the decree from which condonation could be inferred or a reconciliation or an attempt to effect one, decree established recriminatory defense against husband's action for divorce on ground of extreme cruelty. Civ.Code, §§ 94, 122.

14. Appeal and error ⚷996

The reviewing court has no power to weigh the evidence, and findings of trial court supported by any reasonable inference will not be disturbed.

15. Evidence ⚷595

Inferences drawn by trial court in support of findings must be based on evidence and must be reasonable and cannot be based upon mere conjecture, surmise or suspicion.

16. Evidence ⚷594, 597

A trial court cannot arbitrarily disregard the uncontradicted evidence in a case and base its findings and judgment on mere suspicions which are not supported by the record.

17. Divorce ⚷130

Trial court's finding that wife treated husband in cruel and inhuman manner and wrongfully inflicted grievous bodily injury and grievous mental suffering on husband supported by mere surmise, conjecture or suspicion did not warrant granting husband divorce on ground of extreme cruelty. Civ. Code, § 94.

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Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Suit for divorce by Roland M. Comfort against Helen E. Comfort. From a judgment for the plaintiff, defendant appeals.

Reversed.

Monta W. Shirley, of Los Angeles (George W. Nilsson and Jones & Snow, all of Los Angeles, of counsel), for appellant.

Henry G. Bodkin, of Los Angeles, for respondent.

PETERS, Presiding Justice.

Defendant wife appeals from a judgment granting plaintiff husband an interlocutory judgment of divorce on the ground of extreme cruelty. The decree awarded custody of the son of the parties to the defendant, with provision for $125 per month for his support. The defendant is a resident of New Jersey, but appeared in and contested the action.

The parties were married on November 11, 1919, in Washington, D. C. The child was born in 1922. The respondent is a graduate of Annapolis and is a commander in the United States Navy. He has had a long and distinguished career in the navy. The parties legally separated in March of 1924. In 1923 the wife was living abroad with her family, the husband then being on sea duty. Early in 1924, in response to cabled requests from her husband, the wife returned to New York. The day after her arrival the husband notified his wife that he intended to institute annulment proceedings. Thereafter, in March of 1924, annulment proceedings were instituted by the husband in the state of New York, the then residence of the parties. In that proceeding the husband charged that his wife was afflicted with epilepsy and that she was disloyal to the government of the United States. Judgment went for the wife in the annulment suit, and this judgment was affirmed on appeal without a written opinion. Comfort v. Comfort, 217 App.Div. 752, 216 N.Y.S. 814. While that action was pending on appeal, the wife, in January, 1925, instituted an action in New York for divorce from bed and board, which, in this state, would be tantamount to an action for separate maintenance. In December of 1928 judgment was entered in favor of the wife in the separate maintenance action, the decree granting the wife a divorce from bed and board, awarding her the custody of the child and $50 per week for the support of herself and the child. This judgment was affirmed on appeal. Comfort v. Comfort, 227 App.Div. 1, 236 N.Y.S. 544.

A short time thereafter the wife moved to Vineland, New Jersey. The husband was transferred to sea duty and spent some time in China. While in China he failed to send to his wife the weekly award for her support and the support of the child. In June of 1933 he was transferred to California. In September of 1935 he instituted the present action for divorce on the ground of extreme cruelty. Shortly thereafter the wife commenced an action in New Jersey for an injunction to restrain the husband from further prosecution of the present divorce action. Notice of this action was given the husband by personal service in California. The husband failed to appear and a final decree restraining the husband from maintaining or prosecuting the California divorce action was entered in New Jersey.

The complaint in the present action charges the wife with various acts which, it is claimed, constitute extreme cruelty. Some of these charges were abandoned on the trial, and as to others the trial court found in favor of the wife. On several of the charges, however, the trial court found in favor of the husband.

Substituted service was made on the wife. She appeared in the action. By her answer she denied that the husband was a resident of California, and denied, generally and specifically, each and every allegation of cruelty set forth in the complaint. In addition, the answer set forth numerous affirmative defenses. Among other things, she alleged that the California court had no jurisdiction over the subject-matter of the action, for the reason that the marital res is in Vineland, New Jersey; that the action in California is barred by the New York separate maintenance decree; that New Jersey has enjoined the prosecution of the action; that the husband has been guilty of laches; that in fact defendant, based on the facts found by the New York decree, has a cause of action for divorce against the husband. The prayer of the answer was that the complaint be dismissed; that plaintiff be restrained and enjoined from prosecuting the divorce action or from molesting or bothering defendant and the minor child; that defendant be allowed reasonable attorney's fees and costs, and such other relief as may be equitable and just.

After a trial at which the major evidence was based on depositions, judgment was entered for the husband. The trial court found against all of the affirmative defenses. It also found that the husband was a bona fide resident of California and of the county of Los Angeles for the requisite period; that "since the marriage of plaintiff and defendant, the said defendant has treated plaintiff in a cruel and inhuman manner and has wrongfully inflicted grievous bodily injury and grievous mental suffering on plaintiff herein * * *." The court also found that the plaintiff and the defendant are fit and proper persons to have the custody of the child, but that it is to the best interests of the child to remain in the custody of the mother; that the plaintiff should pay $125 per month for the support, maintenance and education of the child; that plaintiff is eight months delinquent in the payment of the alimony and support awarded the defendant by the New York decree.

On this appeal many contentions are made by appellant. The cause has been exhaustively and ably briefed by counsel for both parties. Appellant urges at great length that, because of the New York separate maintenance decree, and, because of the New Jersey injunction, California has no jurisdiction over the divorce proceeding even though the husband is a resident of California. Appellant also urges that, by reason of the New York decree, as a matter of law, she has a perfect recriminatory defense. It is also contended that the acts of alleged cruelty as found by the trial court, and as they appear from the evidence, do not constitute extreme cruelty within the code definition of those terms. These points will be considered in order.

Is the respondent husband precluded from maintaining the present action by virtue of the New Jersey injunction?

In the present action the trial court found that the New Jersey court was without jurisdiction to render the injunction decree. The husband was not served in the injunction proceedings in New Jersey, and at no time had he been a resident of that state. He was personally served in Los Angeles.

[1, 2] An injunction is obviously a personal decree. It operates on the person of the defendant by commanding him to do or desist from certain action. It is a fundamental rule of jurisdiction that constructive service on a nonresident is not effective so as to permit a court to render a valid judgment in personam which will be within the protection of the full faith and credit clause, or, in fact, that will be valid in the state where rendered. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565; In re Culp, 2 Cal.App. 70, 83 P. 89.

[3] Appellant recognizes this doctrine, but contends that the New Jersey injunction operates upon the res, that is, the marital status; that she being the innocent party, according to the New York decree, the marital domicile followed her to New Jersey; that New Jersey had jurisdiction over the res, and had jurisdiction to protect it by rendering the personal injunction decree; that this decree is entitled to recognition in California. Appellant cites cases from New Jersey which indicate that in that state the courts will grant injunctions restraining prosecution of divorce actions in other states although the defendant has not been personally served or has not appeared in New Jersey. Gross v. Gross, 180 A. 204, 13 N.J.Misc. 499; Haring v. Kaufman, 13 N.J.Eq. 397, 78 Am. Dec. 102; Perlman v. Perlman, 113 N.J. Eq. 3, 165 A. 646; Di Brigida v. Di Brigida, 116 N.J.Eq. 208, 172 A. 505; Knapp v. Knapp, 173 A. 343, 12 N.J.Misc. 599. It is quite significant, however, that appellant cites no case holding that other states must or will give recognition to such a decree under the full faith and credit clause. Whatever effect the New Jersey decree might have on the husband were he to be found within the confines of the state of New Jersey, we are confident that such a decree, not based on personal service within the jurisdiction, is not entitled to full faith and credit under the Constitution, and should not be recognized as a matter of comity as against one of our own citizens.

Does the New York separate maintenance decree, coupled with the fact that appellant wife is a resident of New Jersey, deprive the courts of California of jurisdiction of the present proceeding?

Appellant argues that the California courts have no jurisdiction over the marital res for the reason that the New York separate maintenance decree conclusively established that she was the innocent party, and that under the cases, the marital domicile follows that of the innocent party. Great reliance is placed on the case of Delanoy v. Delanoy, 216 Cal. 27, 13 P.2d 719, 86 A.L.R. 1321. In that case a wife brought an action for divorce in California. The husband defended on the ground that he had secured a Pennsylvania divorce. The last place the parties had lived together as husband and wife was California, and this state was still the domicile of the wife. The Supreme Court held that, even though the husband had been a bona fide resident of Pennsylvania at the time he secured his divorce, such decree having been secured by constructive service on the wife, was not entitled to full faith and credit and would not be recognized under the doctrine of comity, until California first determined for itself who was the innocent party. It was held that the plaintiff wife in the California action could establish in that action the invalidity of the Pennsylvania decree by proving that she was the innocent party, and that defendant husband, plaintiff in the Pennsylvania action, had, in effect, perpetrated a fraud on the wife and on the Pennsylvania court in procuring a divorce in that state. The California Supreme Court also held that if, in fact, the wife was the innocent party, the marital res remained with her in this state, and that, under such circumstances, the decree of the Pennsylvania court, so far as this state was concerned, was void because of lack of jurisdiction over the subject-matter. The court held, and this is the doctrine relied upon by appellant in the instant case, that when the parties separate the marital res follows the domicile of the innocent party.

[4] There are obvious factual and legal distinctions between the Delanoy case and the instant one. In the case now before the court it is not the plaintiff, a resident of California, as it was in the Delanoy case, who is attempting to attack the foreign decree. Rather, it is the defendant, a nonresident of California, who seeks to make use of the rule of the Delanoy case for the purpose of establishing her point as against a resident of California, that this state has no jurisdiction of the marital res, which necessarily follows her because she was adjudged the innocent party by the New York decree entered in 1928. In the Delanoy case service on the wife in the Pennsylvania action was by publication, and she did not appear therein. In the present case the wife has appeared in the California action. Although it is true that by answer she objected to the jurisdiction of the California court, she also answered on the merits, and requested affirmative relief. If we assume that the marital res attached itself to the innocent party—the wife—as a result of the New York decree, and followed her to New Jersey when she changed her domicile, the real question would seem to be whether by coming into this state and contesting the action on its merits, and asking for affirmative relief, she has conferred jurisdiction over the marital res on the courts of this state. Suppose that in the Delanoy case the wife was the innocent party, but nevertheless she appeared in and contested the Pennsylvania action and asked for affirmative relief, and further, suppose the Pennsylvania court had decided against her. Could she then have attacked the Pennsylvania decree by bringing an action in California and proving to the satisfaction of the California court that she was the innocent party? It would seem that she could not.

Appellant wife urges that she has not submitted the marital res to the jurisdiction of the California court, even if that could be done by appearing generally without objection to the jurisdiction of the California court, for the reason that by answer she objected to the jurisdiction of the California court as well as contesting on the merits. She contends that this was the only legal method of raising the point that the court had no jurisdiction over the subject-matter. The trial court held that, by appearing in the action and seeking affirmative relief, she had estopped herself from asserting that the California court was without jurisdiction.

There is another fundamental fallacy in appellant's argument on this point. She assumes that, once having been adjudicated the innocent party, the marital domicile forever follows her, and that her husband can never, under any circumstances, secure a divorce for causes arising after the entry of the separation decree. If the husband can secure a divorce from the wife, after the wife has secured a decree of separate maintenance, for causes arising after the entry of the separate maintenance decree, it must be because the marital domicile is then with the husband.

[5] It must be remembered that in the present action the trial court did not treat the separate maintenance decree as a nullity. It found that the decree was final and conclusive as to the matters adjudicated by it. But the trial court also found that the wife was guilty of various marital offenses after the separation. This is of considerable importance. The separate maintenance decree entered by the New York court in 1928, so far as this point is concerned, simply established that in 1928 and prior thereto the wife was the innocent party. It could not, and did not, establish her continued innocence subsequent to that date. If it is the law that a husband may acquire a cause for divorce after a separate maintenance decree has been secured by his wife for causes arising after the entry of such decree, then it necessarily follows that under such circumstances the marital domicile is no longer exclusively attached to

her. In the subsequent divorce action the court must determine that the husband is then the innocent party and has been purged of his former misconduct. Under some circumstances, the husband, in such a situation, must be able to acquire an independent residence for purposes of divorce, and that court must be deemed to have jurisdiction of the marital res. Since this is so, the California court in the present action had jurisdiction to ascertain whether, after the separation, the wife had committed a marital offense, and whether the circumstances were such that the husband could lawfully secure an independent domicile which would also be the marital domicile. If jurisdiction over the marital res follows the domicile of the innocent party, and, if the husband can lawfully become the innocent party by reason of acts occurring after his wife secures a separate maintenance decree, clearly California has jurisdiction to determine whether the facts exist to give it jurisdiction. This is in exact accord with the doctrine of the Delanoy case.

[6] There can be no doubt that in this state, under some limited circumstances, the husband may secure a divorce from his wife for causes arising after the wife has separated from him. It is true that in Mayo v. Mayo, 3 Cal.2d 51, 43 P.2d 535, the Supreme Court announced a contrary doctrine, but in Stitt v. Stitt, 8 Cal.2d 450, 65 P.2d 1297, the Mayo case on this point was expressly overruled. In the Stitt case a divorce was granted the husband for acts of cruelty occurring after the parties had separated. The opinion intimates that the original separation was based on misconduct by the wife. But in Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351, the wife secured a separate maintenance decree in California based on the cruelty of the husband. About eight years later the husband secured a Nevada divorce on grounds of extreme cruelty. The instant action was to terminate the allowance for alimony awarded the wife in the separate maintenance decree on the ground the parties were divorced. The court held that in the absence of a showing to the contrary it would be presumed that the acts of alleged cruelty upon which the husband relied occurred subsequent to the date of the separate maintenance decree, and, further, that the evidence was capable of the construction that a condonation of the husband's offense had taken place.

Does the New York separate maintenance decree establish a recriminatory defense?

From what has been said it is clear that the California court had jurisdiction of the divorce proceeding. But this is not decisive of the present appeal. Among the other affirmative defenses pleaded by appellant wife was the defense of recrimination. She pleaded the New York separate maintenance decree and now urges that it establishes, as a matter of law, a perfect recriminatory defense. Under the facts of this case, we agree with that contention.

Recrimination is defined in section 122 of the Civil Code as follows: "Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce."

It is the theory of appellant wife that the New York decree of 1928 conclusively established that she was entitled to a divorce at that time, and that such cause of divorce, judicially established, constitutes, as a matter of law, a recriminatory defense. Respondent's answer to this contention is two-fold. First, he contends, and the trial court found, that the judgment of the New York court in the separate maintenance action is not a recriminatory defense for the reason that it was not a showing by the wife "of any cause of *divorce*" against the husband within the meaning of section 122 of the Civil Code. Secondly, it is contended, and the trial court found, that an unreasonable length of time had elapsed since the occurrence of the matters determined in the separate maintenance action, and that such acts were therefore barred as a recriminatory defense. Neither of these contentions is sound.

The New York decree was based on desertion by the husband and upon his cruelty. In reference to desertion the New York court found: "That although the plaintiff has always conducted herself towards the defendant as a faithful, loving and obedient wife, the defendant disregarding his duty as a husband, and without plaintiff's consent, has been wilfully and continuously absent from the plaintiff for more than eight months prior to the commencement of this action, without any cause or justification therefor, and with intention not to return; and that the defendant has abandoned and deserted plaintiff."

Of course, in this state desertion must continue for one year to constitute cause for divorce. Section 107, Civ.Code. The separate maintenance suit was filed in January of 1925. The trial was not had and the decree was not entered until December of 1928. The finding was that the husband had deserted the wife for eight months prior to the *commencement* of the action. Obviously, when the decree was entered after the 1928 trial, the desertion had continued for considerably over a year.

However, whether the desertion finding is sufficient to constitute grounds for divorce in this state is immaterial for the reason that the findings in reference to the cruelty of the husband clearly establish "extreme cruelty" as these terms are defined in section 94 of the Civil Code. The New York findings on the issue of cruelty are as follows:

"5. That since the said marriage between the plaintiff and the defendant, the defendant has treated the plaintiff in a cruel and inhuman manner, and that it has by reason of the premises become unsafe and improper for the plaintiff to live and cohabit with the defendant.

"6. That in the month of January, 1924, the defendant cabled to the plaintiff who was at that time living abroad, requesting her in substance to come to America for the purpose of rejoining and living with the defendant, who prior to that time had been on duty at sea, aboard a battleship of the United States Navy, pursuant to his profession as a naval officer; that pursuant to the said request the plaintiff did return to America in or about the month of March, 1924.

"7. That thereafter, to wit, in the month of March, 1924, and after plaintiff's arrival in America with the child of the parties hereto, the defendant selected a boarding house on Columbia Heights, Brooklyn, N. Y. for the plaintiff to live with her said child.

"8. That thereupon the defendant refused to live with the plaintiff at the said boarding house selected by him.

"9. That thereafter the defendant instituted or caused to be instituted by his attorney in the Supreme Court, Kings County, an action against the plaintiff for an annulment of the marriage between the parties hereto, alleging under oath, among other things that the plaintiff was an epileptic; that the plaintiff knew at the time of her marriage to the defendant that she was an epileptic; that the plaintiff had fraudulently concealed from the defendant the said alleged epilepsy; that the plaintiff has represented herself to be a physically sound and fit person to marry to the defendant; that the plaintiff was disloyal to the United States of America; that she fraudulently represented herself to be loyal to the United States of America prior to said marriage; that the plaintiff was guilty of acts of disloyalty to the United States both before and after said marriage to the defendant; that all of said representations were false and were known to the defendant to be false at the time when made.

"10. That thereafter the said action for annulment brought by the defendant against the plaintiff came on for trial at a Special Term, Part II of the Supreme Court, Kings County on the 17th day of November, 1924, and that the defendant did then and there under oath testify in support of said allegations against the plaintiff, and did then and there encourage and cause others to testify against the plaintiff under oath in support of his said allegations against the plaintiff; that after the conclusion of said trial certain Findings of Fact and Conclusions of Law were made by the Trial Justice, finding in substance that all of the defendant's said allegations against the plaintiff were without foundation in fact, and that thereafter, to wit, on the 4th day of December, 1924, a final judgment was entered in said annulment action dismissing the complaint upon the merits.

"11. That in the complaint in said annulment action brought by the defendant against the plaintiff, and upon the said trial, the defendant did charge the plaintiff with being an unfit person to have the care and custody of the child of the parties hereto; and that in said Findings of Fact made upon the trial of said action, a judicial finding was made that such allegations made by the defendant against the plaintiff were without foundation in fact, and that the plaintiff was and is a fit and proper person to have the care and custody of the child of the parties hereto.

"12. That all of the said charges and allegations made by the defendant against the plaintiff as aforesaid were and are without foundation in fact, and were false and untrue, and that the same were made by the defendant against the plaintiff with malicious intent and for the sole purpose of freeing the defendant from his marital bond to the plaintiff and to avoid his obligation to support and maintain the plaintiff and with the purpose and design of taking from the plaintiff the custody and control of the child of the parties hereto.

"13. That by reason of the premises, the plaintiff has suffered great mental anguish, pain and suffering, and has been humiliated, and plaintiff has been by reason of the premises under a great nervous, physical and mental strain, and that by reason of the premises it has become entirely unsafe and improper for the plaintiff to live and cohabit with the defendant, and the plaintiff has been and is in fear of acts of conspiracy and violence at the hands of the defendant in the event that she should not live and cohabit with the defendant."

The New York Supreme Court, Appellate Division, in affirming the separate maintenance decree, after reviewing the evidence and findings stated (Comfort v. Comfort, 227 App.Div. 1, at page 3, 236 N.Y.S. 544, 547): "I am of the opinion that the prior action brought by this defendant against the plaintiff to annul their marriage, on the ground of epilepsy and of disloyalty to the government of the United States, was not only unjustified, but was based upon false and malicious charges. This constituted cruelty, a sufficient basis for sustaining the judgment in this action. Further, the defendant abandoned the plaintiff and his child at the time of the commencement of the annulment action, and the only contribution to their maintenance and support has been under the order and direction of the Supreme Court. It seems obvious to me that the defendant and his family have higher matrimonial ambitions than the plaintiff in this action, from whom he seeks to rid himself. The extent to which the defendant will go to accomplish his purpose is evidenced by the means to which he has resorted."

[7, 8] Section 94 of the Civil Code defines extreme cruelty as "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage". Respondent contends that the above-quoted findings are insufficient to establish extreme cruelty because they fail to follow the precise terms of section 94, supra, in that there is no finding that the acts caused "grievous" mental suffering. The finding, above quoted (finding No. 13) is that the acts complained of caused "great mental anguish, pain and suffering". Clearly, the acts found by the trial court in the New York action constitute extreme cruelty in this state. Polakoff v. Polakoff, 51 Cal.App. 359, 196 P. 778; Cooper v. Cooper, 88 Cal. 45, 25 P. 1062; MacDonald v. MacDonald, 155 Cal. 665, 102 P. 927, 25 L.R.A., N.S., 45. The failure to follow precisely the terms of the statute is immaterial where the acts found are such that as a matter of law they establish extreme cruelty. Polakoff v. Polakoff, supra.

From what has been said it follows that appellant wife established, by the New York separate maintenance decree, that in 1928, under California law, she had a "cause of divorce" against her husband within the meaning of section 122 of the Civil Code, supra.

Respondent contends, however, and the trial court found, that the cause of divorce thus established by his wife was barred by lapse of time and by her laches. Section 124 of the Civil Code provides that: "A divorce must be denied: * * * Three. In all other cases when there is an unreasonable lapse of time before the commencement of the action". Section 125 of the Civil Code provides: "Unreasonable lapse of time is such a delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation notwithstanding the commission of such offense." Section 126 of the Civil Code provides: "The presumptions arising from lapse of time may be rebutted by showing reasonable grounds for the delay in commencing the action." Section 127 of the Civil Code provides: "There are no limitations of time for commencing actions for divorce, except such as are contained in section one hundred and twenty-four." Respondent points out that the cause of divorce relied upon by his wife as a recriminatory defense is predicated on acts occurring prior to January of 1925—some ten years before the husband filed the present action. He also points out that most of the acts he relies on as establishing a cause of divorce against his wife occurred in 1932, and thereafter. Under such circumstances, he contends, the wife's cause of action is barred by the lapse of an unreasonable length of time. Respondent urges that under the cases whether a recriminatory defense is barred is a question of fact, and relies on such cases as Kenniston v. Kenniston, 6 Cal.App. 657, 92 P. 1037, where a delay of ten years was held to defeat a cause of action for divorce, and Johnston v. Johnston, 21 Cal.App. 181, 131 P. 81, where the same result was reached predicated on a six-year delay. Other cases are collected in 9 California Jurisprudence, page 692, section 60. The point involved in those cases was that under the facts surrounding the delay there involved there was at least a permissible inference that there had been "connivance, collusion, or condonation". But no such inference or presumption is possible in this case. Here the acts upon which the New York decree is predicated occurred in 1924. Immediately thereafter, in January of 1925, the wife filed her action for separate maintenance. That was the only relief she could secure in New York. The decree was entered in 1928. Since filing the separate maintenance decree it is admitted that the parties have lived separate and apart. There has been no attempt at a reconciliation. The New York decree established the appellant's legal right to live separate and apart from her husband. There is not one word of testimony to support an inference or presumption of connivance, collusion, or condonation. The evidence is positive and uncontradicted that there was no connivance, collusion or condonation.

[9, 10] The appellant cannot be charged with laches. Laches implies a failure to do something that a party should have done. What could appellant have done that she did not do? She acted promptly upon the occurrence of the acts constituting cruelty. She secured from the New York court all of the relief that court had power to grant. She could not sue her husband again on the same set of facts so as to procure any additional or different relief than that already obtained. For several years he was in China and since 1933 he has been in California. This case is entirely different from cases where the husband commits acts of cruelty, and the parties separate, the wife seeking no legal redress for the wrong committed. Many years later the husband sues for divorce and she sets up the acts committed by her husband as a recriminatory defense. In such case the trial court may properly indulge in the presumption that there has been "connivance, collusion, or condonation of the offense, or full acquiescence in the same" within the meaning of section 125 of the Civil Code, supra. But where, as here, the evidence completely rebuts such presumption the trial court cannot disregard the uncontradicted testimony.

[11, 12] Respondent husband contends that such a doctrine will forever bar him from securing a divorce because of his misdeeds of 1924. That may be true. The doctrine of recrimination is based on the concept that he who seeks redress for the violation of a contract resting upon mutual and dependent covenants must himself have performed the obligations on his part. 9 Cal.Jur., p. 689, sec. 58. It is part of the general equity doctrine that he who comes into equity must come with clean hands. The legislature has seen fit to make the doctrine an integral part of the law of this state. It is not for the courts to determine the rightness or wrongness of the doctrine so declared. That is a legislative and not a judicial function.

[13] While it is true, as already pointed out in this opinion, that under some limited circumstances a husband may secure a divorce for acts occurring after his wife has secured a separate maintenance decree, those circumstances do not exist in the instant case. In Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351, there was evidence from which the trial court could reasonably infer not only a condonation, but also that the parties had actually resumed marital relation after the wife secured the separate maintenance decree. In every case cited by respondent there was either direct evidence or evidence from which an inference could be drawn that, after the wife secured her decree, there was either a reconciliation or a bona fide attempt to effect one. There is no such evidence in the instant case. Under such circumstances it must be held that, as a matter of law, the appellant has established a recriminatory defense.

[14-17] In view of this conclusion we do not find it necessary, nor would it serve any useful purpose, to review the evidence in order to demonstrate that the acts of cruelty found to have been committed by the wife, as such acts appear in the evidence, do not constitute extreme cruelty within the code definition of those terms. We have read the entire record. We have grave doubts whether the husband has established a cause of divorce against his wife. We are well aware of the rule that the appellate court has no power to weigh the evidence, and that findings supported by any reasonable inference will

not be disturbed. But this power of the trial court is not unlimited. Mere conjecture, surmise or suspicion is not sufficient to support a finding. The inference drawn must be based on evidence, and must be reasonable. A trial court may not arbitrarily disregard the uncontradicted evidence in the case and base its judgment on mere suspicions which are not supported by the record. The evidence in this case, in our opinion, shows no action on the part of appellant that would justify a trial court in finding that she was guilty of extreme cruelty towards her husband—a husband from whom she had been legally separated for many years, and who failed, after the separation, to make any attempt to see his child, and, except on one occasion after instituting this action, to whom he has never sent a letter, postcard or present. To hold that the acts which the wife is found to have committed constitute extreme cruelty it would be necessary to hold that acts innocent in themselves, and where the surrounding circumstances demonstrate they were innocent, can be grounds for divorce if there is any possibility that such acts could have been improper. That is not the law. Findings cannot thus be supported by mere surmise, conjecture or suspicion.

The judgment appealed from is reversed.

We concur: KNIGHT, J.; WARD, J.

16 Cal.2d 197

SCOTT v. KENYON.

L. A. 17304.

Supreme Court of California.

Sept. 10, 1940.

1. **Judges** 🔑48

A judge of the District Court of Appeal was disqualified to sit in such court on the trial or hearing of an appeal in an action wherein he had previously ruled on a demurrer filed in the action when pending in the superior court.

2. **Elections** 🔑305(6)

Every presumption on appeal was in favor of court's finding that all nine of absentee voters cast their ballots for contestant in absence of evidence.

3. **Elections** 🔑298(2)

Ordinarily, in an election contest the courts are reluctant to throw out votes where it can be told for whom the vote was intended, and where the irregularity complained of is that of one of the election officials for which the voter is not to blame. Pol.Code, § 1364.

4. **Elections** 🔑298(2)

The rights of voters in general and the purity of elections may demand that certain votes be not counted, even where the intention of the voters can be determined. Pol.Code, § 1364.

5. **Elections** 🔑298(3)

A violation of a mandatory provision in election law vitiates election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or rights of voters injuriously affected. Pol.Code, § 1364.

6. **Elections** 🔑241

A substantial compliance with the essential requirements of the absent voters' law with respect to the counting of votes is necessary. Pol.Code, §§ 1357–1364.

7. **Elections** 🔑244

The opening of absent voters' ballots by inspector in election for councilman of city of sixth class, returning of such ballots to respective envelopes and depositing of such ballots in ballot box with other election supplies under clerk's custody, following which and prior to canvass of votes by city council the ballot box was tampered with and certain ballots removed, was not a substantial compliance with absent voters' law, in that "secrecy of ballot" was violated and opportunity for fraud was presented, and hence absent voters' ballots should not be counted. Pol.Code, §§ 1357–1364.

See Words and Phrases, Permanent Edition, for all other definitions of "Secrecy of Ballot".

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In Bank.

Appeal from Superior Court, San Diego County; Frank J. Macomber, Judge.

Election contest by Asa E. Scott against Claud H. Kenyon. From a judgment for defendant, plaintiff appeals.

Affirmed.

Prior opinion, 93 P.2d 160.

Lindley & Higgins, of San Diego, for appellant.

Thomas Whelan, of San Diego, for respondent.

McCOMB, Justice pro tem.

[1] The above-entitled case was transferred to this court for the reason that the record disclosed that Mr. Justice Griffin, one of the justices who concurred in the opinion of the District Court of Appeal, 93 P.2d 160, had previously as a superior court judge ruled upon a demurrer filed in the action when the same was pending in the superior court. Mr. Justice Griffin was thus disqualified from participating in the cause. Knouse v. Nimocks, 8 Cal.2d 482, 66 P.2d 438.

From an examination of the evidence and the law applicable thereto we find ourselves in accord with the statement of the case and the conclusions of law reached by the District Court of Appeal, Fourth Appellate District, as stated in the opinion prepared by Mr. Presiding Justice Barnard. We therefore adopt the same as the opinion of this court. It is as follows:

"This is an appeal from a judgment denying any relief to the contestant in an election contest. Both parties hereto were candidates for the office of councilman in an election held in El Cajon, a city of the sixth class, on April 12, 1938. The only question raised is whether or not the absent voters ballots, nine in number, should be counted for the plaintiff.

"This appeal was taken on the judgment roll alone and the only facts before us are those appearing in the findings. The court found that on the night of April 12, 1938, the election board counted the regular ballots cast, and then opened and counted the absent voters ballots adding the result to the official tally sheet; that nine persons had cast absentee ballots; that said absent voters' ballots were in the possession of the city clerk up to April 12, 1938, at which time they were turned over by him to the inspector of the election; that thereupon the inspector of the election opened each of said ballots without permitting the spectators or other election officers to find out the name of the absent voter whose ballot was being read; that the inspector then and there removed the number on each of said ballots and announced for whom it was cast; that as each vote was announced it was entered on the official tally sheet; that after these votes were thus added the official tally sheet showed that the plaintiff had received 226 votes and the defendant 222 votes.

"The court also found that at about 11 o'clock p. m. upon said date the inspector put into the ballot box all of the regular ballots voted at said election and all of the election supplies, and then placed in said box the nine absent voters' ballots, each in its own envelope, together with the numbers which had been removed therefrom; that he then locked the box and delivered it with the key in the lock thereof to the city clerk at about 1 o'clock a. m. on April 13, 1938; that said ballot box was retained by the city clerk in an office which was a part of his residence some distance from the city hall; that at all times while the ballot box remained there the key remained in the lock thereof; that there was an opportunity for unauthorized persons to open said ballot box and to tamper with its contents; and that the numbers which had been removed from the absent voters' ballots and placed in said ballot box were not there when it was opened by the city council on April 18, 1938, for the purpose of canvassing the result of the election.

"It was further found that on April 18, 1938, the city council canvassed the votes cast at said election, determined and declared that the plaintiff had received 217 votes and the defendant 222 votes, and declared that the defendant was elected; that in making said canvass the city council counted the votes cast by the nine absent voters and deducted these from the total results set forth by the election board on the official tally list; that the city council found as a fact that when it opened the ballot box for the purpose of canvassing the vote at said election, the nine absent voters' ballots were each contained in its own envelope and not sealed; that the city council refused to count said absent voters' ballots for the reasons that said ballots had previously had the numbers removed, that they were not in individual sealed envelopes, and that they had been opened; that immediately after said canvass by the city council all of the ballots voted at said election, including the ballots cast by the nine absent voters, together with the envelopes in which these votes had been placed, and all of the election supplies, including the roster of voters and the official tally list, were placed by the city clerk in the ballot box and the same was locked with a padlock.

"The court found that between the date of the election and the time the ballot box was opened in court the same had been tampered with and certain ballots had been removed, that when it was opened in court ten of the regular ballots cast at said election were missing and four of the absent voters' ballots, together with the envelopes in which each was contained, had also been removed therefrom.

"The court then found that there was no evidence from which it could find that said absent ballots had been changed between the time when the same were delivered by the absentee voters to the city clerk and the time when the same were placed in the ballot box immediately following the canvass of the returns by the city council on April 18, 1938; that all nine of said absentee voters had cast their ballots for the plaintiff; that said absent voters' ballots had been opened and in the possession of unauthorized persons prior to the official canvass thereof by the city council; that an opportunity existed during said time for said absentee ballots to have been tampered with and changed but that there is no evidence from which the court could find that said absentee ballots were tampered with or changed during said time; that there was no evidence as to the identity of the person or persons who had tampered with said ballot box and who had removed therefrom the ten regular ballots and the four absent voters' ballots and their envelopes; that there was no evidence as to the time said ten regular ballots were removed from the ballot box; that 'there had been an opportunity for unlawful interference with both said ballots voted at said polls and said absent voters' ballots, and that the same had in fact been removed sometime subsequent to April 12, 1938.' It was then found that said absent voters' ballots could not be counted for anyone and that the plaintiff did not receive as many legal votes at said election as did the defendant.

"The casting of ballots by absent voters, the method of voting and the manner in which the ballots shall be counted are provided for in sections 1357 to 1364 of the Political Code. Section 1361 makes it the duty of the legislative body of a city to canvass and count the absent voters' ballots as soon as all those issued have been returned or accounted for and not later than seven days after the election. Section 1362 provides that in counting the same the legislative body shall take up the return envelopes containing such ballots, separately, in the presence of a majority of the council and of the public who may be present, and compare the signature of the voter on each such envelope with that on the registration affidavit of such voter. When the board is satisfied that the signature on the envelope is the signature of the voter, it shall announce the name of such voter, whereupon anyone may challenge the counting of such ballot. If such challenge is overruled the board shall then open the identification envelope without unfolding the ballot, remove the number therefrom, destroy such number, and deposit the ballot in the ballot box provided for the purpose. After all such ballots are thus deposited in the box, the box shall be thoroughly shaken. The ballots shall then be taken out, one at a time, and the votes counted in the usual manner and the result tabulated under a special heading, regardless of the precincts from which the votes came. The total vote thus cast for any candidate shall then be added to the previous total for that candidate.

"It will be observed that these statutes are designed to carefully protect the absent voter in his right to a secret ballot, which is the very foundation of our election system. Great care is taken to provide that, in handling and counting the absent voters' ballots, the same secrecy which surrounds the casting of regular ballots at the polls shall be preserved and maintained. In handling and counting the absent voters' ballots with which we are here concerned, practically every applicable provision of the law, including every provision designed to preserve the secrecy of the ballot, was broken. Not only did the inspector who opened these ballots know for whom each of such voters cast his ballot, but each ballot was returned to its original envelope, upon which was the voter's name, and which was left unsealed. Not only is it apparent that an opportunity for fraud existed, but it clearly appears that the secrecy of these particular ballots was destroyed.

[2] "The court found that all nine of these absentee voters cast their ballots for the plaintiff. Every presumption is in favor of this finding, in the absence of the evidence. However, it does appear that the ballots themselves could not have supported this finding since four of them had disappeared. The ballot box had actually been opened before the canvass of the votes on April 18. Ten of the ballots cast at the polls were also missing and the court found that it could not be determined when they were taken. It is possible that some of those ballots were substituted for some of those in the open envelopes supposed to contain absent voters' ballots. Whatever the facts, great doubt and uncertainty surround the entire matter. Assuming, in support of the court's finding, that the nine absent voters personally appeared in court and testified that they voted for the plaintiff, the very necessity of such evidence destroys the secrecy of ballot which the statute was designed to preserve. Moreover, it does not certainly appear that the plaintiff received a majority of the votes, in any event, since ten of the votes cast at the polls were missing and it could not be determined when they disappeared. With the evidence in that condition, it could not be told whether or not the votes cast were correctly canvassed and counted by the canvassing board on April 18th.

"We have then an unfortunate situation where no attempt was made to substantially follow the law, where an opportunity for fraud existed, where it appears that the ballots were actually tampered with, and where the secrecy of the ballot was actually destroyed. It is insisted, however, that section 1364 of the Political Code provides that the provisions of that chapter shall be liberally construed in favor of the absent voter and that these nine absent voters should not be disenfranchised when it can be told for whom they voted.

[3-5] "Ordinarily, courts are reluctant to throw out votes where it can be told for whom the vote was intended and where the irregularity complained of is that of one of the election officials for which the voter is not to blame. At times, however, irregularities on the part of election officials are of such a kind that broader considerations, such as the rights of voters in general and the purity of elections may demand that certain votes be not counted even where the intention of the voters can be determined. In many cases the votes of an entire precinct have been thrown out for such reasons although this has resulted in the disenfranchisement of such voters.

"The general rule is thus set forth in Rideout v. City of Los Angeles, 185 Cal. 426, 197 P. 74, 75:

"'* * * A distinction has been developed between mandatory and directory provisions in election laws; a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation.'

"In Knowles v. Yates, 31 Cal. 82, the court said:

"'We are aware that courts have been very indulgent respecting the omissions, inadvertencies and mistakes of officers of elections, lest by exacting of them a technical compliance with the requirements of the law the citizen might be deprived of a sacred right. We are not disposed to be less indulgent in respect to the observance of forms and methods than have been the courts to which counsel have referred; but we deem it of the highest importance to the protection of the elective franchise that the law should be complied with in substance, and that those intrusted with the discharge of the duties pertaining to elections should be required so to perform them as to preserve the ballot-box pure. Others besides those who may lose their votes by the malconduct of officers of elections are concerned; and while seeking upon just principles to save to the elector his vote offered and given in good faith, we are not to forget that he himself, as well as all honest people, are vitally interested in the protection of the right of suffrage, against the fraudulent machinations and devices of men whose partisan moral code bears upon its title-page the infamous maxim, "All is fair in politics." These observations are made to show the importance of so far adhering to the substantial requirements of the law, as to protect and preserve elections from abuses subversive of the inherent and constitutional rights of the people.'

[6, 7] "Similar principles are applicable here, where there was not only opportunity for fraud, but such actual tampering with the ballots as prevented a complete review and recount, and where the rights of the voters to a secret ballot were 'injuriously affected by the deviation'. If the absent voters' law is to achieve its purpose, it is of the utmost importance that its terms be substantially complied with. In the long run this is important to all voters, including any who might lose their votes in a particular case. With respect to the votes of absentee voters, it is not only important to be able to tell how they actually voted, but it is of equal importance that the provisions of law be so carried out that it cannot be told how a particular individual voted. The law permitting absent voting is carefully drawn to protect the voter in the secrecy of his ballot, and it would be largely useless if such secrecy is not maintained. If the opening of envelopes containing such ballots by unauthorized persons, and the returning of the ballots to their original envelopes so that election officers, canvassing boards, and even outsiders and spectators may see how the individual voted, is to be permitted, the inevitable result will be that many voters will refrain from voting rather than run the risk of such a possibility. While it is unfortunate that any voter should lose his vote when it can be told for whom he intended to vote, it would be equally or more unfortunate to deprive many others of their vote by holding that a substantial compliance with this law is unnecessary. To so hold would be to destroy, by judicial decision, the secrecy with which the law has surrounded the casting of such ballots. Assuming that slight variations from the procedure provided for in the statutes ought not to prevent the counting of such votes, that is not the situation here where practically every provision of the statute was violated, and

where, in fact, secrecy was not maintained. We therefore hold that there must be a substantial compliance with the essential requirements of the absent voters' law with respect to the counting of the votes, and that such a substantial compliance does not here appear. It follows that the trial court correctly found and concluded that these absent voters' ballots should not be counted for anyone."

The judgment is affirmed.

We concur: GIBSON, C. J.; CARTER, J.; EDMONDS, J.; SHENK, J.

SPENCE, Justice pro tem.

16 Cal.2d 190

PROUTY v. PROUTY.

L. A. 16927.

Supreme Court of California.

Sept. 10, 1940.

1. Divorce 🔑296, 312

In determining who should have custody of minor children of parties to divorce actions, a broad discretion is vested in trial courts, and it is only when a clear case of abuse of such discretion is made out that Supreme Court will interfere with determination of trial court on appeal.

2. Divorce 🔑303(3)

In proceeding to modify divorce decree with respect to custody of minor child, burden is on moving party to satisfy court that conditions have so changed as to justify modification.

3. Divorce 🔑312

All presumptions are in favor of reasonableness of divorce decree fixing custody of minor child, and in absence of a showing that compels conclusion that decree should be modified, an appellate court cannot interfere with trial court's refusal to modify it.

4. Divorce 🔑298(4)

The question as to whether a parent is a fit person to have custody of minor child refers to his or her fitness at time of hearing and is not necessarily controlled by conduct many years prior thereto.

5. Divorce 🔑303(3)

Evidence of prior acts of misconduct of a parent may be admissible in a proceeding to modify provision of divorce decree for custody of minor child if it can be said to have a direct bearing upon the issue of present unfitness, but such evidence should be limited to such issue alone.

6. Divorce 🔑303(3)

In proceeding to modify divorce decree with respect to custody of minor child, the report of a court investigator is advisory only and trial judge has right to disregard it.

7. Divorce 🔑303(2)

The court, in modifying divorce decree with respect to custody of minor child, proceeds upon new facts considered in connection with facts formerly established, the change of circumstances, the conduct of the parties, and the best interests of the child.

8. Divorce 🔑303(3)

Trial court did not abuse its discretion in refusing to modify divorce decree granting custody of child to mother because of change in conditions, in that mother had suffered two mental attacks subsequent to decree, where at time of trial mother was normal mentally, or in determining that fact that father did not know prior to original order awarding custody that two of mother's brothers had suffered mental disorders did not justify modifying order of custody despite fact that there had been no actual change in circumstances.

9. Divorce 🔑303(2)

In proceeding to modify divorce decree with respect to custody of minor child, paramount interest of court is welfare of the child.

10. Divorce 🔑303(3)

Trial court did not abuse its discretion in refusing to modify divorce decree granting custody of child to mother on ground that mother was financially unable to care for child, in view of evidence that mother's income consisted of $62.50 per month from trust fund established by former husband's grandmother, received by her from husband as property settlement at time of their divorce, and $25 per month paid by husband as support for child, and that she intended

to augment such income by securing part-time employment, or to live with her mother if she found herself unable to do so.

11. Divorce ⟹312½

Trial court can award counsel fees and costs to divorced wife upon husband's motion to modify divorce decree with respect to custody of minor child.

In Bank.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Suit for divorce by Averil E. Prouty against Cheney Russell Prouty, Jr., wherein decree was entered in favor of plaintiff, giving her custody of minor child, subject to defendant's right of visitation. From an order denying defendant's application for modification of final divorce decree with respect to custody of minor child, the defendant appeals.

Affirmed.

Frank P. Doherty and Gerald E. Kerrin, both of Los Angeles, for appellant.

Leonard Wilson and Clifford Thoms, both of Los Angeles (Robert P. Dockeray, of Los Angeles, of counsel), for respondent.

CARTER, Justice.

This is an appeal from an order of the superior court of Los Angeles county denying appellant's application for modification of a final decree of divorce with respect to the custody of a minor child.

Appellant and respondent were married at Santa Ana, California, on February 2, 1927. A daughter, whose custodial status is the subject of this proceeding, was born to them on October 15, 1928. The spouses separated on June 12, 1934, and, on November 23, 1934, an interlocutory decree of divorce by default was entered in favor of the respondent wife, giving her custody of the child, subject to appellant's right of visitation. A final decree of divorce was entered on December 5, 1935. In October, 1937, defendant instituted the present proceeding to have the divorce decree modified to give him sole and exclusive custody of the minor child. After a hearing, which consumed five days, an order was entered denying appellant the relief sought, and from that order he now appeals.

Appellant contends that the order of the trial court is against the evidence and against the law—that it indicates an utter disregard for the best interests of the child and constitutes an abuse of discretion.

[1] It is the settled rule that, in determining who should have the custody of the minor children of the parties to divorce actions, a very broad discretion is vested in the trial courts. It is only when a clear case of abuse of said discretion is made out that this court will interfere with the determination of the trial court on appeal. Taber v. Taber, 209 Cal. 755, 290 P. 36; Simmons v. Simmons, 22 Cal.App. 448, 134 P. 791.

The record in this case is voluminous and presents evidence which is highly conflicting.

According to that produced by the appellant, respondent is the victim of a mental illness diagnosed by physicians as insanity of the manic depressive type. During their marriage, respondent had two attacks of said illness, the second being so severe as to require her confinement in the State Hospital for the Insane at Patton, California. Since her divorce, respondent has twice been committed to hospitals for the insane in the state of Iowa, and twenty out of the twenty-four months immediately prior to this proceeding she spent either in hospitals for the insane or on parole therefrom. The testimony of physicians and superintendents of hospitals for the insane was generally to the effect that manic depressive insanity seldom causes a deterioration in the mind of its victims, and that during the intervals between attacks their minds usually are perfectly lucid. Several of said experts testified that the disease is cyclic in nature, with the attacks increasing in severity and duration progressively over the years. Others, however, were of the opinion that it is possible for one to become completely cured of the malady. Testimony that two of respondent's brothers had also been confined for certain periods in institutions for the insane was uncontradicted. Appellant disclaims having knowledge of this latter fact at the time the interlocutory decree of divorce was granted.

It is appellant's contention that a change in custody of the child is warranted by the change of circumstances since the original order. As one of these "changes" appellant maintains that respondent's two mental attacks since her divorce indicate that she is subject to recurring attacks of manic-depressive insanity; that said disease is incurable; and that during these attacks the child has necessarily been in the custody of other persons at all times, namely —respondent's mother or appellant's parents. Appellant also contends that because he did not know that two of respondent's brothers had suffered mental disorders prior to the entry of the interlocutory decree, and, because this fact had been deliberately concealed from him until after the custody of the child had been awarded to respondent, he now has the right to rely upon this fact as warranting a change in the custody of the child. He asserts that this fact constitutes proof that respondent's mental collapse was due to an inherited tendency and not to appellant's mistreatment of her as contended by respondent, and would have been an influential factor had it been known at the time of the making of the original order. Furthermore, appellant maintains that the welfare of the child demands a change in custody for the reasons that the child is excitable in nature and may have inherited respondent's family tendency toward mental weakness; because the sight of the mother while subject to her attacks or suffering from her various hallucinations would be detrimental to the child's physical and mental health; and because it is also likely that under such conditions respondent might even do physical harm to the child.

As a further change of circumstances appellant points out that he has remarried and now has a home with which to provide the child.

Since the respondent had suffered two mental attacks prior to the original order awarding custody, it is rather difficult to term two subsequent attacks as changes in circumstances. However, it has been suggested in a previous case decided by this court (Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719, 723) that where "some fact, secret and hidden at the time of the entry of the former judgment, would in the interest of the welfare of the child justify a court in modifying the former order of custody despite the fact that there had been no actual change of circumstances * * *". However, the trial court was of the opinion that the fact of the brothers' mental weakness either could have been learned prior to the original order or that it was not a sufficient change in circumstances to warrant a modification of the decree. Olson v. Olson, 95 Cal.App. 594, 272 P. 1113.

[2, 3] It must be borne in mind that in every proceeding to modify a provision for the custody of a minor child the burden is on the moving party to satisfy the court that conditions have so changed as to justify the modification. All presumptions are in favor of the reasonableness of the decree, and in the absence of a showing that compels the conclusion that the decree should be modified, an appellate court cannot interfere with the trial court's refusal to modify it. Gavel v. Gavel, 123 Cal.App. 589, 11 P.2d 654.

A great deal of testimony was introduced to demonstrate appellant's past unfitness to have the child. It was shown that during his marriage appellant was never able to earn a living for himself and his family, that the mainstay of their support was his wealthy parents and a trust fund established by his grandmother. The moral derelictions with which appellant was charged were in part admitted and in part denied. A recounting of their details would serve no useful purpose here.

[4, 5] After a consideration of all the evidence we are forced to the conclusion that at times in the past it is probable that neither party to this action was a fit or proper custodian for a minor child. The question as to whether a parent is a fit or proper person to have the custody of a minor child refers, however, to his or her fitness at the time of the hearing and is not necessarily controlled by conduct many years prior thereto. Ott v. Ott, 127 Cal. App. 322, 15 P.2d 896; In re Green, 192 Cal. 714, 221 P. 903. Evidence of prior acts of misconduct may be admissible if it can be said to have a direct bearing upon the issue of present unfitness, but such evidence should be limited to this issue alone.

In the instant case, respondent at the time of the hearing was normal mentally and appeared to the trial court to be a fit person to rear a child. As to the appellant, there was no testimony as to his unfitness at the time of the hearing to have the custody of the child. With regard to his change in circumstances, it was pointed out that, although he was remarried, he married his present wife before her divorce was final. He has as yet obtained no steady employment and himself testified that his earned income approximates but $50 per month, and the family is otherwise maintained by a trust fund income of $62.50 per month, and the $50 per month received by his present wife from her former husband to support the child of their marriage.

[6] According to the testimony of witnesses and the report of the court investigator, the home atmosphere to which appellant could bring the child is very congenial. The trial court struck from its files the first report of the court investigator recommending that the child be awarded to the appellant, and ordered a more full report without recommendation. The general purport of this second report also favored the appellant's custody of the child. Appellant contends that, the fact that this is only the second report of said investigator to have been refused in eleven years, is an indication that the trial court had "prejudged" this case. Such a report, however, is advisory only and the trial judge always has the right to disregard it.

It is impossible to determine whether or not the trial judge was influenced in her decision by an interview with the child, a girl, nine years of age, for that interview is not a part of the record. Counsel for appellant state that the attorneys for both parties were present at the interview and that the child expressed no preference for her mother but stated merely that she loved both parents.

[7, 8] In the case of Crater v. Crater, 135 Cal. 633, 67 P. 1049, 1050, the correct rule for a trial court to follow when considering the modification of a custody decree, is: "The court, in revising and modifying its decree, proceeds upon new facts considered in connection with the facts formerly established, the change of circumstances, the conduct of the parties, and the best interests of the child." These facts were presented to the trial court which, at the same time, had an opportunity to observe the parties and their child. Had the appellant's record been without blemish, we are of the opinion that the child should have been awarded to him. But in view of the highly conflicting evidence as to the fitness of either, as to the nervous reaction of the child after visits to each parent, as to the child's expression of her own desires, and the fact that we, as an appellate court, have no opportunity to observe or form an opinion of the fitness of the parties, we are unable to say that the trial court by refusing to modify the original order, abused its discretion.

[9] Of course, the paramount interest of the court is the welfare of the child. Crater v. Crater, supra; Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582. Obviously, after observation of both parties, the trial court came to the conclusion that the mother, during mental normalcy, was a better person than the father to rear their minor daughter. Since there was some testimony that the respondent may be fully cured of her affliction, we cannot say that the trial court entirely disregarded the best interest of the child in awarding its custody to her. Furthermore, in order to safeguard the minor's well-being, the court imposed certain conditions upon the respondent, requiring her to maintain a home in other than an apartment house, to have someone live with her at all times, and to have a physical and mental examination every six months. In view of these conditions, and the fact that in the event of the breach thereof, or of another mental collapse on the part of the mother, the court may modify its order, we are unable to say that the conclusion reached by the court would not redound to the best interests of the child.

[10] The appellant complains that the respondent is financially unable to care for the minor. Respondent's income consists of $62.50 per month from the trust fund established by appellant's grandmother, received by her from the appellant as a property settlement at the time of their divorce, and $25 per month paid by appellant as support for the child. She stated to the court that her intention is to augment this income by securing part-time employment, or to live with her mother if she finds herself unable to do so. The trial court evidently felt that respondent was capable of properly supporting herself and the child and that she should have an opportunity to prove her ability. Of course, should she at any time fail in this regard, the trial court may modify its custodial award.

[11] Appellant also contends that the trial court erred in awarding counsel fees and costs to the respondent and that the amount awarded was so large as to constitute an abuse of discretion. Such orders have heretofore been upheld by courts of this state upon motions to modify decrees in divorce cases where the rights to the custody of children were involved (Jacobs v. Jacobs, 68 Cal.App. 725, 230 P. 209; Ott v. Ott, 127 Cal.App. 325, 15 P.2d 897); and

in other instances as well. Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862; Parker v. Parker, 22 Cal.App.2d 139, 70 P.2d 1003; McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257; Treece v. Superior Court, 113 Cal.App. 728, 298 P. 1040. We do not find the amount so large as to indicate an abuse of discretion in requiring appellant to pay the same.

The order appealed from is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; HOUSER, J.; SPENCE, Justice pro tem.

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16 Cal.2d 184

HOLLYWOOD MOTION PICTURE EQUIPMENT CO., Limited, v. FURER.

L. A. 16134.

Supreme Court of California.

Sept. 3, 1940.

1. Frauds, statute of 🔑49

Oral contracts invalidated by statute because not to be performed within a year include those only which cannot be performed within that period, and even though a promise may not by its terms be performed within a year, yet it is not inhibited by the statute if there is a possibility that it may be. Civ.Code, § 1624.

2. Frauds, statute of 🔑45(2)

For an oral contract to be void under statute making an oral contract void if by its terms it is not to be performed within a year from the making thereof, contract must itself contain language, the reasonable interpretation of which shows a clear intention that it cannot be performed within the year, and it is subject of proof unless by its terms it is incapable of performance within such period. Civ.Code, § 1624.

3. Frauds, statute of 🔑44(1)

An oral agreement, on plaintiff's delivering patterns to defendant for manufacture of castings, that defendant would not make any castings therefrom other than those ordered by plaintiff was not void under statute making an oral contract, which by its terms is not to be performed within a year from the making thereof, invalid. Civ.Code, § 1624.

4. Patents 🔑183

An inventor who delivered patterns to machinist for the manufacture of castings for the inventor only was not precluded from having machinist enjoined from selling the castings to others and for an accounting and for damages, merely because there was no showing of a secret invention, since the machinist became a "bailee" of the patterns, and his use of them to the detriment of the inventor was a "conversion of the bailment."

See Words and Phrases, Permanent Edition, for all other definitions of "Bailee" and "Conversion of the Bailment".

5. Bailment 🔑11

Where a bailee of an article has accepted it under definite terms to hold it and to use it for the benefit of the bailor, a confidence has been reposed which should remain inviolate.

6. Patents 🔑183

Though the inventor of any product of the mind may forfeit his ownership thereof when it becomes known to the public, yet such forfeiture does not deprive the inventor of his right to make contracts with reference to his product, nor does he yield the right to have such contracts protected by the courts, where a confidential relationship has been created on the basis of the inventor's secret. Civ.Code, § 980.

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In Bank.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by the Hollywood Motion Picture Equipment Company, Limited, against A. J. Furer, individually and doing business under the firm name and style of the Acme Tool & Manufacturing Company, to enjoin the defendant from selling certain castings and to require the defendant to account for profits made on sales of castings and for damages, wherein the defendant filed a counterclaim. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment reversed.

Prior opinion, 99 P.2d 1073.

Henry O. Wackerbarth, of Los Angeles, for appellant.

William Jennings Bryan, Jr., and Harry C. Gogen, both of Los Angeles, for respondent.

MOORE, Justice pro tem.

The trial court having sustained an objection to the introduction of any evidence in support of the complaint on the ground that it failed to state a cause of action, and having entered judgment in favor of defendant on his counterclaim in the sum of $822.75, plaintiff appeals.

The complaint alleges that in 1931 and 1932 plaintiff invented, developed and improved a bomb microphone and certain other devices for use in sound recording and light testing; that for the purpose of manufacturing said devices for sale, plaintiff caused wooden patterns of said inventions to be made for use in making forms from which finished castings were to be wrought; that in December of 1932, while defendant was operating a machine shop, plaintiff delivered said patterns to defendant in order to have the latter make said finished castings in metal for use in assembling said devices; that said patterns remained with defendant until June 29, 1935, during which period plaintiff caused defendant to manufacture and finish said castings therefrom for $25 per set; that at the time of said delivery it was orally agreed that "immediately prior to the time that plaintiff first delivered said patterns to defendants and as a condition precedent thereto, said defendants * * * would only make therefrom such castings as were ordered by plaintiff, and that *they would not make any castings therefrom* other than those ordered by the plaintiff"; that while plaintiff was selling said castings to the retail trade for $100 per set, defendant manufactured castings from said patterns, and by circular letters offered to sell and did sell said castings, at prices less than that received by plaintiff; that, as a result of said acts of defendants, plaintiff was damaged in the sum of $5,000, a sum expended by plaintiff in advertising said devices. The court was asked to enjoin defendant from selling said castings and to require defendant to account for profits made upon sales of castings and to pay damages in the sum of $5,000.

(1) The argument that the complaint does not state a cause of action is grounded upon the claim that the promise of defendant that he would not make any castings from said patterns other than those ordered by plaintiff was an oral promise, and that it is invalid under section 1624 of the Civil Code because the promise "by its terms is not to be performed within a year from the making thereof". Since there is no phraseology in said agreement which declares that it is not to be performed within a year, and since no period of time is mentioned in the agreement, defendant, in order to invoke said statute, interpolates an implication that his promise "not to make any castings" should be followed by *"at any time"* or he contends that the infinitive phrase means that he would never make said castings for others. If given such construction defendant urges that the contract is one to desist from doing a thing, with no time limit upon the act of desisting, and, therefore, is one of such a nature that it must require more than a year for performance. In support of such contention defendant cites Long v. Cramer Meat Packing Co., 155 Cal. 402, 101 P. 297, wherein this court held that the agreement that "under no circumstances would any sheep ever be allowed to range, graze, pasture, or water" upon their ranch was not enforcible because by its nature it was not to be performed within a year and therefore was void. But that case does not control in the interpretation of the contract at bar. The predecessors of those parties owning neighboring lands by oral agreement joined in a venture as tenants in common to acquire certain detached parcels of land so that they "could control the waters thereon, and thereby protect and secure for themselves the use and benefit of the surrounding ranges * * * [and] prevent sheep from grazing upon said ranges * * [and] that the same should and would *always* be used for the purpose of grazing, ranging, and pasturing and watering the horses and cattle of the respective parties, and their successors * * * *and that under no circumstances would any sheep ever be allowed to* range, graze, pasture, or water upon said lands or any part thereof so far as the same could be prevented by said Charles Cramer". In view of the italicized words, this language clearly contemplated a period of time in excess of a year. Even the plaintiff there contended that "the agreement was to go right along indefinitely. No time was fixed for its termination".

When plaintiff left its patterns with defendant for him to manufacture the devices not a word in their oral agreement indicated an intention that defendant was to make castings always or over any definite period of time. Defendant agreed "not to make any castings therefrom other than those ordered by the plaintiff". Plaintiff might have ordered and received all castings it desired within six months. This would have terminated their relations. By no term or construction of the contract was plaintiff obligated to order castings made or to leave the patterns with defendant after the expiration of a year. Whatever number of castings contemplated would not necessarily determine that the period of performance was to be longer than a year.

[1, 2] Nothing was to be done or "refrained from" by defendant that could not have been performed or refrained from within a year. To say that because plaintiff did not specify any time during which defendant should "not make any castings" means that he should never do so, is to read into the agreement something which is not there. It is well settled that oral contracts invalidated by the statute because not to be performed within a year include those only which *cannot* be performed within that period. 2 Williston on Contracts, § 495. Even though a promise may not by its terms be performed within a year, yet it is not inhibited by the statute if there is a possibility that it may be. The contract itself must contain language whose reasonable interpretation shows a clear intention that it cannot be performed within the year. It is subject of proof unless by its terms it is incapable of performance within said period. In Dougherty v. Rosenberg, 62 Cal. 32, plaintiff had promised "altogether [to] forbear" to bring suit to foreclose a lien until he had obtained final judgments against certain third parties, events which might occur within a year. It was held that an agreement to refrain altogether for an indefinite time is not within the operation of the statute. In Mayborne v. Citizens' Trust & Savings Bank, 46 Cal.App. 178, 188 P. 1034, 1039, plaintiff recovered judgment for the value of personal services rendered decedent Dutton over a period of more than twenty years. Referring to defendant's contention that the oral contract of plaintiff and decedent was invalid because it was "not to be performed within a year from the making thereof," the court said, "This rule does not apply to contracts, either express or implied, for the rendition of services for an indefinite period of time and payment to be made at the termination of the relationship. [Citing cases.] To fall within the condemnation of the statute the contract must be such as to be incapable of performance within one year."

[3] In view of the language of said section 1624 of the Civil Code and of the foregoing authorities, we see no escape from the conclusion that the court erred in holding that the contract sued upon herein was invalid as being in violation of said section 1624. Dutton D. Co. v. United States, F. & G. Co., 136 Cal.App. 574, 29 P.2d 316. To apply the statute under the circumstances of this case would operate a fraud upon plaintiff.

[4-6] (II) A further ground urged to establish the insufficiency of the complaint is that the complaint does not allege that plaintiff's invention was a secret invention or allege facts from which such secrecy can be determined. Said statement is true but upon the facts alleged plaintiff is not required to rely upon the secrecy of its invention. We have here a relationship created by a contract where the manufacturer took into his custody certain patterns created by the inventor for the purpose of manufacturing castings from them for the inventor. Defendant did not acknowledge the dominance of a fundamental precept of honesty and fair dealing, enjoined by the Decalogue and supported by prevailing moral concepts. "Thou shalt not steal" applies with equal force and propriety to the industrialist of a complex civilization as to the simple herdsman of ancient Israel. Where a bailee of an article has accepted it under definite terms to hold it and to use it for the benefit of the bailor, a confidence has been reposed which should remain inviolate. The mere fact that the ingenious principle materialized in the thing bailed may be known to all the world would not depreciate the sanctity of the contract between the bailor and the bailee. When a former employee of the Dupont Fabrikoid Company undertook to manufacture leather by use of alleged secret processes learned while in the company's employ, it was held that "the starting point * * * is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them". Continuing, Justice Holmes said: "Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be de-

nied, but the confidence cannot be. * * * the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets, he must take the burden with the good." E. I. Du Pont De Nemours Powder Co. v. Masland, 244 U.S. 100, 37 S.Ct. 575, 576, 61 L.Ed. 1016. While the inventor of any product of the mind may forfeit his ownership thereof when it becomes known to the public (Civ. Code, sec. 980), yet such forfeiture does not deprive the author of his right to make contracts with reference to his product. Neither does he yield his right to have such contracts protected by the courts where a confidential relationship has been created on the basis of the inventor's secret. Hamilton Mfg. Co. v. Tubbs Mfg. Co., D. C., 216 F. 401, 407.

In the case before us, defendant agreed not to use the specific patterns committed to his care for making castings for others than plaintiff. He became bailee of the patterns and his use of them to the detriment of plaintiff was a conversion of the bailment. "If a bailee, having no authority to use the thing bailed, uses it, or, having authority to use it in a particular way, uses it in a different way, unauthorized by the terms of the bailment, or to a greater extent than authorized * * * such unauthorized use constitutes a conversion of the chattel, rendering the bailee liable even for the loss or damage which due care could not have prevented." 8 Cor.Jur.Secundum, Bailments, § 31 pp. 283, 284.

When plaintiff committed its patterns to defendant for a specified use for the mutual profit of both parties, it was incumbent upon defendant to preserve them for the purpose declared in the bailment and not to apply them to his own uses. It follows that, even though plaintiffs alleged inventions were of the public domain, the complaint has stated a cause of action by alleging the appropriation of the use by defendant of plaintiff's said patterns to the detriment of plaintiff as alleged.

The judgment is reversed.

We concur: GIBSON, C. J.; CARTER, J.; SHENK, J.: CURTIS, J.; SPENCE, Justice pro tem.

EDMONDS, J.; I concur in the judgment.

ROSE et al. v. STATE et al. *

S. F. 16040.

Supreme Court of California.
June 27, 1940.

Rehearing Granted July 27, 1940.

1. Eminent domain 🔑4
States 🔑4

All powers not granted by the Constitution of the United States to the federal government are reserved to the states, and the power of eminent domain is one of such reserved powers.

2. Eminent domain 🔑1

The power of "eminent domain" does not depend for its existence on a specific grant in the Constitution of a state, and is inherent in the sovereign state and founded on the law of necessity, but such power may be limited by constitutional provision.

See Words and Phrases, Permanent Edition, for all other definitions of "Eminent Domain".

3. Eminent domain 🔑70

The constitutional prohibition against taking or damaging private property for public use without just compensation is a restriction placed on the state and upon all its agencies who derive from it their power of eminent domain. Const. art. 1, § 14.

4. Eminent domain 🔑70

Failure of the Legislature to enact a statute allowing suit against the state to recover value of private property taken or damaged for public use does not entitle the state to disregard the constitutional limitation on the state, requiring that just compensation be paid for private property taken or damaged for public use. Const. art. 1, § 14.

5. Constitutional law 🔑32
States 🔑191(1)

Constitutional provision against taking or damaging of private property for public use without just compensation is self-enforcing, and by such provision state has indicated its consent to be sued thereunder. Const. art. 1, § 14.

6. States 🔑191(1), 200

The constitutional provision that suits may be brought against the state in such manner and in such courts as shall be directed by law is not "mandatory" but is permissive, and decides what suits, other than those already provided for, might be brought against the state, and prescribes manner for so doing, and the courts having jurisdiction thereof. Const. art. 20, § 6.

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* Subsequent opinion 123 P.2d 505.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

7. Constitutional law 🔑32

The constitutional provision that suits may be brought against the state in such manner and in such courts as shall be directed by law does not require enactment of a statute permitting suits to be brought to secure right granted in constitutional provision against taking or damaging of property for public use without just compensation. Const. art. 1, § 14; art. 20, § 6.

8. Statutes 🔑181(1)

The language of a statute should never be so construed as to nullify the will of the Legislature. Code Civ.Proc. § 1859.

9. Constitutional law 🔑15
Statutes 🔑181(1, 2), 231

Statutes must be given a reasonable interpretation, and one which will carry out the intent of the legislators and render them valid and operative, rather than defeat them, and sections of the Constitution, as well as of the Codes, will be harmonized where reasonably possible, in order that they all may stand.

10. Statutes 🔑225½

A general provision of a statute is controlled by one that is special, and such special provision is treated as an exception to the general provision, and a specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the general provision, standing alone, would be broad enough to include subject to which a more particular provision related.

11. Constitutional law 🔑26

A constitutional right may be subject to reasonable rules and regulations for the enforcement or protection thereof.

12. Constitutional law 🔑36

The Legislature by statutory enactment may not abrogate or deny a right granted by the Constitution, and a right constitutionally granted cannot be taken away by the failure of the Legislature to act.

13. Eminent domain 🔑70

The constitutional provisions against taking or damaging of private property for public use without just compensation were not enacted to protect sovereign state, but were enacted to protect and preserve individual rights of subjects of the sovereign. Const. art. 1, §§ 13, 14.

14. States 🔑191(1)

No distinction can be drawn between suits against agencies of the state and suits against state itself as affecting right to sue to recover compensation for the taking or damaging of private property for a public use without just compensation. Const. art. 1, §§ 13, 14.

15. Eminent domain 🔑271

That property owner can, prior to construction of an improvement in street fronting his property, either seek to enjoin construction of the improvement or sue for consequential damages does not preclude property owners from suing to recover consequential damages resulting from the construction of a subway in street fronting their property.

16. Highways 🔑86

The owner of property fronting on a street or highway has as appurtenant thereto certain private easements in the street in front of or adjacent to the lot, distinguished from the public easements therein, which are a part and portion of his property.

17. Eminent domain 🔑303
Highways 🔑85, 89

Property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of such rights he is entitled to compensation.

18. Eminent domain 🔑303

A property owner is entitled to compensation whenever his right of access to the street fronting his property is impaired in a manner peculiar to the particular property itself and different than that suffered in common with the public generally.

19. Eminent domain 🔑303

Property owners whose easements of ingress and egress were substantially impaired by construction in street fronting their property of a subway and blind side lanes on each side of subway were entitled to recover compensation from the state. Const. art. 1, §§ 13, 14.

20. Eminent domain 🔑303

The question of damage to right of access to property does not depend on the location of the obstruction strictly on owner's property line, or upon total destruction of owner's means of access into the street proper.

21. Eminent domain 🔑307(2)

In cases involving an owner's right in the street fronting his property, questions whether or not his property has suffered a damage peculiar to itself, what constitutes a damage peculiar to the property itself, and what amount of compensation should be paid, are questions of fact for jury, or for trial court trying case without a jury.

22. Eminent domain 🔑2(6)

Property owners whose easements of ingress and egress were substantially impaired by construction in street fronting their property of a subway were not barred from recovery of compensation on ground that the damaging occurred as a result of an exercise of police power, and was damnum absque injuria. Const. art. 1, §§ 13, 14.

23. Appeal and error 🔑1171(2)

In property owners' suit to recover damages to right of access to property resulting from construction of a subway in street fronting their property, court would not disturb finding that property owners' frontage was 120 feet, where reference to maps in evidence revealed that frontage was recorded thereon as 118 feet, plus or minus, and any discrepancy was so small as to come within "de minimus rule".

See Words and Phrases, Permanent Edition, for all other definitions of "De Minimus Rule".

24. Evidence 🔑568(4), 571(7)

In property owners' suit to recover damages allegedly resulting from construction of a subway in street fronting property, the trial court was not bound by opinion of witnesses on market value of property, but province of such testimony was to aid court in arriving at a conclusion.

25. Eminent domain 🔑307(1)

Information obtained by trial judge who visited premises alleged to have been damaged by erection of subway in street fronting premises could be taken into consideration in determining extent of damages.

26. Eminent domain 🔑300

In property owners' suit to recover damages for impairment of their right of ingress and egress resulting from construction of a subway in street fronting their property, evidence sustained findings of trial court as to amount of damages, where trial court viewed premises, and total damages awarded was within scope of testimony of valuation witnesses.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Mary V. Rose and others against the State of California, a commonwealth, and the People of the State of California, acting by and through the Department of Public Works, for damages resulting from the construction of an improvement in a street fronting plaintiffs' property. From an adverse judgment, defendants appeal.

Affirmed.

Prior opinion, 94 P.2d 1058.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellants.

John T. Wentz and Booth B. Goodman, both of Oakland, for respondents.

CARTER, Justice.

Defendants appeal from a judgment for plaintiffs in an action for damages allegedly sustained as the result of the construction of an improvement in the street fronting plaintiffs' property.

This is one of a series of similar actions brought against the defendants by the owners of property fronting upon Jackson street, in the town of Hayward, Alameda county, to secure compensation for damage allegedly caused by the construction of a subway or underpass in the center of Jackson street. Although the actions were tried separately, and are before this court on separate appeals, the facts, rights and liabilities involved in each are substantially the same; therefore, the law applicable to each will be fully considered and determined herein.

Plaintiffs are and at all times pertinent to this action were the owners of approximately 3.05 acres of land fronting some 118 feet on Jackson street in the town of Hayward. The property is devoted to a fruit orchard and is improved by a five-room residence, windmill, tankhouse and barn, but has been zoned as "industrial property".

Jackson street runs from East Fourteenth street in Hayward to Mt. Eden, where it connects with the highway leading to the San Mateo toll bridge. During the month of December, 1935, the defendant, State of California, acting through its Department of Public Works, and under the authority of the Railroad Commission, awarded a contract for the building of a subway to eliminate a crossing at grade of Jackson street and the tracks of the Western Pacific Railroad Company. Plaintiffs' property lies adjacent to the right of way of said railroad company on the north side thereof, and on the east side of Jackson street. The entire parcel is opposite the approach to the subway. In front of plaintiffs' property Jackson street is 66 feet wide. The subway, 24 feet in width, is located in the center of Jackson street. It descends under the railroad tracks of said company to a depth of approximately 16½ feet, then ascends again to grade beyond said railroad tracks. On each side of the subway are "blind" lanes, 14.5 feet in width, which do not cross the tracks, but serve the owners of property adjacent thereto as means of ingress and egress to and from Jackson street and their respective parcels of land.

The amended complaint alleges that the construction of the subway resulted in an impairment of plaintiffs' access to Jackson street with a consequent depreciation in the market value of their property in the sum of $5,000. The case was tried by the court without a jury, and from a judgment for plaintiffs, defendants prosecute this appeal.

Defendants maintain that their demurrer to the amended complaint should have been sustained on the ground that the trial court had no jurisdiction of these defendants nor of the subject of this action, and that the amended complaint did not state a cause of action. It is their position that plaintiffs' property has not been damaged, but, that even if it had been damaged, plaintiffs have no remedy because the State cannot be sued without its express consent, and no such consent has been given.

Plaintiffs on the other hand contend that they have suffered a damage peculiar to their individual property in that their means of ingress and egress thereto has been impaired; that they have thus been deprived of their property without just compensation in violation of article I, sections 13 and 14 of the Constitution of California, and the Fifth and Fourteenth Amendments to the Constitution of the United States; and that this cause of action may be brought under said article I, section 14 of the Constitution of California.

Two major questions then are presented by this appeal: (1) Is section 14 of article I of the Constitution of California self-executing? and (2) have the plaintiffs herein sustained a compensable damage within the meaning of said constitutional provision?

As to the first question our answer must be in the affirmative.

[1, 2] Under our system of government all powers not granted by the Constitution of the United States to the federal government are reserved to the states, and the power of eminent domain is one of those reserved powers. It does not as a consequence, depend for its existence upon a specific grant in the Constitution of a state. Instead, it is inherent in the sovereign state and founded upon the law of necessity. This power, however, may be limited by constitutional provision, and it has been held that a constitutional provision for the payment of compensation is a limitation aimed by the Constitution at the power of eminent domain, limiting the exercise of that power by the public in favor of the individual owner of property. Commonwealth v. Plymouth Coal Co., 232 Pa. 141, 81 A. 148, affirmed 232 U.S. 531, 34 S.Ct. 359, 58 L.Ed. 713; 18 Am.Jur. 635.

[3] It is plain from a reading of the following portion thereof that section 14 of article I is such a limitation: "Eminent Domain. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *; provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such se-

curity in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. * * *"

[4, 5] Since article I, section 14, therefore, is a restriction placed by the Constitution upon the state itself, and upon all its agencies who derive from it their power of eminent domain, it cannot be said that the mere failure of the legislature to enact a statute allowing suit to be brought against the state entitles the state to disregard and violate that limitation. The logical inference is that said constitutional provision is intended to be self-enforcing.

In fact this court has already held section 14 of article I to be self-executing. Weber v. County of Santa Clara, 59 Cal. 265; Trahern v. San Joaquin County, 59 Cal. 320. Shortly after this constitutional enactment was adopted there arose a question as to whether section 14 of article I, or an act of the legislature which had previously been in effect, was controlling in the matter of condemning land for road purposes. Of said section 14, article I, this court in the case of Weber v. County of Santa Clara, supra, said: "The constitutional provision is prohibitory in its nature and is self-executing; it is in direct conflict with the Act of March 18th, 1874, and by necessary operation repeals the same. The Constitution contemplates and provides for a proceeding in Court in all cases where private property is sought to be taken for public use, and it prohibits any other proceeding to that end."

In the case of Trahern v. Board of Supervisors of San Joaquin County, 59 Cal. 320, it was claimed that section 14 of article I was not self-executing. The appellant contended therein that the language—"as shall be prescribed by law"—in said section evidently contemplated some act of legislation on the subject, and until that had taken place no damages could be assessed in pursuance of the constitutional provision. The court, however, decided to the contrary, on the authority of the Weber case, cited and quoted supra. This court is not alone in holding such a constitutional provision self-executing. As to those cases in which, like the case at bar, the injury is consequential—a damaging rather than a taking, it is said in 18 American Jurisprudence at page 1028: "When there is no actual occupancy of the land—and the injury is not so severe as to constitute a taking in the constitutional sense, in the states which, by their Constitutions, require compensation when property is damaged, it is settled that the constitutional provision may be invoked in a proceeding other than an eminent domain proceeding. Under such a constitutional guaranty, the right to recover in an action in damages for consequential injury has been sustained in a number of cases. It is held that the constitutional provision is self-executing; that is, that even if a statute has not been enacted providing a remedy for damage from the construction of public works, the landowner is entitled to enforce his constitutional right to compensation in a common-law action." Board of Com'rs of Logan County v. Adler, 69 Colo. 290, 194 P. 621, 20 A.L.R. 512; Hickman v. Kansas City, 120 Mo. 110, 25 S.W. 225, 23 L.R.A. 658, 41 Am.St.Rep. 684; Chester County v. Brower, 117 Pa. 647, 12 A. 577, 2 Am.St. Rep. 713; Swift & Co. v. Newport News, 105 Va. 108, 52 S.E. 821, 3 L.R.A., N.S., 404; Johnson v. Parkersburg, 16 W.Va. 402, 37 Am.Rep. 779; Washington Water Power Co. v. Waters, C.C., 186 F. 572; Campbell v. Arkansas State Highway Commission, 183 Ark. 780, 38 S.W.2d 753; Elgin v. Eaton, 83 Ill. 535, 25 Am.Rep. 412; McGrew v. Granite Bituminous Pav. Co., 247 Mo. 549, 155 S.W. 411; State ex rel. Applegate v. Taylor, 224 Mo. 393, 123 S.W. 892; Householder v. Kansas City, 83 Mo. 488; Chick Springs Water Co. v. State Highway Dept., 159 S.C. 481, 157 S.E. 842, 847.

The above-cited cases appear to be the leading authorities holding that a constitutional provision such as article I, section 14 of our Constitution is self-executing, but there are many other cases to this effect.

Many of these authorities are collected in the case of Chick Springs Water Co. v. State Highway Dept., supra, and we quote with approval the following portion of the opinion in said case:

"'It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the Legislature to render such provisions nugatory by refusing to pass laws to carry them into effect; and where the matter with which a given Section of the Constitution is divisible, one clause thereof may be self-executing and another clause or clauses may not be self-executing. Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect and no ancillary legislation is necessary to the enjoyment of a right given and the enforcement of a duty imposed.' 12 C.J. 729.

"'A constitutional provision against taking private property for public use without just compensation therefor is self-executing, even though the method of ascertaining such compensation is left for Legislative determination. When the Constitution forbids damage to private property, and points out no remedy and no Statute affords one for the invasion of the right of property thus secured, the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance.' 12 C.J. 732.

"'Const. art. 2, § 21 (Ann.St.1906, p. 148), providing that private property shall not be taken for public use without just compensation is self-enforcing and requires no legislation to give it effect. Where a statute or the Constitution creates a right, but is silent as to the remedy, the party entitled to the right may resort to any common-law action which will give him adequate redress.' State [ex rel. Applegate] v. Taylor, 224 Mo. 393, 123 S.W. 892, 895.

"'It was the design of the amendment to our Constitution under consideration to remove an existing mischief, viz., the damaging of private property for public use without just compensation, and a constitutional provision should never be construed as dependent for its efficacy and operation upon legislative will. 6 A. & E. Ency. L. 913, and authorities cited. So that when the provision of a Constitution, as does ours, no less than the provision in the Constitutions of the states of West Virginia and Illinois, forbids damage to private property, and points out no remedy, and no statute affords one, for the invasion of the right of property thus secured, the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance.' Swift & Company v. City of Newport News, 105 Va. 108, 52 S.E. 821, 824, 3 L.R.A.(N.S.) 404.

"'Where the Constitution forbids a damage to the private property of an individual, and points out no remedy, and no statute gives a remedy, for the invasion of his right of property thus secured, the common law, which gives a remedy for every wrong, will furnish the appropriate action for the redress of his grievance. We think therefore the declaration showed a good cause of action, and the demurrer thereto was properly overruled.' Johnson v. City of Parkersburg, 16 W.Va. 402, 37 Am.Rep. 779.

"In the case of Great Northern R. Co. v. State of Washington, 102 Wash. 348, 173 P. 40, 42, L.R.A. 1918E, 987, the state of Washington was sued by the railroad company for injury to its property, resulting from the construction of a state highway. The action was based on the constitutional provision of the state of Washington prohibiting the taking or damaging of private property for public uses without just compensation. The state of Washington interposed a demurrer to the suit, similar to the one in the case at bar, contending that the state was immune from suit. The demurrer was overruled, and it was held that the action would lie.

"In said case, portions of the opinion are as follows:

"'It is contended by the state that a suit against it to recover for damages will not lie, and that the damage herein involved is not for a public use, within the meaning of the constitutional provision requiring compensation. We cannot accede to this contention; for, if the state could have condemned the right to inflict the necessary damage or invade plaintiff's property, its failure to so condemn is not an excuse to deny plaintiff's recovery. * * * When taking private property for a public use, the state acts in its sovereign capacity. * * * "It goes not as a trespasser, inspired by selfish or unlawful motive, but as one taking without malice or intent to do wrong, and presumptively for the public good. It cannot put on the cloak of a tortfeasor under the statute if it would, it cannot plead a willful wrong to defeat a just claim." * * *

"'In our opinion, the theory that property rights are ever to be sacrificed to public convenience or necessity without just compensation is fraught with danger, and should find no lodgment in American jurisprudence. If the acts which caused the injury were done under and in consequence of the direction of the state, then the state is to be regarded as the superior and responsible as such although it does the work by contract and by the direction of its duly authorized officers. The plaintiff's complaint states a cause of action under article I, § 16 of our Constitution, and the state's demurrer was properly overruled.' * * *

"'The general presumption of law is that all constitutional provisions are self-executing, and are to be interpreted as such, rather than as requiring further legislation, for the reason that, unless such were done, it would be in the power of the Legislature to practically nullify a fundamental of legislation. 6 R.C.L. p. 58; Black on Interpretation of Laws, p. 21.' McColl v. Marlboro School Dist., 143 S.C. 120, 124, 141 S.E. 265; Brice v. McDow et al., 116 S.C. 324, 108 S.E. 84, 87."

Following the line of reasoning enunciated in the foregoing excerpt from the opinion of the Supreme Court of South Carolina, the Supreme Court of Missouri in the case of Hickman v. Kansas City [120 Mo. 110, 25 S.W. 226, 23 L.R.A. 658, 41 Am.St.Rep. 684], supra, said: "It is also well-settled law that article of the constitution gives an absolute right, and is self-enforcing, and, although the legislature may have enacted no law providing a mode for the ascertainment and payment of the compensation provided for, resort may be had, by the party entitled to the right, to any common-law action which will afford him adequate and appropriate means of redress."

And the Supreme Court of Arkansas in the case of Campbell v. Arkansas State Highway Commission [183 Ark. 780, 38 S.W.2d 755] supra, declared: "It is true that the Arkansas state highway commission did not institute condemnation proceedings against the property owners, but the property owners had a right to maintain this action. It was a remedy given them under the common law for a trespass or injury to their real estate. The right existed under the provision of the Constitution; and, where the statute provides no adequate remedy, it may be enforced by an action for damages. County of Chester v. Brower, 117 Pa. 647, 12 A. 577, 2 Am.St. 713; and Swift & Co. v. Newport News, 105 Va. 108, 52 S.E. 821, 3 L.R.A. (N.S.) 404. In the case last cited it was held that a constitutional provision that private property shall not be damaged for public use without compensation is self-executing, and the common law will furnish an appropriate remedy in the absence of one expressly given by Constitution or statute."

In support of their contention that a sovereign state cannot be sued without its express consent, defendant cites Perry v. United States, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912, 95 A.L.R. 1335 in which it was determined that a holder of a federal government bond providing for payment in gold coin of standard weight and fineness could not sue the United States government after deflation of the dollar for the reason that Congress had not passed a statute authorizing such an action. This case, however, does not involve a constitutional provision such as article I, section 14, and is not in point in the view we have taken of this case—that the State of California by said self-executing provision of its constitution has indicated its consent to be sued thereunder.

As further authority for their position that the right granted by constitutional article I, section 14, may not be enforced without specific legislation providing the method of enforcing it, defendant has cited Spinney v. Griffith, 98 Cal. 149, 32 P. 974 and Bailey, etc., Iron Co. v. Goldschmidt, 33 Cal.App. 661, 166 P. 363. In these cases actions were brought under section 15 of article XX of the Constitution, providing for various mechanics' liens and stating that "the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens." The legislature failed to enact such legislation and the courts held that the constitutional provision conferred no right whatever, but that the whole remedy was contingent upon statutory enactment. These cases clearly are different from the one at bar for they are concerned with a constitutional section wherein it is specifically provided that the legislature should provide a method for the enforcement of the right granted. Section 14 of article I contains no such mandate. The court in the Spinney case, supra, correctly held that the statute was not self-executing, that the plaintiff therein did not comply with the terms of the legislative enactment applicable to the enforcement of a lien and was therefore not entitled to defend his lien. This decision was followed in the Bailey case, supra, which also held that the constitutional provision was inoperative except as supplemented by legislative action and that it was not intended to be self-executing.

Defendants attempt to distinguish decisions of other states holding a constitutional provision similar to article I, section 14 to be self-executing on the ground that the Constitutions of said states do not contain a provision similar to article XX, section 6, of our Constitution. The language of said section is as follows: "Suits may be brought against the State in such manner and in such courts as shall be directed by law."

It is defendants' contention that the state a sovereign body, cannot be sued without its express consent; that article XX, section 6 empowers the legislature to determine when and how suits may be brought against the state; that the legislature in Political Code Section 688, the only general statute on the subject, has seen fit to permit suits against the state only where the actions are on express contract or for negligence.

[6] In passing it may be noted that article XX, section 6, does not on its face appear to be mandatory and direct that "all suits against the State must be brought in such manner * * *." On the contrary the wording of said section, and the fact that it is located in the portion of the Constitution devoted to a discussion of "Miscellaneous subjects" tends rather to give the impression that said section was intended to be permissive, that is, to decide what suits, other than those already provided for, might be brought against the state, and to prescribe the manner for so doing, and the courts having jurisdiction thereof.

Application of the rules of statutory interpretation to the two constitutional provisions under discussion does not disturb our conclusion as to the self-enforcing character of article I, section 14.

[7-9] As is declared in the Code of Civil Procedure, section 1859, "In the construction of a statute the intention of the legislature * * * is to be pursued, if possible." Certainly the language of a statute should never be so construed as to nullify the will of the legislature. If section 6 of article XX is to be construed as requiring the enactment of a statute permitting suit to be brought to secure the right granted in section 14 of article I, the effect would be to permit the legislature, by its refusal or neglect to act, to nullify the intent of the framers of the Constitution. Such a result would be inconsonant with the rule that statutes might be given a reasonable interpretation, one which will carry out the intent of the legislators and render them valid and operative, rather than defeat them. In so doing, sections of the Constitution, as well as of the Codes, will be harmonized where reasonably possible, in order that all may stand.

[10] It is well settled, also, that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.

Further discussion of the interpretation of article I, section 14, is unnecessary for it cannot but be obvious that it must be regarded as self-enforcing in order to effectuate its evident objects and purposes.

After pointing out that Political Code Section 688 permits suits against the state only on express contract or negligence, defendants cite Pacific Gas & Electric Co. v. State, 214 Cal. 369, 6 P.2d 78, to the effect that section 688 of the Political Code as it now stands grants permission to sue the state only upon express contract; and further cite United States v. Great Falls Mfg. Co., 112 U.S. 645, 5 S. Ct. 306, 28 L.Ed. 846, 848 and Crescent Wharf, etc., Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028, to the effect that a suit such as the one brought herein by the plaintiffs is an action on implied contract, which on the authority of Crescent Wharf, etc., Co. v. City of Los Angeles, supra, may not be instituted under Political Code, section 688.

Defendants continue, maintaining that the case last cited holds that rights granted by section 14 of article I of the Constitution are not superior to or in any different category from other property rights, and that a suit to recover damages for an infringement upon said rights, as a consequence, does not stand in any different light than any other class of suit, and may not be brought against the State of California without its express consent.

While we are familiar with the decisions mentioned above, we are not entirely in accord with the view that an action in the nature of inverse condemnation, such as the one with which we are herein concerned, is strictly a suit on implied contract. We are more inclined to hold the constitutional provision itself grants a cause of action—statutory in nature. However, since it has been held that under a self-executing constitutional provision, an action will lie at common law to recover compensation for private property taken or damaged for public use, we do not find it necessary to rule on that question in order to reach a decision in this case.

We do, however, wish to point out that this court in the Crescent Wharf case, supra, merely declared that the respect in which the right to compensation under Constitutional article I, section 14, is not superior to or in a different category from other property rights is that such a right is not exempt from reasonable statutory regulations or enactments. In said case the regulation was a statute of limitations.

[11] We are entirely in accord with that view. That a constitutional right may be subject to reasonable rules and regulations for the enforcement or protection thereof is elementary. A recent decision of this court in the case of Chesney v. Byram, Cal.Sup., 101 P.2d 1106,—which cites the Crescent Wharf case, has held that a right granted by a constitutional provision may be subject to reasonable regulation and control by the state legislature and at the same time such provision may be self-executing.

[12] It will be noted, however, that in neither of said cases did the court in any way imply that by state legislation or a lack thereof a constitutional right might be taken away or denied altogether, for it is likewise elementary that the legislature by statutory enactment may not abrogate or deny a right granted by the Constitution. Potter v. Ames, 43 Cal. 75; Wilcox v. Engebretsen, 160 Cal. 288, 116 P. 750; Sievers v. Root, 10 Cal.App. 337, 101 P. 925. And it follows as a logical conclusion that a right constitutionally granted cannot be taken away by the failure of the legislature to act.

[13] As stated in the case of State v. Fletcher, 168 Okl. 538, 34 P.2d 595, the constitutional provisions in question were not enacted to protect in any way the sovereign state, but were specifically enacted to protect and preserve the individual rights of the subjects of the sovereign. Certainly, in the absence of provision in the section itself, the framers of the Constitution did not intend to grant a right which the legislature by its refusal or neglect to enact proper remedial machinery therefor might take away or deny.

[14] Defendant has attempted to distinguish suits against agencies of the state from suits against the state itself, contending that though they admittedly may be maintained against the former, they cannot be brought against the latter without its express consent because of its sovereign nature.

This same argument was advanced in the case of Chick Spring Water Co. v. State Highway Department, supra, and, we believe, ably answered in the opinion therein, as follows:

"No valid distinction can be drawn between cities, counties, and other political subdivisions, * * * and the state highway * * *. All are agencies of the state, and all derive their immunity from the same source, the state, and upon the ground that, being agencies of the state, they are in effect the state itself. Counties, cities, and other political subdivisions are held liable where they take property, not upon the ground that they are authorized by statute to be sued, but because of the constitutional provision requiring compensation to be made for such taking. This protection is afforded to the humblest citizen by the Constitutions of the state and the United States, and neither government can itself or by any statute or through any agency take property without paying compensation. 'Immunity from suit' cannot avail in this instance, and, if no statute exists, liability still exists, because as to this provision the Constitutions are self-executing.

"To hold otherwise would be to say that the Constitution itself gives a right which the Legislature may deny by failing or refusing to provide a remedy. Such a construction would indeed make the constitutional provision a hollow mockery instead of a safeguard for the rights of citizens.

"No court has ever applied the doctrine of immunity from suit to cases like the one at bar, nor can they, for to do so would absolutely annul the provision of article 1, § 17, of the Constitution."

[15] It is urged by the defendants that inasmuch as plaintiffs in this state can either enjoin or sue for damages in cases such as this (Wilcox v. Engebretsen, 160 Cal. 288, 116 P. 750; Rockridge Place Co. v. Oakland, 61 Cal.App. 791, 216 P. 64), plaintiffs are not entirely without a remedy.

It must be pointed out, however, that in many cases of consequential damage the remedy of injunction alone would be comparable to no remedy at all—for prior to the construction of the improvement which causes the injury it may not be apparent that damage will result, or if it is obvious that damage will result, it may be impossible to ascertain the extent thereof.

We proceed next to a consideration of the question whether or not plaintiffs have sustained a compensable damage within the meaning of article I, section 14 of the Constitution.

[16] That the owner of property fronting upon a street or highway has as appurtenant thereto certain private easements in the street in front of or adjacent to the lot—distinguished from the public easements therein—which are a part and portion of his property and are the private property of the lot owner as fully as the lot itself, is not open to question.

[17] The nature of this property right is described in Brown v. Board of Supervisors, 124 Cal. 274, at page 280, 57 P. 82, 83, as: "The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. This right is peculiar and individual to the abutting owner, differing from the right of passing to and fro upon the street, which he enjoys in common with the public, and any infringement thereof gives him a right of action. Dill.Mun. Corp. § 712. In Eachus v. [Los Angeles] Ry. Co., 103 Cal. 614, 37 P. 750 [42 Am.St.Rep. 149], the right which the abutting owner has to the use of the street fronting upon his lot is defined to be an easement therein for the purposes of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as that which he has in the lot itself, and any act of the municipality by which that easement is destroyed or substantially impaired for the benefit of the public is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation."

[18] That a property owner is entitled to compensation whenever his right of access is impaired in a manner peculiar to the particular property itself and different than that suffered in common with the public generally is indicated by the following language in the case of Montgomery v. Santa Ana W. Ry. Co., 104 Cal. 186, 37 P. 786, 788, 25 L.R.A. 654, 43 Am.St.Rep. 89—(which involved the construction of railroad tracks within the limits of the street): "We affirm that, when a public street in a city is dedicated to the general use of the public, it involves its use, subject to municipal control and limitations, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase, or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control, and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress, or his right to light and air, shall be interfered with."

This doctrine is affirmed in several cases in which abutting owners were compensated for impairment of access to their property. Geurkink v. City of Petaluma, 112 Cal. 306, 44 P. 570 (change of natural watercourse); Wilcox v. Engebretsen, 160 Cal. 288, 116 P. 750 (change of grade); Eachus v. City of Los Angeles, 130 Cal. 492, 62 P. 829, 80 Am.St.Rep. 147 (change of grade); and McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139 (open cut and stairway in sidewalk).

In the case at bar it cannot be questioned that the plaintiffs, as abutting owners on Jackson Street, possess not only the right to the use of the street in common with other members of the public, but also a private right or easement for the purposes of ingress and egress to and from their lot, which right may not be taken away or destroyed or substantially impaired or interfered with for public purposes without just compensation therefor.

In their own words it is plaintiffs' theory, "that the State, having taken a sixty-six foot roadway in the entire width of which and entire length of which plaintiffs have an easement of ingress and egress as abutting property owners, and having constructed a subway twenty-four feet in width, varying in depth from nothing to seventeen and one-half feet, having constructed fourteen feet blind side lanes on each side of said subway, and in one portion thereof a side lane ten feet, four inches wide, and having constructed four foot sidewalks, plaintiffs' right of ingress and egress has been substantially impaired."

The defendants concede that as a general proposition a property owner whose means of ingress or egress has been substantially impaired is entitled to damages. It is the position of the defendants, however, that this right of access does not extend across the street or to the length thereof, but is confined to the right to get on or off the abutting property and to and from the general system of public streets. Defendants contend that in order for a damage to be compensable it must interfere with the owner's access to the street, not merely cause him inconvenience after he reaches it.

More specifically defendants take the view that as long as plaintiffs can step from their lot into the narrow blind lane which is a part of Jackson Street and connects their property with the main traveled portion of the thoroughfare, right of ingress and egress is not impaired in spite of the fact that in order to proceed in a northerly direction, they must drive up said lane to the northerly entrance of the subway and await an opportunity to enter the traffic emerging therefrom; and to proceed in a southerly direction they must cross said traffic, then make a right angle turn underneath the tracks.

[19] Whether under this particular set of facts the plaintiffs have suffered a compensable damage, is a question we deem already settled by the case of McCandless v. City of Los Angeles, supra. A brief résumé of the facts in that case will reveal the striking proximity with which they parallel those in the case at bar.

Plaintiff, McCandless, was the owner of a lot on Sunset boulevard in the city of Los Angeles. Said lot had a frontage of 53.1 feet and was 145 feet deep. Sunset boulevard at this point was 100 feet in width, having 60 feet thereof paved for vehicular traffic, and on each side thereof a strip of 20 feet wide from the property line to the curb, used for sidewalk and parking.

The defendant city constructed a pedestrian subway from and in front of plaintiff's property to the opposite side of Sunset boulevard. The southerly approach to the subway was an open cut in the sidewalk immediately in front of the plaintiff's property with steps leading down to the level of the subway proper. The stairway paralleled the plaintiff's front property line and was about 7 feet distant therefrom. To protect the open cut and the stairway, iron railings were constructed around three sides of the opening, the railings being above the surface of the sidewalk. The open cut and stairway were about 20 feet in length and were opposite the center portion of plaintiff's property. The plaintiff sued the city, alleging damages by reason of the impairment of ingress and egress.

This court therein held that the complaint stated a cause of action, and that questions of whether or not the improvement caused a damage special and peculiar to plaintiff's property, whether such damage constituted a substantial impairment of her right of access, and the extent of the compensation to be awarded therefor were all questions of fact to be determined by the trial court or jury.

Defendants attempt to distinguish the McCandless case, asserting that the McCandless property was on a main city thoroughfare, in a commercial zone, whereas plaintiffs' property lay on the outskirts of a small town and was used for agricultural and residential purposes. Defendants further compare the public improvements constructed, claiming that a legal distinction exists between the two cases, namely, that in the McCandless case the interference with the right of ingress and egress arose out of the fact there was difficulty in getting to and from said property into the public street, whereas in the case at bar any inconvenience arises after the public street is reached. It is their contention that plaintiffs' right herein has not been infringed as a matter of law. Defendants further claim that the inconvenience suffered by plaintiffs herein is shared with the public in general and is not therefore compensable.

These purported distinctions are not convincing. The plaintiff in the McCandless case had access to Sunset boulevard around the cut and stairway placed in front of her property in the sidewalk; just as plaintiffs herein had into the main traveled portion of Jackson street via a blind lane next to their property.

[20] The question of damage to the right of access does not depend on the location of the obstruction strictly on the owner's property line, or upon total destruction of the owner's means of access into the street proper.

[21] It is the opinion of this court that in every case involving an abutting owner's right in the street fronting his property, the questions are whether or not his property has suffered a damage peculiar to itself over and above or different from that suffered by the public generally; what constitutes a damage peculiar to the property itself; and what the amount of compensation therefor shall be. We hold that all these are questions of fact to be ascertained by the jury or the trial court. We are averse to the laying down of a hard and fast set of rules providing that under certain conditions the owner of property will be entitled to compensation and that under others he will not. Any attempt to do so would require entrance into the realm of speculation and conjecture entirely beyond the range of judicial pronouncement.

This view is borne out by the language in the case of McCandless v. City of Los Angeles, 214 Cal. 67, 71, 73, 4 P.2d 139. Substantially this same opinion is expressed in Smith v. S. P. R. R. Co., 146 Cal. 164, at page 167, 79 P. 868, 106 Am. St.Rep. 17. See, also, O'Connor v. S. P. Ry. Co., 122 Cal. 681, 55 P. 688; Brown v. City of Seattle, 5 Wash. 35, 31 P. 313, 32 P. 214, 18 L.R.A. 161.

[22] As a further defense defendants have contended that even if plaintiffs herein were damaged, the damaging occurred as the result of an exercise of police power and is damnum absque injuria. Relying very strongly upon the cases which have held that the closing of a street crossing by the railroad commission is damnum absque injuria as to nonabutting property owners, defendants maintain that plaintiffs certainly cannot complain because they must travel a narrow side lane to reach the main traveled portion of the street when they could not recover if the street were closed entirely.

Briefly, we may observe that recovery has been denied in those cases upon the ground that the injury is one suffered in common with the public, is not special or peculiar to the property—that the difference in damage is one of degree and not of kind, depending upon the property owner's proximity to the closed crossing. Compensation has also been refused on the ground that access is not in fact impaired, that convenient and reasonable means of ingress and egress is afforded, although not the quickest and closest route to traveled thoroughfares. We have noticed also that a growing number of decisions denying recovery for damages to nonabutting owners of property on closed streets are prompted by the economic factors involved. Since every property owner for a great distance therefrom is somewhat inconvenienced by the closing of a street, the question of where to stop awarding damages is not only difficult to ascertain, but the payment of said damages places a great burden upon the public whenever such closings are ordered.

The cases determining what does and what does not constitute a compensable damage are in considerable confusion.

This decision will not be benefited by a lengthy consideration of the authorities cited by defendants. Defendants contend that the case of City of San Mateo v. R. R. Commission, 9 Cal.2d 1, 68 P.2d 713, 718, decides conclusively that the closing of a grade crossing is under the police power and any injury resulting therefrom is damnum absque injuria. The court therein stated that in the absence of facts to the contrary it would assume that none of the plaintiffs' property directly abutted on the area to be closed, and that the private property in question was contiguous to either county or state highways connected by public crossings. The court then held that the nature of abutting owner's right is "an easement in the street fronting upon his lot, for the purposes of ingress and egress", and concluded that no such right had been taken away in the case before it.

In Arcadia Realty Co. v. City of St. Louis, 1930, 326 Mo. 273, 30 S.W.2d 995, 997, the court said: "But if it be assumed that plaintiffs' properties will be stripped of potential uses and their value thereby lessened, and that the streets on which such properties are located will become cul de sacs as plaintiffs claim * * * all as a result of the street vacations in question, still plaintiffs will not by reason thereof suffer injury special or peculiar to them within the meaning of the rule long established in this state. In order for a property owner to sustain an injury special or peculiar to him on account of the vacation of a street, his property or some part of it must abut on the vacated portion, or else the vacation must deprive him of reasonable access to the general system of streets."

West Virginia has the same constitutional provision as to the taking or damaging of private property for public use as California. The effect of such provision was considered by the Supreme Court of that state in the case of Richmond v. City of Hinton, 117 W.Va. 223, 185 S.E. 411, 412. That case involved the closing of a grade crossing, leaving the plaintiff's property in a cul de sac instead of on a street opening in each direction. The court says: "There are many cases which hold * * * that a property owner is not entitled to damages for inconvenience shared with the general public and differing in degree only, if the street was closed at a place where his property does not abut. * * * The just compensation, guaranteed by the Constitution, must be confined within bounds. There must be a reasonable limit beyond which the guaranty is not applicable. Conceding that there is difficulty in determining just where the bounds should be laid down, it is evident that the difficulty is accentuated if remote and indirect damages are to be allowed. Where would the line be drawn? Conceivably a mercantile business would have fewer patrons, * * * and a dwelling less eligible because of the closing of a street two or three blocks away. * * * If damages could be recovered in such circumstances, crushing burdens would be imposed on the public treasury. We are of opinion that property is damaged within the meaning of both the Constitution and the common law when the corpus or an appurtenant right is affected. In a situation such as at bar clearly the corpus remains intact. And the appurtenant right of access is not affected within the meaning of the guaranty against public encroachment so long as a convenient way of ingress and egress remains. The Constitution does not undertake to guarantee to a property owner the public maintenance of the most convenient route to his door. The law will not permit him to be cut off from the public thoroughfares, but he must content himself with such route for outlet as the regularly constituted public authority may deem most compatible with the public welfare."

See, also, New York, Chicago & St. Louis R. R. Co. v. Bucsi, 128 Ohio 134, 190 N.E. 562, 566, 93 A.L.R. 632—wherein the court concludes that it will deny compensation in all cases where the property still has reasonable access to the general system of public streets even though that is only in one direction and says:

"We are fully aware that the rule adhered to by this court in this case may be harsh under certain circumstances, but any other rule would breed untold confusion. If one nonabutter on a street that had been closed at one end could maintain an action for damages, then every other nonabutter would have the same right; and the rule of damages would be of such a speculative nature as to open a wide avenue for imposition.

"The time has come when Ohio must adopt one of the two rules. There is no middle ground. Either each and every nonabutter upon a vacated street must be given a right of action for damages, or such right must be denied all nonabutters. The term 'nonabutter' as used herein is used in the sense that the property in question does not abut upon that part of the street that is vacated."

We are not here called upon to determine whether a legal limitation should be placed on the right of recovery in the cul de sac cases by a determination that as a matter of law a nonabutting owner suffers no peculiar and special damage, and endures his injury in common with the general public, or retains a reasonable access to general traveled streets.

Our decision to regard the holding in the McCandless case, supra, as controlling with respect to the compensable nature of plaintiffs' damage herein, makes it unnecessary for us to consider this contention. The effect of the McCandless decision was to determine that a damage resulting from a factual situation similar to that with which we are here concerned, is compensable. This result was emphasized in the decision of the District Court of Appeal in the McCandless case, McCandless v. City of Los Angeles, 10 Cal.App.2d 407, 52 P.2d 545, in which a hearing by this court was denied. Said case held that an instruction to the effect that any taking or damaging of the McCandless property was done under the police power and therefor not compensable, was properly refused. The earlier decision in the same case by this court was cited as being authoritative on this point.

In the instant case, the several property owners whose access is impaired by the construction of a subway in the street on which their property fronts, suffer a special and peculiar damage to their particular property different from that suffered in common with the public in general; and it has been decided as a question of fact that their means of ingress and egress has been substantially impaired. Furthermore, the ascertainment of those who are entitled to compensation presents us with no extensive and difficult problem.

The case of Powell v. McKelvey, 56 Idaho 291, 53 P.2d 626, is not in point for the reason that the Idaho Constitution does not grant compensation for a "damaging" as well as a "taking" of private property. Furthermore, the side lanes in said case where not blind and were as a matter of fact held not to interfere with the lot owner's right of access. Ralph et al. v. Hazen et al., 68 App.D.C. 55, 93 F.2d 68, is not decided under a constitutional provision such as article I, section 14 and, therefore, is likewise not applicable here.

[23] We have examined the findings of the trial court and do not find that they contain inconsistencies or irreconcilable conflicts on any material issues. Defendants contend that the trial court erred in computing the amount of damage to plaintiffs' property on the basis of a 120-foot frontage on Jackson street when said frontage was in fact only 118 feet as indicated on maps in evidence, which maps were agreed upon by the parties to be accurate. Reference to one of said maps reveals that the said frontage is recorded thereon to be 118 feet "plus or minus". In addition, defendants themselves, in their answer, stated that the frontage of plaintiff's property measured "not more than 120 feet". Since there is some evidence to support said finding of the trial court, and since if such discrepancy did exist, it is so infinitesimal as to come within the rule of de minimus, we do not feel that the interference of this court is required.

Defendants also complain that the finding of the trial court as to damage,—namely, that the property was damaged to the extent of $35 per front foot, 125 feet deep, and that the remainder had been damaged in the sum of $200—was not supported by the evidence for the reason that all of the valuation testimony was based on the full depth of the property and not upon the basis of a subdivision at a depth of 125 feet.

[24-26] There is little merit in this contention. That the trial judge is not bound by the opinion of the witnesses on market value is well settled. The province of such testimony is only to aid the court in arriving at a conclusion. 10 Cal.Jur. 972. Furthermore, in the instant case, the trial judge visited the premises, and the information so obtained "is independent evidence to be taken into consideration * * * in determining the issues of the case." Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 297, 83 P.2d 942, 945 (an eminent domain case) and cases cited. In Joint Highway Dist. No. 9 v. R. R. Company, 128 Cal.App. 743, 18 P.2d 413, 421, the court did not even view the premises, but it was held therein that "the trial court was not obliged to blindly accept the estimate of any witness on market value, and properly made its own determination of the ultimate fact, aided by the testimony of the various witnesses weighed in the light of all of the evidence before the court."

The facts are that plaintiffs' property is admittedly zoned as industrial property and testimony as to its value as such was received; the trial court viewed the premises and reached its own conclusion as to the value of 125-foot front strip of the property and the back portion thereof; and the total amount of the damage awarded was within the scope of the testimony of the valuation witnesses. Joint Highway Dist. No. 9 v. R. R. Company, supra, 128 Cal. App. page 762, 18 P.2d 413; City of Stockton v. Ellingwood, 96 Cal.App. 708, 718, 275 P. 228. In view of these facts we cannot say that the finding of the trial court was not supported by the evidence.

Other contentions raised by both parties do not require further discussion, for they have been examined and found to be without merit.

For the reasons and upon the authorities contained herein, the judgment of the trial court is affirmed.

We concur: SHENK, J.; CURTIS, J.

Maria Simas BETTENCOURT, Plaintiff and Respondent, v. STATE of California, Defendant and Appellant.

S. F. 16036.

Supreme Court of California.

June 27, 1940.

Rehearing Granted July 27, 1940.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Prior opinion, 94 P.2d 1066.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellant.

E. H. Christian and Eugene K. Sturgis, both of Oakland, for respondent.

CARTER, Justice.

This is one of several appeals from judgments entered in actions for damages arising out of highway construction work. In each instance the facts are substantially the same, although the extent of the injury varies.

The amount awarded for damage in this particular case was the sum of $3,500. All material legal points here presented are disposed of in a decision this day filed in the case of Rose et al. v. State of California et al., Cal.Sup., 105 P.2d 302. Upon the grounds and for the reasons there given, the judgment herein is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.

Joseph F. BRANDON, also Known as Joe Brandon, Plaintiff and Respondent, v. STATE of California, Defendant and Appellant.

S. F. 16037.

Supreme Court of California.

June 27, 1940.

Rehearing Granted July 27, 1940.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Prior opinion, 94 P.2d 1066.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellant.

E. H. Christian and Eugene K. Sturgis, both of Oakland, for respondent.

CARTER, Justice.

This is one of several cases in which an appeal has been taken by the defendant from a judgment rendered against it for damages allegedly sustained by the plaintiff as the result of the construction of an improvement in the street or highway fronting the plaintiff's property. The facts in each case are substantially the same, although the amount of damage in each instance varies. For the injury to his property, plaintiff herein was awarded the sum of $750. All material legal questions here presented are determined by our decision this day filed in the case of Rose et al. v. State of California et al., Cal.Sup., 105 P. 2d 302. Upon the authority of and for the reasons set forth therein, the judgment appealed from herein is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.

A. S. JONES and R. P. King, Plaintiffs and Respondents, v. STATE of California, Defendant and Appellant.

S. F. 16038.

Supreme Court of California.

June 27, 1940.

Rehearing Granted July 27, 1940.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Prior opinion, 94 P.2d 1066.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellant.

E. H. Christian and Eugene K. Sturgis, both of Oakland, for respondents.

CARTER, Justice.

This is an appeal by the defendant from a judgment for plaintiffs in an action for damages sustained as the result of the construction of a subway in the street fronting plaintiffs' property. The facts are substantially the same as those presented in several similar cases this day decided, the amount of the award in the instant case being $6,000. All material legal questions here presented have been determined in our decision filed this day in the case of Rose et al. v. State of California et al., Cal. Sup., 105 P.2d 302. Upon the authority of and for the reasons set forth therein, the judgment appealed from is hereby affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.

Ella T. LAUGHLIN (a Widow), Plaintiff and Respondent, v. STATE of California, Defendant and Appellant.

S. F. 16039.

Supreme Court of California.

June 27, 1940.

Rehearing Granted July 27, 1940.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Prior opinion, 94 P.2d 1067.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellant.

Louis J. Trabucco and Eugene K. Sturgis, both of Oakland, for respondent.

CARTER, Justice.

Defendant herein appeals from a judgment of the superior court of Alameda county in favor of plaintiff, awarding $7,500 for the damages allegedly sustained by plaintiff as the result of the construction of a subway in the street fronting her property. This is one of a series of similar cases in which the facts, rights and liabilities, are substantially the same. All material legal questions here presented are disposed of in a decision this day filed in the case of Rose et al. v. State of California et al., Cal.Sup., 105 P.2d 302. Upon the authorities there cited and for the reasons there given, the judgment herein is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.

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40 Cal.App.2d 582

PEOPLE v. DERR.

Cr. 1737.

District Court of Appeal, Third District, California.

Sept. 11, 1940.

Criminal law 🔑1182

Where transcript on appeal was filed June 25, 1940, and no brief had been filed in behalf of appellant, and cause was regularly placed on calendar for oral argument on September 11, and no appearance was made for appellant, conviction was affirmed. Pen. Code, § 1253.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Herman Derr was convicted of burglary, and he appeals.

Affirmed.

W. H. Woodward and Chas. H. Epperson, both of Stockton, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

The appellant was convicted in the superior court of San Joaquin county of the crime of burglary, a felony.

The transcript on appeal was filed in this court June 25, 1940. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on September 11, 1940. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.

GUILLIAMS v. HOLLYWOOD HOSPITAL et al.*

Civ. 12036.

District Court of Appeal, Second District, Division 1, California.

Sept. 6, 1940.

Hearing Granted Nov. 4, 1940.

1. Pleading ⇨192(3)

In patient's action against hospital and physicians to recover damages for a broken rib, allegation in complaint that defendants caused rib to be broken was demurrable as a "conclusion," where other allegations affirmatively showed that patient had no knowledge as to how, when, or where his rib was broken.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

2. Negligence ⇨111(1)

Negligence may be charged in general terms, and it is sufficient to state what was done and to say that it was negligently done, without stating the particular omission which rendered the act negligent.

3. Hospitals ⇨8

Physicians and surgeons ⇨18(4)

In action by hospital patient against hospital and physicians to recover damages for a broken rib which was allegedly broken after patient entered hospital, complaint was demurrable as failing to allege what the defendants did or omitted to do.

4. Negligence ⇨121(2)

"Res ipsa loquitur" rule is not a principle of pleading, but is peculiarly applicable in the realm of evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

5. Negligence ⇨121(2)

The presumption of negligence symbolized by the phrase "res ipsa loquitur" cannot be relied upon to supply the deficiency of a faulty pleading and thus prevent the pleading from being demurrable, although such presumption is available in the trial of an action.

6. Hospitals ⇨7

A hospital corporation was not guilty of negligence in failing to discover that one of its patients had a broken rib, since the discovery of a broken rib and the treatment thereof constituted act of "practicing medicine," and hospital as a corporation lacked authority under statutes to practice medicine, and hospital had no legal duty to examine patient from time to time for broken bones. Stat.1937, p. 1255, § 2008.

See Words and Phrases, Permanent Edition, for all other definitions of "Practicing Medicine".

7. Hospitals ⇨7

A hospital is not an insurer of the safety of its patients, and there is nothing about a hospital, as such, that is inherently dangerous.

8. Pleading ⇨48

A plaintiff has burden of alleging facts constituting a cause of action, and such burden cannot be shifted and issues cannot be joined by resort to speculation and presumptions.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Andrew E. Guilliams against the Hollywood Hospital, a corporation, and others. From a judgment in favor of defendant Hollywood Hospital, plaintiff appeals.

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* Subsequent opinion 114 P.2d 1.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Fred O. Reed and Richard L. Kirtland, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by plaintiff from the judgment in favor of defendant Hollywood Hospital entered following the sustaining of a demurrer to the second amended complaint, without leave to amend. The demurrer was general and special. The complaint alleges in substance that plaintiff entered the Hollywood Hospital as a patient, and as such was the subject of an operation on the right kidney. In particular it was alleged "That after plaintiff entered said hospital to be operated upon, as aforesaid, and while plaintiff was so under the care, attendance and control of said defendants, as aforesaid, and through the negligence, recklessness and want of ordinary care on the part of said hospital, conjoined with the negligence, recklessness and want of care on the part of each of said other defendants herein, one of plaintiff's ribs on his left side, to-wit, his second floater rib, was broken; that plaintiff does not know whether his said rib was broken before, or during or after said operation was performed, as aforesaid, but alleges the fact to be that his said rib was not broken before he entered said hospital and came under the care, attendance and control of said defendants, as aforesaid, and that it was broken at some time after he so entered said hospital and while he was so under the care, attendance and control of said defendants, as herein set forth, and through the negligence, recklessness and want of care on the part of said defendants and each of them; that said defendants and each of them wholly omitted and failed to render, and they did not render this plaintiff any care or treatment for said broken rib for a period of about six weeks after said operation, and that none of said defendants became aware of the fact that plaintiff's said rib had been broken, or being aware of said fact, negligently, recklessly and wantonly and designedly failed and refused to render to plaintiff any care or treatment for said broken rib; that by the exercise of ordinary, or any care or skill in the care and attendance upon said plaintiff by said defendants and by the use of any skill on the part of said defendant Laraway, John Doe and Richard Roe, said defendants and each of them would have become aware and would have known that plaintiff's rib had been broken as aforesaid."

The complaint further alleges "That defendants Dr. Laraway, John Doe and Richard Roe so carelessly, negligently and unskillfully performed said operation that said defendants *caused* said second floater rib on plaintiff's left side to be broken, and that in *causing* said rib to be broken as aforesaid, said defendants and each of them failed to use and exercise the ordinary skill of surgeons in this community in performing such operation as said defendants were engaged to perform for plaintiff as herein set forth, or to use any care, *or* plaintiff alleges that said rib was *caused* to be broken through the carelessness, negligence and recklessness of each of said defendants in caring for and attending plaintiff *prior* to said operation or *during* said operation or *after* said operation, but that as to which of said times said rib was *so caused* to be broken, plaintiff is uninformed." (Italics added.)

[1] Thus it will be seen that plaintiff alleges in substance that defendants so negligently performed the operation that they *caused* the rib to be broken, *or*, as the complaint continues, said rib was caused to be broken prior to, during or after said operation, but as to which of said times said rib was caused to be broken, plaintiff is uninformed. In other words, plaintiff's complaint affirmatively shows that plaintiff has no knowledge as to how, when or where his rib was broken. This being true, the allegation that defendants *caused* it to be broken, as a matter of law, is a conclusion. In addition to its legal characterization such allegation might also properly be regarded as pure speculation.

[2, 3] It is appellant's contention that it is sufficient to plead negligence generally; that it is enough to aver such facts as set forth what the defendant did or omitted to do and aver that his conduct in that behalf was careless and negligent. It is argued by appellant that the complaint, having met this requirement, is sufficient. In Dunn v. Dufficy, 194 Cal. 383, 228 P. 1029, 1030, the rule is declared to be as follows: "Negligence may be charged in general terms; that is, what was done being stated,

it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent." Within the application of the above rule, plaintiff's complaint, even in the form of a general allegation, is far short of the requirements of the rule. Indeed, the complaint fails to conform to the specifications noted as essential by appellant, for nowhere in said complaint are averred "such facts as set forth what the defendant did or omitted to do".

[4, 5] In addition to the foregoing, it is argued, quoting from appellant's brief: "Further it is settled law that where, from the facts alleged, it appears that the doctrine of res ipsa loquitur applies, no allegation of negligence is required." No citations appear in support of this last-mentioned contention. Nor is it likely that any can be found. Respondent points out, and properly, that "res ipsa loquitur" "is not a principle of pleading, but is peculiarly applicable in the realm of evidence". In that connection it has been declared that "When the trial court was considering the general demurrer filed by respondent to the second amended complaint, the duty was imposed upon the court of testing the sufficiency of the complaint by the established rules of pleading. Rules of evidence could have no place in such a consideration. Rules of evidence apply to a trial of issues of fact. Respondents' general demurrer necessarily assumed the truth of all material facts alleged in the complaint. A disputable presumption whose effect was simply to relieve appellant from the necessity of proving that respondent was negligent and that such negligence was the proximate cause of appellant's injuries could not extend further and relieve him also of the burden of setting out in his pleading proper allegations which would show a cause of action which he proposed later to substantiate by the production of evidence." Graybiel v. Consolidated Ass'ns, Ltd., 16 Cal.App.2d 20, 26, 60 P.2d 164, 167. With regard to the phrase res ipsa loquitur, Wigmore observes that "the question has come to be increasingly common whether the fact of the occurrence of an injury (unfortunately now termed 'accident', by inveterate misuse) is to be regarded as raising a presumption of culpability on the part of the owner or manager of the apparatus. 'Res ipsa loquitur' is the phrase appealed to as symbolizing the argument for such a presumption". Wigmore on Evidence, vol. IV, sec. 2509, p. 3556. Literally the phrase is interpreted to mean "the thing speaks for itself"; a Latin phrase useful in its place, but in no sense a "doctrine" as that term is commonly understood and applied in the law. Although available in the trial of an action, such a presumption cannot be relied upon to supply the deficiency of a faulty pleading and thus afford a refuge from the perils of a demurrer.

[6] Finally, it is contended by appellant in substance that plaintiff's complaint sufficiently charges negligence on the part of respondent hospital by reason of the alleged failure of respondent to discover plaintiff's broken rib. In that connection it is sufficient to note that respondent, being a corporation, is without authority to practice medicine. That privilege, as pointed out by respondent, is denied to corporations by section 2008 of the Business and Professions Code, Stat.1937, p. 1255. The discovery of a broken rib and the treatment thereof, after the discovery, would appear to be an act of practicing medicine. It should also be noted that no legal duty devolved upon respondent hospital, in the circumstances, to examine plaintiff from time to time for broken bones.

[7, 8] It would serve no purpose to comment on the various decisions cited by the parties hereto in support of their respective contentions, for a sufficient resemblance of the facts in such cases, when compared to the facts in the case at bar, is lacking to the extent that reference thereto as examples is of little, if any, value. Defendant hospital is in no sense an insurer, nor can it be successfully contended that there is anything about a hospital, as such, that is inherently dangerous. The attempt, therefore, of plaintiff, in the circumstances, to base a cause of action upon a lack of knowledge, as the complaint in substance affirmatively shows, finds no support in the law. Although in recent years strict rules of pleading have been somewhat relaxed, nevertheless the burden upon the plaintiff of alleging facts constituting a cause of action remains in full force and effect. It cannot be shifted; nor can issues be joined by resort to speculation and presumptions.

The demurrer properly was sustained.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: YORK, P. J.; WHITE, J.

40 Cal.App.2d Supp. 831

PEOPLE v. AUSEN.

No. Cr. A 1705.

Appellate Department, Superior Court, Los Angeles County, California.

Aug. 24, 1940.

1. Street railroads ⟹122

The statute providing that vehicular traffic facing a red or "stop" signal shall stop before entering nearest crosswalk at an intersection is applicable to motormen operating street cars. Vehicle Code, § 476(c) 1 (e, f), St.1939, pp. 1607, 1608.

2. Municipal corporations ⟹703(1)

The statute providing that vehicular traffic facing a red or "stop" signal shall stop before entering nearest crosswalk at an intersection does not state an absolute rule, especially in view of provision that no person shall disobey statute except when it is necessary to avoid a collision, or in case of other emergency, since such provision discloses an intent to establish a rule which can be obeyed within reason. Vehicle Code, § 476(c) 1 (e, f), St.1939, pp. 1607, 1608.

3. Street railroads ⟹122

In prosecution of street car motorman for violating statute providing that vehicular traffic facing a red or "stop" signal shall stop before entering nearest crosswalk at an intersection, denying cross-examination of people's witness was error, where questions bore directly on issue of whether motorman's conduct was willfully in violation of law, or was justified by an "emergency" within meaning of statute. Vehicle Code, § 476(c) 1 (e, f), St. 1939, pp. 1607, 1608.

4. Street railroads ⟹122

In prosecution of street car motorman for violating statute providing that vehicular traffic facing a red or "stop" signal shall stop before entering nearest crosswalk at an intersection, where traffic signals involved did not include a yellow or "caution" signal, provisions of statute concerning traffic facing yellow or "caution" signals were inapplicable and motorman was bound to justify his conduct, if at all, under "emergency" clause of statute. Vehicle Code, § 476 (b) 1 (f), § 476(c) 1 (e, f), §§ 511, 511.7, and 514, St.1939, pp. 1607, 1608, 2108, 2109, and St.1935, p. 178.

5. Municipal corporations ⟹707

Although a bona fide effort must be made, and reasonable care used, to comply with Vehicle Code, when a person operating a vehicle is approaching an intersection at a speed which is otherwise lawful and signal, without preliminary warning, changes from "Go" to "Stop" while vehicle is so close to crosswalk line that it is physically impossible to stop it before crossing that line, operator may, if charged with violation of Code, show circumstances under which he proceeded, in order that it may be determined as a fact whether "emergency" contemplated by Code existed. Vehicle Code, § 476(b) 1, § 476(c) 1 (e, f), §§ 511, 511.7, and 514, St.1939, pp. 1607, 1608, 2108, 2109, and St.1935, p. 178.

6. Street railroads ⟹122

In prosecution of street car motorman for violating statute providing that vehicular traffic facing a red or "stop" signal shall stop before entering nearest crosswalk at an intersection, objections to questions addressed to witness concerning weather, speed of street car when witness first saw it, and its speed when signal changed, should have been overruled. Vehicle Code, § 476(b) 1, § 476(c) 1 (e, f), §§ 511, 511.7, and 514, St.1939, pp. 1607, 1608, 2108, 2109, and St.1935, p. 178.

◆

Appeal from Municipal Court of Los Angeles.

O. L. Ausen was convicted by a judgment of the Municipal Court of the City of Los Angeles of violating the Vehicle Code, § 476(c) 1, St.1939, p. 1607, and he appeals.

Reversed and remanded to Municipal Court for new trial.

Gibson, Dunn & Crutcher, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

SCHAUER, Judge.

Defendant appeals from a judgment of conviction of violating paragraph 1 of subsection (c) of section 476 of the Vehicle Code of California, St.1939, p. 1607, which in material part reads as follows:

"Whenever traffic is controlled by official traffic control signals exhibiting the words 'Go,' 'Caution,' or 'Stop,' or exhibiting different colored lights successively, the following colors only shall be used, and said terms and lights shall indicate as follows:

* * *

"(c) Red alone or 'Stop.'

"1. Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at an intersection or at such other point as may be indicated by a clearly visible line, and shall remain standing until green or 'Go' is shown alone * *."

The evidence shows that defendant, on the occasion in question, was acting as a motorman operating a street car on tracks on a public highway in the city of Los Angeles and that his car was so operated in an easterly direction on Seventh Street that it entered the intersection of Towne Avenue while a traffic signal on the southwest corner thereof showed the word "Stop".

[1] Defendant moved to dismiss the complaint on the ground that the law he was charged with violating was not applicable to motormen operating street cars. Subsection (e) of said section 476 expressly provides that "The motorman of any street car shall obey all official traffic signals as applicable to vehicles * * *" (with an exception not material in this case). We hold that such law is applicable to motormen operating street cars and that the motion was properly denied. During the trial, however, an error of law occurred which entitles the defendant to a new trial.

[2, 3] We do not regard the provisions of paragraph 1, subsection (c), section 476, Vehicle Code (above quoted), as stating a rule absolute under all circumstances. Subsection (f) of said section, itself, provides that "No person shall disobey the directions of this section except when it is necessary for the purpose of avoiding a collision or in case of other emergency * * *," thereby disclosing an intent to establish a rule which could be obeyed within reason but which did not call for inexorable compliance regardless of circumstances. An emergency is not necessarily something wholly unexpected; according to Webster's New International Dictionary (1930), it may also comprehend a pressing necessity or exigency. In 20 C.J. at p. 499, we find it defined as "Any event or occasional combination of circumstances which calls for immediate action or remedy; * * * a perplexing contingency or complication of circumstances." It was error, under the circumstances disclosed in the record of this case, to sustain objections to questions asked on cross-examination of the People's principal witness and which questions bore directly on the issue as to whether defendant's conduct in the premises was wilfully in violation of the law or was legally justified by an "emergency," within the meaning of the statute.

We are strengthened in our construction of the "emergency" clause of the statute as being applicable here by the following considerations. Where official traffic signals have two signs only—"Stop" and "Go"—with no preliminary warnings of change, strict compliance with the letter of the law in every instance (disregarding the emergency clause) would be almost impossible of achievement and bona fide efforts to attain such compliance would tend to defeat one of the principal purposes of the law. Traffic signals are not installed to *retard* traffic—on the contrary, their principal purpose, along with promoting safety for users of highways generally, is to *expedite* traffic movement. So important is the *flow* of traffic that Vehicle Code, § 511.7, St.1939, p. 2109, provides that: "Local authorities in timing traffic signals may so regulate the timing thereof as to permit the movement of traffic in an orderly and safe manner at speeds slightly at variance from the speed otherwise applicable within the district or at intersections under this code." A signal-marked intersection with a prima facie lawful crossing speed of 15 or perhaps 25 miles per hour, according to the district in which located, could never be approached safely at any such speed if the operator of the vehicle were under the *absolute* necessity, with penal sanction, of stopping, in any event whatsoever whenever the signal changed to show "Stop", "before entering the nearest crosswalk * * * [to] remain standing until green or 'Go' is shown alone". Such an interpretation of the law would make every signal-marked intersection of every street a "boulevard stop"—every "Go" signal would be first a stop signal; the flow of traffic would be but spasmodic drippings.

Operators in attempting in good faith to comply with such an unreasonable construction of the law would be menaced by the provisions of section 514 of the same code, St.1935, p. 178, requiring that: "No person shall drive upon a highway at such a slow speed as to impede or block the normal and *reasonable movement* of traffic * * *."

[4] Further provisions of said section 476 disclose legislative recognition of the fact that it would be impracticable to require a vehicle absolutely to stop under all circumstances on a change of signal. Subsection (b) of the cited section permits the use of the word "Caution" and a yellow light on traffic signals and makes the following rules applicable when such yellow light or caution signal is displayed [476, Vehicle Code (b) 1]: "Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at the intersection or at a marked line, but if such stop can not be made in safety a vehicle may be driven cautiously through the intersection or past such signal." There is no more reason for recognizing the physical fact that a moving vehicle requires time and space in which to change its inertia from motion to repose when confronted with a yellow light than there is when it faces a red light. In either case the duty to stop is imperative unless the circumstances depicted by subsection (b) 1 or by subsection (f) are present. Since in the instant case the traffic signals involved did not include the yellow or "Caution" signal, the provisions of said subsection (b) 1 are inapplicable and defendant must justify his conduct, if at all, under the "emergency" clause of subsection (f).

[5, 6] Certainly a bona fide effort must be made, and reasonable care used, to comply with the law in every instance. But when a person operating a vehicle is approaching an intersection at a speed which is otherwise lawful under all extant circumstances (see Vehicle Code, section 511, St.1939, p. 2108), and when the signal, without preliminary warning, changes from "Go" to "Stop" while the vehicle is so close to the crosswalk line that it is physically impossible to stop it before crossing that line, the operator is entitled, if charged with a violation of the law, as was the defendant here, to show the circumstances under which he proceeded, in order that it may be determined as a fact whether the "emergency" contemplated by the law existed. The objections to the three questions addressed to the witness Fujiki inquiring concerning the weather, the speed of the street car when the witness first saw it (while it was opposite the center of a safety zone) and its speed at the time the signal changed (the position of the car at that time, according to later adduced testimony of the witness Ashworth, being approximately 10 feet West of the signal) were improperly interposed and should have been overruled.

The judgment is reversed and the cause is remanded to the Municipal Court for a new trial.

I concur: SHAW, P. J.

16 Cal.2d 59

PEOPLE v. BLACK'S FOOD STORE et al.
SAME v. GREEN FROG FOOD EMPORIUM et al.

No. 5320.

Supreme Court of California.

Aug. 19, 1940.

As Modified on Denial of Rehearing
Sept. 16, 1940.

1. Appeal and error 🔑954(3)

Where the evidence adduced on application for preliminary injunctions was conflicting, and there was no showing that the injunctions would result in unusual detriment to defendants, the Supreme Court could not hold that the trial court abused its discretion in granting orders for preliminary injunctions. Code Civ.Proc. § 527.

2. Trade-marks and trade-names and unfair competition 🔑68(2)

The Legislature has the authority under its police powers to regulate business for the general welfare of the public by prohibiting merchants from selling products below cost for the purpose of injuring competitors and destroying competition. Gen.Laws 1937, Act 8781, § 3.

3. Statutes 🔑114(1)

The title to the Unfair Practices Act, as amended, sufficiently embraces the subject-matter included therein to conform to the constitutional provision requiring the subject of an act to be expressed in its title. Gen.Laws 1937, Act 8781; Const. art. 4, § 24.

4. Appeal and error 🔑954(3)
Injunction 🔑135

The granting or denial of a preliminary injunction on a verified complaint, together with oral testimony or affidavits, even though the evidence with respect to the absolute right therefor may be conflicting, rests in the sound discretion of the trial court, and the order may not be interfered with on appeal except for an abuse of discretion.

5. Trade-marks and trade-names and unfair competition 🔑95(1)

Where verified complaints alleged that merchants sold merchandise below cost for purpose of injuring competitors and destroying competition contrary to statute, and merchants' representatives testified that they did sell, offer for sale, and advertise goods in question at prices below invoice or replacement cost, but did so merely to increase volume and not to injure competitors or destroy competition, a sound discretion was conferred on the trial court to grant or deny preliminary injunctions, and the court did not abuse its discretion in granting preliminary injunctions. Gen.Laws 1937, Act 8781, § 3; Code Civ.Proc. § 527.

6. Trade-marks and trade-names and unfair competition 🔑95(1)

Orders granting preliminary injunctions against merchants charged with unlawfully selling products for less than cost for the purpose of injuring competitors or destroying competition did not determine the merits of the controversies but had the effect of merely maintaining the status quo until the cases were decided on their merits. Gen. Laws 1937, Act 8781, § 3; Code Civ.Proc. § 527.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Consolidated proceedings by the People of the State of California against Black's Food Store and others and against the Green Frog Food Emporium and another, charging defendants, as merchants, with unlawfully selling products for less than cost for the purpose of injuring competitors and destroying competition contrary to statute. From orders granting preliminary injunctions, defendants appeal.

Affirmed.

Levinsky & Jones, Gilbert L. Jones, and Jack J. Miller, all of Stockton, for appellants.

F. C. Clowdsley, Dist. Atty., and Maxwell M. Willens, Asst. Dist. Atty., both of Stockton, for respondent.

THOMPSON, Justice pro tem.

The above-entitled cases were consolidated for trial. Each complaint charges the defendants, as merchants, with unlawfully selling products for less than cost "for the purpose of injuring competitors and destroying competition", contrary to section 3 of the Unfair Practices Act of California, as amended in 1937. Stats. 1937, p. 2395; 2 Deering's Gen.Laws of 1937, p. 4157, Act 8781. Upon the hearing of a notice to show cause, at which time evidence was adduced, the court, in the exercise of its discretion, issued preliminary injunctions under the provisions of section 527 of the Code of Civil Procedure. From the orders granting the preliminary injunctions the respective defendants have appealed. The records are presented on a bill of exceptions. The only question involved is whether the court abused its discretion in granting the orders for preliminary injunctions.

[1-3] Since the evidence which was adduced upon the application for preliminary injunctions is conflicting and there was no showing that the temporary injunctions will result in unusual detriment to the defendants, we may not hold that the court abused its discretion. It has been held upon sound principle that the legislature has the authority, under its police powers, to regulate business for the general welfare of the public, by prohibiting merchants from selling products below cost "for the purpose of injuring competitors and destroying competition". Wholesale Tobacco Dealers Bureau of So. Calif., Inc., v. National Candy & Tobacco Co., 11 Cal.2d 634, 82 P.2d 3, 8, 118 A.L.R. 486. The title to the Unfair Practices Act, as amended, sufficiently embraces the subject-matter included therein to conform to article IV, section 24, of the Constitution of California.

[4] The authorities are numerous and uniform to the effect that the granting or denial of a preliminary injunction on a verified complaint, together with oral testimony or affidavits, even though the evidence with respect to the absolute right therefor may be conflicting, rests in the sound discretion of the trial court, and that the order may not be interfered with on appeal, except for an abuse of discretion. Kendall v. Foulks, 180 Cal. 171, 179 P. 886; Metropolitan Laundry Co. v. Greenfield, 20 Cal.App.2d 246, 66 P.2d 722, 14 Cal.Jur. 180, sec. 7; 32 C.J. 29, sec. 11; 14 R.C.L. 312, secs. 11 and 12.

[5, 6] In the present case the applications for temporary injunctions were heard on the verified complaints which specifically allege that the merchandise was sold below cost "for the purpose of injuring competitors and destroying competition". Representatives of the defendants testified that they did sell, offer for sale and advertise the goods in question "at prices below their invoice or replacement cost", but that they did so merely "to increase the volume of our business", and that they had no intention of thereby "injuring competitors" nor did they "intend to destroy competition". The evidence in this case therefore created a mere conflict on the material issue regarding the intention with which the goods were sold below cost. A sound discretion was therefore conferred upon the trial court to grant or deny the preliminary injunctions. It does not appear that discretion was abused. The orders do not determine the merits of the controversies. They have the effect of merely maintaining the status quo until the cases are decided on their merits.

The orders are affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; CARTER, J.; SPENCE, J. pro tem.

I concur in the judgment: HOUSER, J.

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40 Cal.App.2d 174

KLINE v. SAN FRANCISCO UNIFIED SCHOOL DIST. et al.

Civ. 11383.

Supreme Court of California.

Sept. 16, 1940.

Schools and school districts ⚷89

The statute imposing liability upon a school district for any judgment against the district on account of injury arising out of negligence of the district or its officers, or employees, must be liberally construed with a view to effect its objects and promote justice. School Code, § 3; § 2.801, as amended by St.1937, p. 414.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Andrew R. Schottky, Judge.

On petition for a hearing in the Supreme Court after decision by the District Court of Appeal.

Petition denied.

For prior opinion, see 104 P.2d 661.

Philander B. Beadle and Jasper L. Searles, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel) for respondents.

PER CURIAM.

The petition for a hearing after decision by the District Court of Appeal is denied. It should be observed, however, that the statement in the opinion of the District Court of Appeal, 104 P.2d 661, 662, that the section of the School Code under which the plaintiff's claim was made "must be construed strictly", was not necessary to the decision and in addition is contrary to the provision of section 3 of that code which enjoins a liberal construction of the provisions of said code and all proceedings under it "with a view to effect its objects and to promote justice".

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16 Cal.2d 211

YOUNG v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

L. A. 17491.

Supreme Court of California.

Sept. 19, 1940.

1. Certiorari 🔑5(1)

A petition for writ of review will not lie where the order sought to be reviewed is appealable. Code Civ.Proc. § 1068.

2. Certiorari 🔑5(1)

In action to quiet title to realty, an order striking an order joining as party defendant one claiming judgment lien upon realty and seeking annulment of judgment debtor's deed thereof to plaintiff, and striking out a certain cross-complaint filed by judgment creditor and default of the plaintiff in failing to answer the cross-complaint, within time, and striking an order substituting bankruptcy trustee as party defendant for assignee of judgment against bankrupt, who conveyed realty to plaintiff, was an "appealable order" and petition for writ of review would not lie on behalf of the trustee, since, when trustee was dismissed from the case, litigation was ended as to him. Code Civ.Proc. §§ 379, 389, 1068.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

Action to quiet title to realty by John Crofton against the Pacific Coast Joint Stock Land Bank of San Francisco in which O. F. Neal was joined as a party defendant and filed a cross-complaint to establish a judgment lien on realty and to declare a deed thereof to plaintiff to be void. The order bringing in defendant Neal and his answer and cross-complaint were stricken from the files, and a default entered on the cross-complaint by the clerk, and an order substituting Fred S. Young, trustee in bankruptcy of the trust estate of Thomas Nugent Crofton, for O. F. Neal as defendant and cross-complainant, was set aside by the Superior Court in and for the County of San Diego and Edward J. Kelly, Judge thereof, and the trustee petitions for a writ of review.

Writ discharged.

For prior opinion, see 98 P.2d 770.

F. L. Richardson, of San Diego, for petitioner.

O. A. Thorpe and Gray, Cary, Ames & Driscoll, all of San Diego, for respondents Superior Court etc.

SHENK, Justice.

This is a proceeding in review to annul an order of the respondent Superior Court made on June 17, 1939, in an action to quiet title pending in said court, entitled John Crofton v. Pacific Coast Joint Stock Land Bank of San Francisco (No. 93526), hereinafter called the bank. The real property involved had been owned by Thomas N. Crofton, the father of John Crofton. On April 26, 1935, the father transferred the title to said real property to his son. At the time of said transfer Thomas N. Crofton was indebted to the bank in the sum of $4,951.

The following occurred in 1938: On March 28th the bank recovered a judgment against Thomas N. Crofton in the sum of $4,951 on the indebtedness aforesaid, with interest and costs. On April 28th execution was issued on that judgment and, on June 21st, was levied on said real property on the theory that the transfer of title had been made for the purpose of defrauding creditors and that the property still belonged to Thomas N. Crofton. On June 30th the bank assigned the judgment to O. F. Neal. On July 1st, Thomas N. Crofton filed a voluntary petition in bankruptcy and on July 2d was adjudged a bankrupt. On July 18th John Crofton commenced his action to quiet title, naming the bank as the defendant. On October 1st Neal obtained an ex parte order making him a party defendant in the action. The order was made on the ground that he was a necessary party to the determination of the rights of the parties to the action. Neal thereupon, and pursuant to section 442 of the Code of Civil Procedure, served on the plaintiff's attorney and filed an answer to the complaint and a cross-complaint alleging that the transfer of the real property from Thomas N. Crofton to John Crofton was for the purpose of defrauding creditors and claiming a lien on the real property in the amount of the judgment against Thomas N. Crofton. An answer to the cross-complaint was not served or filed by the plaintiff within the time allowed by law and on October 20th, on Neal's application, the clerk entered the default of the plaintiff and cross-defendant. On November 10th receipt of a copy of an answer to the cross-complaint was acknowledged in the name of the attorney for the cross-complainant Neal, and the original thereof was filed on November 14th.

The following occurred in 1939: In May, Fred S. Young, as trustee of the bankrupt estate of Thomas N. Crofton moved the court for an order substituting himself as party defendant and cross-complainant in the place of Neal on the ground that, as such trustee, he had succeeded to all the right and interest of the bankrupt in said real estate or of Neal, whose claim had been filed in the bankruptcy proceeding. On June 5th the court granted the motion and made the order of substitution.

On June 6th, Fred S. Young, as trustee, moved to strike the plaintiff's answer to the cross-complaint on the ground that it had been filed after the time allowed by law and after the plaintiff's default had been entered. On June 13th the motion was granted. On June 24th, the plaintiff moved to strike his default entered by the clerk on October 20, 1938; also to strike the order striking his answer to the cross-complaint. That motion was made on the ground that the default entry was void, that the default was waived by the receipt of a copy of the answer by the defendant and cross-complainant's attorney, and on the further ground of mistake, inadvertence, surprise and excusable neglect. On the same day the plaintiff also moved to strike the order joining Neal as a party defendant, and the answer and cross-complaint filed by Neal. The latter motion was made on the ground that Neal was not a proper party defendant, that he was not brought in as required by law, and that service of said answer and cross-complaint was not made in accordance with law. On June 17th the court granted the motions, with the exception of the motion to strike the order striking the answer of the plaintiff to the cross-complaint. As a result of that order the following were stricken from the files: The order joining Neal as a party defendant; the answer and cross-complaint filed by Neal; the default of the plaintiff in failing to answer the cross-complaint within time; and the order substituting Young in the place of Neal. No further order was made or entered by the court. The action therefore remained as it was before Neal was joined as a party defendant, namely, as an action to quiet title against the bank as the sole defendant. The effect of the order was to dismiss from the case the defendant Neal and the defendant Young, who had been substituted in his place. This proceeding was commenced by Young, as trustee of the bankrupt estate. The petitioner alleged that the order striking the order joining Neal in the action, the order striking Neal's answer and cross-complaint, and the order setting aside the order substituting him in Neal's place, deprived him of the right to appear in said action and protect the interest which he represented, and that he had no adequate remedy by appeal for the reason that the plaintiff was insolvent and would not be able to respond in damages for any rentals collected pending appeal. The petitioner seeks to have the order of June 17, 1939, annulled and thereby to have reinstated the order joining Neal as a party, the answer and cross-complaint of Neal, the default of the plaintiff, and the order substituting Young in the place of Neal. The matter is submitted on the petition, a copy of the clerk's record in the pending action, and the briefs of the parties to the proceeding.

[1, 2] It becomes important to determine whether the order of June 17, 1939, was an appealable order, for if it was, certiorari would not lie and the writ heretofore issued should be discharged. Casner v. Daily News Co., 12 Cal.2d 402, at page 406, 84 P.2d 1032; and cases cited; Code Civ. Proc. sec. 1068.

On the application of Neal to be made a party defendant in the pending action the court apparently was of the view that he was a necessary party to the action, that is, a party without whose presence the issues in the quiet title action could not properly be determined. The court had the power to make him such a party, pursuant to sections 379 and 389 of the Code of Civil Procedure. After he had become a party defendant, Neal filed an answer and a cross-complaint. The petitioner trustee in bankruptcy herein was then substituted as a party defendant in the place and stead of Neal. The right of the petitioner to displace Neal as a party defendant is not clear, but in any event the petitioner became a party defendant whose interest on behalf of the bankrupt estate was adverse to that of the plaintiff. When by the order of June 17, 1939, the petitioner was dismissed from the case, the litigation was ended in the trial court as to him. His right of appeal from that order is supported by numerous decisions in this state, particularly, Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39, and Halterman v. Pacific Gas & Electric Co., 22 Cal.App.2d 592, 71 P.2d 855, wherein it was held that it is not necessary that the order or judgment be binding on all the parties to the action in order that it be final and appealable within the meaning of section 963 of the Code of Civil Procedure. In the Howe case it was said, at pages 533 and 534 of 198 Cal., at page 42 of 246 P.: "The circumstances that a particular judgment may not be binding upon all the parties to the action does not prevent it from being a final judgment within the Code provisions relating to appeals. 2 Cal.Jur. 141. In the present case, the issues tendered by the cross-complaints, which were stricken from the files, are entirely severable from the issues made by the complaints and answers. * * * Appellants have filed their cross-complaints under the authority found in section 442 of the Code of Civil Procedure as amended in 1923 * * *. They contend that the section gives them the right to cross-complain in order that they may take care of the situation in which they find themselves in the present cases; that, to avoid a mutiplicity of litigation and duplication of trials and issues and facts, they have the right to follow the procedure which the lower court, by its order, has prevented; that, unless they have the right to an immediate appeal, their rights are lost, for, if they must wait until a final determination of the whole action in the lower court before taking the appeal, a reversal of the order striking their cross-complaints from the files would, in effect, amount to only a hollow victory. * * * By its action the trial court has, in effect, dismissed, the appealing defendants from the actions in so far as they have a right to have their claims for affirmative relief determined therein and adjudicated by single judgments. In that regard the cases are ended as to them, and they are no longer before the court. In effect, their dismissal is complete. To hold that they are bound to wait until the final judgment in the respective actions before taking appeals from the orders, which are substantially final judgments as to them, seems to be as wholly unreasonable as the same contention was declared to be in Rocca v. Steinmetz, supra" [189 Cal. 426, 208 P. 964].

The order complained of was within the rule above stated and must be declared to have been an appealable order.

The writ is discharged..

We concur: GIBSON, C. J.; EDMONDS, J.; HOUSER, J.; SPENCE, Justice pro tem.; YORK, Justice pro tem.

40 Cal.App.2d 583

JOHNSTON v. BREWER.

Civ. 12540.

District Court of Appeal, Second District,
Division 2, California.

Sept. 12, 1940.

1. Negligence 🔑83

The "last clear chance doctrine" is that a party who has the last chance to avoid the accident is solely responsible, notwithstanding previous negligence of another.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance Doctrine".

2. Appeal and error 🔑1033(5)

Plaintiff could not complain because trial court gave instruction on last clear chance doctrine, where error, if any, in giving of such instruction was more favorable than prejudicial to plaintiff.

3. Municipal corporations ⚷120

In determining intent with which an ordinance was enacted, court's consideration is primarily directed to discovering evil sought to be remedied by it.

4. Evidence ⚷14

It is common knowledge that one whose senses have been dulled by intoxicants is unable to control his bodily movements in a normal manner, and as a result the presence of such persons upon public streets and highways is dangerous not only to themselves but to others who are lawfully using the streets and highways.

5. Drunkards ⚷10

The ordinance of city of Los Angeles providing that no person should be or appear in any place open to public view or on any street, sidewalk, highway or railway depot in a state of drunkenness or intoxication, was enacted in interests of general welfare for dual purpose of protecting intoxicated persons from results of their own folly and of protecting the general public from dangers and other evils attendant upon presence of such persons upon streets and highways and in other public places.

6. Negligence ⚷6

The violation of a municipal ordinance is negligence as a matter of law.

7. Automobiles ⚷246(34)

An instruction that if jury should find that pedestrian who was struck by an automobile violated municipal ordinance providing that no person should be or appear in any place open to public view or on any street, sidewalk, highway or railway depot in a state of drunkenness or intoxication, pedestrian was guilty of negligence as a matter of law, was proper.

8. Automobiles ⚷245(73)

Whether pedestrian seeking to recover for injuries sustained when struck by automobile was intoxicated at time of accident was for jury.

9. Trial ⚷62(3)

Trial court is vested with discretion as to permissible scope of evidence offered in rebuttal.

10. Trial ⚷62(3)

Where testimony proffered on rebuttal is merely cumulative of relevant evidence received as part of plaintiff's case in chief, action of trial court in refusing to admit it in evidence is not an abuse of discretion.

11. Trial ⚷62(3)

Refusal of trial court to permit plaintiff to introduce testimony in rebuttal as to whether there were skid marks at scene of accident to rebut statements made by defendant on cross-examination was not an abuse of discretion, where as part of plaintiff's case in chief testimony to effect that defendant's automobile had skidded approximately 50 feet was introduced, and particularly where defendant did not state as positive fact that his automobile did not skid.

12. Trial ⚷260(8)

Refusal of trial court to give plaintiff's requested instruction that defendant was bound to exercise due care toward plaintiff even though plaintiff was not in crosswalk at time he was struck by defendant's automobile was not error, where jury was adequately advised by other instructions that both plaintiff and defendant were bound to exercise ordinary care under all circumstances and that neither was required to use a greater degree of care than other. Vehicle Code, § 562, St.1935, p. 188.

13. Trial ⚷260(3)

Refusal of trial court to give an instruction requested by plaintiff to effect that burden was on defendant to prove contributory negligence on part of plaintiff by a preponderance of evidence was not error, where rule as to burden of proof of contributory negligence was correctly stated in another instruction.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Leo Johnston against Thomas C. Brewer for injuries received when plaintiff was struck by an automobile driven by defendant. From a judgment for defendant, the plaintiff appeals.

Affirmed. Appeal from order denying motion for new trial dismissed.

Max M. Gilford and Glenn C. Ames, both of Hollywood, for appellant.

Joseph A. Spray, of Los Angeles (Charles P. Gould, of Los Angeles, of counsel), for respondent.

PER CURIAM.

Plaintiff commenced this action to recover damages for personal injuries received when he was struck by an automobile driven by defendant. The action was tried before a jury which returned a verdict in favor of defendant. From the judgment entered upon such verdict and an order denying a motion for new trial plaintiff has taken this appeal.

The accident in which plaintiff received his injuries occurred in the city of Los Angeles at approximately 2 a. m. on November 20, 1937. On the morning of the accident, plaintiff left his residence at approximately 1:30 a. m. and proceeded to a restaurant where he purchased a glass of beer. Upon leaving this restaurant he walked to a cafe at the intersection of Venice boulevard and Main street where he partook of some food. Leaving this cafe, plaintiff crossed to the northeast corner of the intersection of Venice boulevard and Main street at which point he stopped, looked in both directions on Main street, and proceeded to cross Main street in a westerly direction. Plaintiff testified that he had observed an automobile traveling north on Main street at a point about one block south of Venice boulevard but that after starting to cross Main street in the crosswalk he remembers nothing more. Actually there were two automobiles traveling north on Main street immediately prior to the accident. As the automobiles approached the intersection of Venice boulevard and Main street defendant guided his car close to the easterly curb of Main street in order to avoid a pedestrian safety zone which was just south of Venice boulevard and the other automobile continued on its course straddling the street car tracks east of the center line of Main street. The automobiles maintained their relative positions as they proceeded through the intersection until they reached a point approximately 50 feet north of the north curb line of Venice boulevard, where the automobile which was following the street car tracks swerved to the left to avoid striking plaintiff. Defendant testified that he saw plaintiff step backward away from the other automobile but was unable to avoid striking plaintiff. As a result of the accident plaintiff suffered a laceration on the back of his head, a compound comminuted fracture of the left leg and a comminuted fracture of the left arm.

[1, 2] It is first contended by plaintiff that the court committed prejudicial error in instructing the jury relative to the doctrine of last clear chance. Plaintiff does not criticize the principles enunciated by the court in the instruction but contends that the doctrine of last clear chance was not applicable under the facts. We deem it unnecessary to decide whether the evidence was sufficient to justify the court in giving the questioned instruction, for no possible prejudice could have resulted to plaintiff in any event. Plaintiff relies upon the rule that where evidence of one or more of the elements essential to the application of the doctrine is lacking, the giving of such an instruction is reversible error. Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A.L.R. 117; Erwin v Morris, 10 Cal.App.2d 168, 51 P.2d 149. Upon examination of the Wallis and Erwin cases, it will be noted that in each instance the defendant was appealing from a judgment in favor of plaintiff. In each case the claim that the giving of the instruction relating to last clear chance was prejudicial error was made by the defendant. The opposite picture is presented by the instant case. Here the appeal is by plaintiff from a judgment in favor of defendant and plaintiff raises the contention that the instruction was erroneously given. When such circumstances are considered in the light of the purpose of the doctrine of last clear chance the nonprejudicial effect of such instruction is apparent. The doctrine has been thus succinctly stated: "A party who has the last chance to avoid the accident, notwithstanding the previous negligence of a plaintiff, is solely responsible." Trowbridge v. Briggs, 140 Cal.App. 554, 35 P.2d 426, 430. The result of the proper application of the doctrine in any given case is to permit plaintiff to recover damages *notwithstanding* his own contributory negligence where defendant had the last clear chance to avoid the accident. It is thus evident that the effect of the giving of such instruction was to inform the jury that they might disregard the normal consequences which would follow from proof of plaintiff's contributory negligence and permit him to recover despite such proof. Obviously where such instruction is improperly given and the jury returns a verdict in favor of the plaintiff, as in Wallis v. Southern Pacific Co. and Erwin v. Morris, supra, the defendant is the party who is prejudiced. But in the instant case, where the verdict was in favor of defendant, the error, if any, in the giving of such instruction was more favorable than prejudicial to plaintiff. By permitting the jury to consider the evidence in the light of the last clear chance doctrine plaintiff was afforded an opportunity to avoid the bar to recovery of damages which normally follows from proof of contributory negligence.

[3-8] The court gave an instruction to the effect that section 41.27 of the Munic-

ipal Code of the city of Los Angeles provided that, "No person shall be or appear in any place open to public view or on any street, sidewalk, highway or railway depot in a state of drunkenness or intoxication." The jury was also informed that if they found that plaintiff had violated the provisions of the foregoing ordinance, "he was guilty of negligence as a matter of law". It is urged by plaintiff that the giving of such instruction was error for the reason that plaintiff was not of the class of persons intended to be protected by the ordinance. Conceding that a violation of a municipal ordinance is ordinarily negligence per se, plaintiff contends that such rule operates only in favor of a person who is within the class of persons intended to be benefited thereby, relying upon the rule as stated in Figone v. Guisti, 43 Cal.App. 606, 185 P. 694, and Corbett v. Spanos, 37 Cal.App. 200, 173 P. 769. Plaintiff argues that the ordinance in question was enacted for the sole purpose of protecting the public from the sight of inebriates in public places. In determining the intent with which an ordinance was enacted our consideration is primarily directed to discovering the evil sought to be remedied by it. In re Alexander, 128 Cal.App. 651, 18 P. 2d 410. Plaintiff would have us hold that the sole purpose of such ordinance was to protect the aesthetic sense of the general public by barring unpleasant sights from the public view. Such a construction is too narrow. It is common knowledge that one whose senses have been dulled by intoxicants is unable to control his bodily movements in a normal manner and as a result the presence of such persons upon the public streets and highways is dangerous not only to themselves but to others who are lawfully using the streets and highways. It is evident that the ordinance was enacted in the interests of the general welfare for the dual purpose of protecting intoxicated persons from the results of their own folly and of protecting the general public from the dangers and other evils attendant upon the presence of such persons upon the streets and highways and in other public places. Under such construction defendant is clearly within the class of persons for whose benefit the ordinance was enacted. Since it is settled that a violation of a municipal ordinance is negligence as a matter of law (Hutchinson v. Miller & Lux, Inc., 60 Cal.App. 1, 212 P. 394; Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045), the court did not err in so instructing the jury. Since the evidence as to plaintiff's intoxication was conflicting such issue was properly submitted to the jury under the instruction in question and other appropriate instructions.

[9-11] The refusal of the court to permit plaintiff to introduce certain testimony in rebuttal is next assigned as error. After defendant had rested his case plaintiff's counsel called a witness who was asked if he had examined the scene of the accident to ascertain whether or not there were skid marks. Defendant's objection that such testimony was not proper rebuttal evidence was sustained. As a part of plaintiff's case in chief testimony to the effect that defendant's car had skidded approximately 50 feet was introduced. Thereafter upon cross-examination of defendant by plaintiff's counsel the following took place:

"Q. Did your tires skid from the application of your brakes? A. I don't know.

"Q. What is your recollection in that regard? A. Well, I was rather nervous all the time and excited——.

"Q. I am asking you what is your recollection? A. My recollection would be no."

This is the testimony sought to be rebutted by the excluded evidence. The trial court is vested with a sound discretion as to the permissible scope of evidence offered in rebuttal. Pontecorvo v. Clark, 95 Cal.App. 162, 179, 272 P. 591. Where as here the proffered testimony is merely cumulative of relevant evidence received as a part of plaintiff's case in chief, the action of the court in refusing to admit it in evidence is not an abuse of discretion. Pontecorvo v. Clark, supra. Moreover, the testimony sought to be rebutted was not of a positive fact but was merely the surmise of a harried witness who had previously stated that he had no knowledge of such fact. Under such circumstances the ruling of the trial court did not exceed the limits of the sound discretion with which it was vested.

[12] The remaining contentions advanced by plaintiff deal with the refusal of the court to give certain requested instructions. Plaintiff requested an instruction in the language of section 562 of the Motor Vehicle Code, St.1935, p. 188, which sets forth the duty of a pedestrian crossing a roadway at a point other than at a crosswalk to yield the right of way and concluding in the following manner: "The provisions of this section shall not relieve the driver of a vehicle from the duty to

exercise due care for the safety of any pedestrian upon a roadway." The asserted error in the refusal of the court to give this instruction is that the jury was not instructed that defendant was bound to exercise due care toward plaintiff even though the latter was not in a crosswalk at the time of the accident. The court did not err in refusing to give the above instruction, for by other instructions the jury was clearly and adequately advised that both plaintiff and defendant were bound to exercise ordinary care under all the circumstances and that neither was required to use a greater degree of care than the other.

[13] The asserted error of the court in refusing to give an instruction requested by plaintiff to the effect that the burden was on defendant to prove contributory negligence on the part of plaintiff by a preponderance of the evidence is without merit. In another instruction requested by plaintiff and given by the court the rule as to the burden of proof of contributory negligence was correctly stated.

The judgment is affirmed. The purported appeal from the order denying the motion for a new trial is dismissed.

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40 Cal.App.2d 660

SNYDER v. PINE GROVE LUMBER CO. et al.

Civ. 6227.

District Court of Appeal, Third District, California.

Sept. 17, 1940.

Rehearing Denied Oct. 16, 1940.

1. Covenants 🔑13

A "grant deed" carries with it a warranty that previous to the time of execution of such conveyance the grantors had not conveyed the same or any right, title, or interest therein to any person other than the grantee, and such estate was at that time free from incumbrance done, made, or suffered by the grantors or any person claiming under such grantors.

See Words and Phrases, Permanent Edition, for all other definitions of "Grant Deed".

2. Property 🔑9

Where original owner by a grant deed conveyed property to party who conveyed it to the immediate grantor of mortgagor, and property was sold on foreclosure, in action by purchaser on foreclosure against original owners for use and occupancy of foreclosed premises and for relief declaring purchaser to be owner, evidence was sufficient to sustain finding that mortgagor was the legal owner of property before foreclosure of mortgage.

3. Landlord and tenant 🔑66(1)

Where record owner of property was successor in interest to party under whom occupants of premises were lessees, occupants were precluded from setting up or claiming adverse possession against the record owner. Code Civ.Proc. § 326.

4. Landlord and tenant 🔑66(1)

Where record owner who mortgaged property paid all taxes which were levied or assessed against property during period occupants of premises claimed adverse possession and occupant of premises stated to others that property belonged to record owner's immediate grantor before conveyance was made, in action for use and occupancy by purchaser on foreclosure, evidence supported finding that the occupants of the premises used the premises as tenants in possession and not as owners under claim of adverse possession.

5. Judgment 🔑251(1)

Where there was an actual controversy before the court as to the rights of purchaser on foreclosure in property purchased at foreclosure sale, judgment declaring purchaser at foreclosure sale to be the owner of the property subject only to right of redemption, and that his title thereto subject to such right be quieted against any and all claims of persons claiming property by adverse possession, was proper.

6. Appeal and error 🔑1011(1)

Trial court's findings on conflicting evidence will not be disturbed on appeal.

7. Vendor and purchaser 🔑79

Where record owner acquired sawmill and timber lands from third parties and employed occupant of premises to manage and operate the business with the view of making sufficient money to reimburse himself and on performance of certain conditions by the occupant title to the property was to be conveyed to the occupant, and property was mortgaged and sold on foreclosure, occupant was not entitled to the property as against purchaser on foreclosure where none of "conditions precedent" were performed by him.

See Words and Phrases, Permanent Edition, for all other definitions of "Conditions Precedent".

8. Homestead ⚿35, 81

Where occupants of a residence on lands of record owner were employed to operate sawmill and used residence for keeping of books of business of lumber yard and mill but did not have such title or possession of the property as to justify claim of homestead, and property was sold on foreclosure, in action for use and occupancy and judgment declaring purchaser on foreclosure to be owner, trial court did not err in failing to set aside homestead to occupants.

◆

Appeal from Superior Court, Amador County; Martin I. Welsh, Judge.

Action by W. Gilman Snyder against the Pine Grove Lumber Company and others, for the value of the use and occupancy of premises purchased by the plaintiff on foreclosure and for declaratory relief. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Levinsky & Jones and Jack J. Miller, all of Stockton, for appellants.

Snyder & Snyder, George F. Snyder, Gumpert & Mazzera, and J. Calvert Snyder, all of Stockton, for respondent.

PER CURIAM.

This action, by the respondent as the purchaser at a foreclosure sale, was for the recovery from the appellants of the value of the use and occupancy of the foreclosed premises, and for declaratory relief respecting the title to the property involved. Judgment was entered in favor of respondent, from which this appeal is taken.

In 1927, a corporation, of which appellant Ed. N. Matson was president and general manager, purchased, upon conditional sale contract, the sawmill involved in these proceedings. This mill, under the management of Mr. Matson, was operated for a while, but the venture was not a success. Payments required to be made under the conditional sales contract were not made, and the mill was repossessed.

In 1933, Mr. Matson tried to induce Mr. J. A. Chichizola to purchase the repossessed sawmill to secure certain timber rights and to finance the removal of the mill to a new location. During these negotiations, Mr. William G. Snyder acted as attorney for Mr. Chichizola. After some investigation Mr. Chichizola refused to advance the necessary money. Mr. Matson then inquired of Mr. Snyder if he knew of any source from which the money might be obtained. After some discussion Snyder told Matson that if he would guarantee that no money or credit in excess of $6,000 would be required to refinance the entire venture, he would obtain that amount. Accordingly, the property involved in this proceeding being then owned by Mr. Chichizola, was deeded to Wm. G. Snyder, with the exception of a small portion owned by Mr. Luigi Galli. Sometime later Mr. Galli transferred this parcel to Mr. Snyder. Before Mr. Chichizola, however, would convey the property to Snyder, he required that he assume certain indebtedness which Mr. Chichizola had become obligated to pay for Matson. This Mr. Snyder agreed to do, and paid either to Mr. Chichizola directly or to creditors holding claims against Mr. Matson, for which Mr. Chichizola was chargeable, some $12,000. About the same time Mr. Snyder acquired timber lands necessary to operate the mill, and also acquired title to the sawmill in question. After acquiring this property, Wm. G. Snyder entered into an agreement with the Matsons wherein Snyder agreed to employ Matson to operate said mill and out of the proceeds thereof to make certain specified payments, and further provided that when all of the terms and conditions had been performed under the contract that the same should be assigned to Matson, except that upon the payment to Matson of $10,000 with interest, an undivided one-half interest in the property and business might be retained by Snyder, and that the residence "upon the said premises at Pine Grove * * * with the lot on which that residence is situated and enclosed by the fence immediately surrounding same, shall go absolutely to said second party * * *."

On April 18, 1934, in order to carry out the agreement to finance the venture Snyder borrowed certain moneys and executed a mortgage upon the property. This mortgage was not paid at its maturity and foreclosure proceedings were commenced, at which sale W. Gilman Snyder, plaintiff and respondent herein, became the purchaser. It is as to his rights in this property that we are here concerned.

The first point requiring consideration is as to the legal ownership of the property on April 18, 1934, the date the mortgage was executed. It is alleged in the complaint that on that date Wm. G. Snyder was the owner of the property in question. This allegation is denied by the appellants. The trial court found in accordance with the allegations in the complaint. There is no pleading by appellants of fraud nor are any facts set forth by defendants which would create a resulting or constructive trust. The evidence shows that the title to all the property here involved originated in a patent from the United States government and through mesne conveyances passed by grant deed to Ed. N. Matson and wife, except a small piece belonging to one Luigi Galli, which was by him conveyed by grant deed to Wm. G. Snyder about three months after Snyder had acquired title to the larger tract.

We need not here set forth the various code sections pertaining to the presumptions to be indulged in from the use of the word "grant" in a grant deed.

[1] A grant deed carries with it a warranty that previous to the time of the execution of such conveyance the grantors had not conveyed the same or any right, title or interest therein to any person other than the grantee, and such estate was at that time free from encumbrance done, made or suffered by the grantors or any person claiming under such grantors.

[2] An examination of the chain of title does not show any conveyance at any time from Matson or his wife, other than a grant deed from them to M. J. Spinetti on December 30, 1929. Some two or three years thereafter, Spinetti conveyed all of his interest in the property to Chichizola, the immediate grantor of Wm. G. Snyder. There is a claim by appellants that some of these deeds were in effect mortgages, but the trial court has not so found, and there is ample evidence to support the finding that Wm. G. Snyder was the legal owner of the premises involved on the date in question.

It is also alleged in the complaint, and the court found, that on the 18th of April, 1934, Wm. G. Snyder and his wife, executed a mortgage on the property here involved to C. Soracco Company, which mortgage was duly foreclosed and the property regularly sold in foreclosure proceedings, and at said sale W. Gilman Snyder, the plaintiff and respondent herein was the purchaser of said property and received a certificate of sale therefor.

There is sufficient evidence in the record to support this finding, and that the mortgage was regularly foreclosed and the sale on foreclosure made as alleged in the complaint. The complaint alleges further that the defendant Matson and his wife had been in possession of the above-described premises as tenants in possession under said Wm. G. Snyder. The answer admitted that the Matsons had been in possession, but in effect denied that they were in possession thereof as a tenant of Snyder, and on the contrary alleged that they were, on the date in question and ever since have been, the owners of said property and holding adversely to Snyder.

[3] We have heretofore found from the chain of title that Wm. G. Snyder was the record owner of the property and that appellants Matson and his wife were lessees or tenants of the property under a lease from M. J. Spinetti. It would therefore seem that by virtue of the provisions of section 326 of the Code of Civil Procedure that appellants are precluded from setting up or claiming adverse possession against Wm. G. Snyder, successor in interest to Spinetti.

It is also in evidence that Snyder as legal owner of the property, paid all of the taxes which were levied or assessed against the property during the period appellants claim adverse possession. Shortly before the property was conveyed by Chichizola to Snyder, in a conversation between Matson and Soracco, Mr. Matson stated that he did not own the property and that it belonged to Mr. Chichizola.

[4] Obviously the trial court was amply supported in finding that appellants Matson and his wife occupied and used the premises as tenants in possession.

The second main contention of appellants is that the court erred in considering the prayer for declaratory relief, contending that it was outside the issues of the case and was unsupported by either the evidence or the pleadings.

The trial court found that plaintiff was entitled to declaratory relief declaring plaintiff to be the owner of the property, subject only to the right of redemption, and that his title thereto, subject to such right, be quieted against any and all claims of the defendants and perpetually enjoining and restraining said defendants from making any claim to or upon said property adversely to plaintiff.

[5] An examination of the pleadings shows that there was an actual controversy between the parties as to the rights of respondent in the property arising from his purchase of the property at the foreclosure sale, and it was entirely proper inasmuch as the matter was before the court, that all issues be determined in the event there was no redemption from the foreclosure sale.

[6] Some point is made as to certain discrepancies appearing in two copies of the agreement, one in possession of Wm. G. Snyder and the other in the possession of the Matsons. The agreement was pleaded by the appellants and attached as an exhibit to their answer. By a verified denial the respondent denied a due execution of the agreement as shown by the exhibit, and alleged that through a mistake in the original draft the words "second party" therein should have been "first party." Testimony was adduced showing how such a mistake could have been made, and a reading of the entire instrument clearly indicates such a mistake. The court found upon conflicting testimony that the contract, as contended by respondent was the contract of the parties which precludes us from going further into this dispute.

Some contention or claim is made that a trust had been created by the agreement between the parties. There is no allegation in any of the pleadings that raises any issue as to a trust relationship.

[7] An analysis of the relationship between the parties indicates that Wm. G. Snyder acquired the mill and timber lands from third parties and that he employed Mr. Matson to manage and operate the business with an ultimate view of making sufficient money to reimburse himself. As an inducement to Snyder to go into the venture Matson guaranteed that he would not be required to advance funds or credit in excess of the sum of $6,000. The contract seems to be a contract of employment with certain conditions precedent to be performed by Matson whereupon the title to the property described would be conveyed to Matson. None of these conditions precedent were performed. Matson was never in a position to demand that the property be conveyed to him. It would first be necessary for Matson to show that he had performed the terms and conditions of the contract upon his part before he would be entitled to the benefits set out.

[8] On April 2, 1936, a homestead was declared on the premises occupied as a residence by Mr. and Mrs. Matson, and it was claimed the court erred in not setting aside this homestead to them. It appears, however, that part of this residence was used for the keeping of the books of the business of the lumber yard and mill, but further it would seem that the Matsons never had such title or were in such possession of the property as to justify a claim of homestead thereon. The taxes were paid by Wm. G. Snyder, and his claim thereto was based upon a grant deed, which deed Matson had procured Chichizola to execute to Snyder, and after the conveyance of the property to Snyder, the Matsons had executed a quitclaim deed of the property to Spinetti, the predecessor in interest to Wm. G. Snyder.

There is nothing in the use or occupation of this property that would show any inconsistency in the record title of Wm. G. Snyder or inconsistent with the occupancy of the property by Matson as a tenant of Snyder.

A careful examination of the entire record convinces us that the judgment from which this appeal is taken should be affirmed, and it is so ordered.

40 Cal.App.2d 654

RUNKLE v. LANE et al.

Civ. 12026.

District Court of Appeal, Second District, Division 1, California.

Sept. 17, 1940.

1. Attachment 🔑6

Where plaintiff sought to rescind certain documents denominated "certificates of assignment" which purported to assign an undivided interest in certain notes secured by deed of trust and to recover amount given to defendants for purpose of investment on ground of fraud, plaintiff's case was based upon an implied promise to pay, and remedy of attachment was therefore available.

2. Attachment 🔑122(1)

One seeking an attachment has right to file an amendment to affidavit for attachment. Code Civ.Proc. § 558.

3. Appeal and error 🔑1024(2)

The question as to sufficiency of affidavits for attachment in light of pleadings was question for trial court, and trial court's judgment would not be disturbed on appeal, merely because record afforded an opportunity for a difference of opinion.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by Milton S. Runkle against W. G. Lane and another, to rescind certain documents denominated as certificates of assignment which purported to assign an undivided interest in certain notes secured by deed of trust, wherein plaintiff contemporaneously instituted attachment proceeding. From an order denying a motion to dissolve the attachment, the defendants appeal.

Affirmed.

C. H. Scharnikow and Wm. J. Clark, both of Los Angeles, for appellants.

Thomas F. McCue, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order denying a motion to discharge an attachment.

The complaint sets forth three separate and distinct causes of action, each based upon fraud and each divided into two counts; each first count sets up a cause of action for money after rescission upon the ground of fraud and each second count a cause of action for money had and received.

It appears from plaintiff's complaint that the plaintiff, who was of the age of sixty-six years at the time of the filing of the complaint, had been dealing with defendants for a period of more than twenty years; that defendants assumed and represented "themselves to be acting as agents, advisers and counsellors of plaintiff, and during said time he was induced to repose great trust and confidence in defendants; that defendants represented that he could and should rely upon defendants in making his investments; that defendants represented that they were skilled in investment fields and plaintiff could rely upon their skill and need not investigate investments made and obtained for him by them; that the securities purchased for and issued to plaintiff were properly and legally issued and that defendants would obtain nothing for plaintiff except securities upon mortgages and deeds of trust which defendants had first investigated and purchased for their own account and which were amply secured. It further appears therefrom that the notes or bonds purported to have been sold by defendants to plaintiff were *never actually delivered* to plaintiff, but remained always in the custody and possession of defendants, and that in lieu of delivery of such notes or bonds, the defendants issued to plaintiff a *new and different* security of their own issue, denominated 'Certificate of Assignment'." (Italics included.)

Plaintiff filed an affidavit for attachment and later an amendment thereto, reciting that the payment of the contract sued upon "has not been secured by any mortgage, deed of trust or lien upon real estate or personal property or any pledge of personal property". It is from the order denying a motion to discharge such attachment that defendants appeal.

Appellants contend that from the face of the complaint it appears that the contract sued upon is secured by a lien upon real and personal property and that the affidavit for attachment is insufficient. Neither contention is sustained by the record.

[1-3] The action is based upon an implied promise to pay, which cause of action was appropriate in the circumstances (Philpott v. Superior Court, 1 Cal.2d 512, 36 P. 2d 635, 95 A.L.R. 990; McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A. L.R. 1019; Los Angeles Drug Co. v. Superior Court, 8 Cal.2d 71, 63 P.2d 1124; Bechtel v. Chase, 156 Cal. 707, 106 P. 81; Corey v. Struve, 170 Cal. 170, 149 P. 48; Hoare v. Glann, 176 Cal. 309, 168 P. 346), and as pointed out by respondent, the remedy of attachment was therefore available. That plaintiff had the right to file an amendment to the affidavit for attachment there can be no question, Code Civ.Proc. § 558. Moreover, it is important to note that the question as to the sufficiency of the affidavits in the light of the pleadings was and is a question necessarily addressed to the judgment of the trial court. That judgment will not be disturbed on appeal merely because the record affords an opportunity for a difference of opinion.

Other questions sought to be raised by appellants are beside the issue.

The record sustains the action of the trial judge, therefore the order appealed from is affirmed.

We concur: YORK, P. J.; WHITE, J.

ASSOCIATED INDEMNITY CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 11453.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1940.

Rehearing Denied Oct. 16, 1940.

Hearing Granted Nov. 9, 1940.

1. Workmen's compensation ⟜753

Where a workman, for his own convenience, chooses a hazardous means of entering or leaving his employer's premises, one not customarily used by employees in his particular class, and no agreement to furnish or permission to use such means of access or exit being shown on part of employer, workman deliberately assumes a risk which cannot be said to have been in contemplation of parties when the contract of employment was made, and an accident happening under such circumstances cannot be said to have "arisen out of or in the course of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Arisen Out of or in the Course of Employment".

2. Workmen's compensation ⟜719

Where no definite instructions as to means of transportation by the employer, and no general custom is present, any reasonable effort of employee to meet the situation is within the scope of the Compensation Act. St.1917, p. 831.

3. Workmen's compensation ⟜753

Injury to dock superintendent when he was riding a switch engine to place of his employment from place where he parked his automobile, after he had called at freight office and picked up some freight shipment documents, was not compensable as having "arisen out of and in course of his employment", where it appeared that only safe and reasonable means of transportation from parking area to place of employment was to walk over footpath provided for such purpose, that such was the means used by all employees, and that superintendent was not given discretion to use any other. St.1917, p. 831.

Proceeding by the Associated Indemnity Corporation, insurer, to review an order of the Industrial Accident Commission of the State of California awarding compensation to Boyden Macfie, employee.

Award annulled.

Purvis, Jakobsen & Kennedy, of San Francisco, for Petitioner.

Everett A. Corten, of San Francisco, for Respondent.

NOURSE, Presiding Justice.

Petitioner seeks annulment of an award of compensation to an employee of its insured employer upon the ground that the injuries to the employee did not arise out of or occur in the course of this employment.

The facts are not in dispute. The employer, Parr Richmond Terminal Corporation, was operating a warehouse and dock on San Francisco bay in which operations the employee served as dock superintendent. The place of employment was so located that all employees had to walk over a footpath for a distance of about half a mile. No other means of approach was provided or available. The employees customarily drove their cars or rode to a parking area provided for that purpose and then walked the remaining distance over this footpath. On the morning of the injury the superintendent rode to this parking place, called at the Southern Pacific freight office and picked up some freight shipment documents at the request of his employer, and then proceeded along the footpath to his place of employment. He approached a freight engine which was switching in the yards of the railroad company and which he found was about to proceed in the direction of the warehouse for a distance of about 400 yards to blow the boilers. At this point there is some conflict in the evidence as to whether he asked and received permission to ride on the tender, or whether he boarded without the knowledge or consent of the engineer. The conflict is immaterial as none of the railway employees had power to give such consent. As the engine proceeded the superintendent stood on the step of the engine or tender and, when the engineer shot off a blast of steam to blow his boilers, the superintendent either fell or jumped from the step and broke his leg. The superintendent arrived at the parking area at about 7:30 a. m. He was due at the plant at 8 a. m. The injury occurred at 7:40 a. m.

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* Subsequent opinion 112 P.2d 615.

In this statement it should be noted that the only means of transportation to the place of employment was to walk over the footpath from the parking area; that the freight engine did not run to the plant, and had no accommodations for passengers; that, in seeking a ride on this engine, the employee was a trespasser engaged in a private and personal diversion which in no manner contributed to the benefit of his employer; and that he had about twenty minutes to walk about half a mile over the footpath to his place of employment, and hence did not choose the diversion because of necessity or interest in his employment.

[1] The rule applicable to a case of this character is correctly stated in 27 California Jurisprudence, page 390, as follows: "When a workman, for his own convenience, chooses a hazardous means of entering or leaving his employer's premises—one not customarily used by employees in his particular class, and no agreement to furnish or permission to use such means of access or exit being shown on the part of the employer—he deliberately assumes a risk which cannot be said to have been in the contemplation of the parties when the contract of employment was made, and an accident happening under such circumstances is foreign to the employment and may not be said to have arisen out of or in the course thereof."

[2] The respondents in presenting their case place special emphasis on Stumar v. Industrial Accident Commission, 16 Cal. App.2d 429, 431, 60 P.2d 557, 558, and since they insist that that case is on "all fours" with this, an examination of that decision will be helpful. The employee was the chief camera man for a motion picture company. He flew his own plane to a new location to inspect it and was killed in landing. It was optional with Stumar whether he should use his own transportation in going to location or transportation furnished by his employer. In holding that the employee was entitled to compensation the District Court of Appeal emphasized this right to use his own discretion as to means of transportation. But the meat of the decision is in the statement reading: "Indeed it might be well argued that he was showing industry and diligence in taking advantage of the daylight on Saturday afternoon to make the inspection while the superintendent of construction was still there. By using his airplane he could arrive at the location in time to afford more time for inspection than by using an automobile. * * * Nor can the claim be defeated on the suggested theory that it was not shown that the employer had acquiesced in the use of Stumar's airplane. Stumar was vested with and required to use initiative and discretion in the performance of his duties. The exercise of initiative and discretion is inconsistent with the requirement of prior acquiescence." The decision is in full harmony with the rule that, where no definite instructions as to means of transportation by the employer, and no general custom is present, any reasonable effort of the employee to meet the situation is within the scope of the Compensation Act, St. 1917, p. 831.

[3] The distinction between these cases and the instant case is apparent. Here the only safe and reasonable means of transportation from the parking area to the place of employment was to walk over the footpath provided for that purpose. This was the means used by all employees, and

the superintendent was not given the discretion to use any other. His voluntary diversion from this course by taking a ride on the switch engine was neither safe nor reasonable, and was not an act showing either "industry" or "diligence" in the interest or service of his employer. The undisputed evidence shows that the employee "for his own convenience" chose a hazardous and unreasonable means of transportation to his place of employment—one not customarily used by other employees, one not contemplated by his contract of employment, and one not used in the interest or service of his employer.

The award is annulled.

We concur: STURTEVANT, J.; SPENCE, J.

40 Cal.App.2d 590

CHILDRESS et al. v. PETERSON et al.

Civ. 2715.

District Court of Appeal, Fourth District, California.

Sept. 12, 1940.

Appeal and error 🔑773(3)

An appeal would not be dismissed on ground that appellants' opening brief was not filed within time provided by court rule, where appellants' opening brief and notice of motion to dismiss appeal were filed on same day. Rules for the Supreme Court and District Courts of Appeal, rule 1, § 4.

◆

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Mrs. Beula F. Childress and Violet M. Michels, against John T. Peterson, individually and as Chief of Police of the Police Department of the City of San Diego, and others. From an adverse determination, defendants appeal. On motion to dismiss appeal.

Motion denied.

Dayton L. Ault, City Atty., and Morey S. Levenson and J. H. McKinney, Deputy City Attys., all of San Diego, for appellants.

Thomas Whelan and Vincent Whelan, both of San Diego, for respondents.

MARKS, Acting Presiding Justice.

This is a motion to dismiss this appeal because appellants' opening brief was not filed within the time provided by section 4 of rule I of the Rules for the Supreme Court and District Courts of Appeal.

Our record shows that the clerk's and reporter's transcripts were filed on June 22, 1940. On August 19, 1940, respondents filed their notice of motion to dismiss the appeal. Appellants' opening brief was filed on the same day. This has been held a sufficient answer to the motion to dismiss. Toth v. Metropolitan Life Ins. Co., 113 Cal. App. 55, 297 P. 564; North v. Evans, 114 Cal.App. 714, 300 P. 893; Lisle v. Ragle, 10 Cal.App.2d 758, 52 P.2d 608; Hall v. Wolford, 22 Cal.App.2d 537, 71 P.2d 596.

The motion is denied.

I concur: GRIFFIN, J.

40 Cal.App.2d 640

GNESA v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 11352.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1940.

1. Street railroads 🔑98(7), 117(22)

Pedestrian, who after looking in both directions entered street in pedestrian zone at intersection with signal in her favor, could assume that street car approaching intersection from left would act within the law and with reasonable care not to harm pedestrian, and was not contributorily negligent as a matter of law for failing to anticipate that street car might suddenly speed up and disobey traffic signal.

2. Street railroads 🔑117(22)

In action for injuries sustained by pedestrian, who after looking in both directions entered street in pedestrian zone at intersection with traffic signal in her favor, when she was struck by street car which entered intersection from left against traffic signal, contributory negligence of pedestrian was for jury.

3. Pleading ⚷376

In personal injury action against city and county, where allegations of complaint relating to presentation of demand upon controller satisfied statute and were admitted by defendant, proof of such demand was not required. Code Civ.Proc. § 462.

4. Pleading ⚷376

Matters admitted in the pleadings need not be proved in absence of statutory requirements. Code Civ.Proc. § 462.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Ruby Gnesa against the City and County of San Francisco, a municipal corporation, for injuries sustained when plaintiff was struck by defendant's street car. From judgment for plaintiff, defendant appeals.

Affirmed.

John J. O'Toole, City Atty., of San Francisco (James J. Harrington, of San Francisco, of counsel), for appellant.

Philander B. Beadle and Allen Spivock, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendant appeals from a judgment awarding plaintiff damages for personal injuries. The case was tried before a jury, and the verdict rests upon a state of facts which are not in material dispute. At the time of her injuries, the plaintiff was attempting to cross Market street at about 9 o'clock p. m. at the intersection of Market and Van Ness. Market street at this point has four sets of street-car tracks, two eastbound and two westbound. The intersection is unusually wide, and, for the protection of traffic, crosswalks are maintained for the benefit of pedestrians, and two concrete islands are maintained at points near the center. The plaintiff approached the intersection from the north, waited until the traffic light showed green, and then started walking at a normal speed, having first observed that there was no east or west traffic on Market street. As she reached a point about half-way between the north curb and first rail of the street-car track she observed the defendant's street-car which later struck her, and which was at that moment about 150 feet to her left. As she reached a point about three feet north of this first rail she observed that the street-car was approaching her, having disregarded the electric traffic signal at the intersection. When she reached a point about midway between the first and second rails she observed that the street-car had suddenly increased its speed to 25 or 30 miles per hour. It was then about 30 feet to her left. She then quickened her pace, and endeavored to escape from the path of the car which did not decrease its speed at any time while she was within this area. She was hit by the extreme left point of the front end of the car when she was at a point just south of the second or southerly rail.

[1, 2] There is no material dispute in the evidence showing these facts. The two questions raised by appellant require no extended discussion. The first involves the charge of contributory negligence. The admitted facts are that respondent looked before she entered the street, followed in obedience to the traffic signal, and kept in the pedestrian lane maintained at that intersection. Appellant's argument in short is that respondent was guilty of contributory negligence as matter of law because she did not anticipate the danger to her if appellant's street-car should disobey the traffic signal and should suddenly be speeded up while she was making a reasonable effort to cross the street. There is no law to support appellant's contention. A party may assume that another will act within the law and with reasonable care not to harm another. Here the respondent did what the law required of her for her own safety. The fact that the appellant chose to act in disregard of these regulations was a matter which respondent was not obliged to anticipate. There is nothing in the evidence here, such as was found in Anderson v. Market Street Ry. Co., 116 Cal.App. 282, 2 P.2d 529, and Gore v. Market Street Ry. Co., 4 Cal.2d 154, 48 P.2d 2, which would support a conclusion of the appellate court that no other inference than that of contributory negligence could be drawn from the facts proved. This being so the question of contributory negligence is one for the jury, and the case is controlled by McQuigg v. Childs, 213 Cal. 661, 663, 3 P.2d 309; Kuhn v. City and County of San

Francisco, 13 Cal.App.2d 641, 642, 643, 57 P.2d 147; 23 Cal.Jur. 885. It would be difficult to find another state of facts so closely parallel with the Kuhn case, supra; and the rule of that decision upon the same question of contributory negligence is a complete answer to the point raised here.

[3, 4] The appellant argues that respondent failed to prove a case against the city and county when she neglected to prove the presentation of her demand upon the controller. The allegations of the complaint relating to the presentation of such demand completely satisfy the statute and were fully admitted by the appellant. None of the authorities cited by appellant touches upon the point in a case where the statute does not expressly require the proof. In certain proceedings, such as actions for divorce, material allegations are required to be proved, and these cannot be established by admissions in the pleading, but this is so only because of the special statutes. Flynn v. Flynn, 171 Cal. 746, 748, 154 P. 837. The settled rule is that, in absence of such statutory requirements, matters admitted in the pleadings need not be proved. Code Civ.Proc., sec. 462; 21 Cal.Jur., p. 155.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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40 Cal.App.2d 656

PEOPLE v. FORTHUN.

Cr. 3347.

District Court of Appeal, Second District, Division 2, California.

Sept. 17, 1940.

1. Automobiles 🔑355(8, 13)

Evidence was sufficient to support finding that defendant was driver of truck that struck street car conductor while he was standing beside his street car at intersection, and supported conviction of failing to stop and comply with requirements of Vehicle Code after vehicular accident, and of negligent homicide. Vehicle Code, §§ 480, 482(a), 500, St.1935, pp. 170, 171, 173.

2. Criminal law 🔑761(12)

An instruction, that it was not necessary that there be proof of both a driving of a vehicle in a negligent manner and the doing of another unlawful act not amounting to a felony, and that if jury was satisfied to a moral certainty and beyond a reasonable doubt that defendant was driving vehicle in question in a negligent manner, and while so driving caused injury which proximately resulted in death of decedent, they should find defendant guilty of failing to stop and comply with requirements of Vehicle Code after vehicular accident, and of negligent homicide, was not improper as assuming that defendant was driver of truck which struck deceased. Vehicle Code, §§ 480, 482(a), 500, St.1935, pp. 170, 171, 173.

3. Criminal law 🔑829(1)

Trial court did not err in refusing defendant's requested instruction, where principles of law therein announced were fully covered by another instruction given by trial court.

Appeal from Superior Court, Los Angeles County; Charles Fricke, Judge.

Peter Forthun was convicted of failing to stop and comply with requirements of the Vehicle Code, after a vehicular accident, and of negligent homicide, and he appeals.

Affirmed.

William W. Larsen, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From judgments of conviction of (1) violating section 480 of the Vehicle Code, St.1935, p. 170 (failing after a vehicular accident to stop and comply with the requirements of section 482[a] of the Vehicle Code) and (2) violating section 500 of the Vehicle Code (negligent homicide), defendant appeals.

Viewing the evidence most favorable to the People (respondent), the essential facts are:

At about 1:38 a. m. of December 31, 1939, a white Ford panel truck, driven by defendant and traveling at a speed of approximately 50 miles an hour, struck and killed Jack Kennedy a streetcar conductor while he was standing beside his streetcar at the intersection of Avenue 19 and Avenue 20 on North Broadway, Los Angeles. The driver of the truck continued on his course and did not stop at the scene of the accident.

Defendant relies for reversal of the judgments on these propositions:

First: There is no substantial evidence to sustain a finding of the above-stated facts upon which the judgments were necessarily predicated, and particularly the fact that defendant was the driver of the truck that struck decedent.

Second: The trial court committed prejudicial error in (a) instructing the jury as follows:

"It is not necessary that there be proof of both a driving of a vehicle in a negligent manner and the doing of another unlawful act not amounting to a felony.

"If you are satisfied to a moral certainty and beyond a reasonable doubt that the defendant was driving the vehicle in question in a negligent manner and while so driving caused the injury which proximately resulted in the death of Jack Kennedy then you should find the defendant guilty as charged.

"Or, if you are satisfied to a moral certainty and beyond a reasonable doubt that at the time the injuries proximately resulting in the death of Jack Kennedy were inflicted, the defendant was driving the vehicle in question and while so driving committed an unlawful act not amounting to a felony, which act was the proximate cause of the death of Jack Kennedy, then you should find the defendant guilty as charged."
and (b) in refusing to instruct the jury at defendant's request thus:

"In a case where circumstantial evidence is relied upon by the people for conviction the circumstances must be consistent with the guilt of the defendant and inconsistent with any other rational hypothesis. If the circumstances in evidence point to the defendant as being guilty, and also point with equal force to some other person not connected with the defendant, or to some unidentified person or agency as the cause of the death of the deceased, and if it is equally probable under the evidence that either the defendant, the third person, or such unidentified person or agency killed the deceased, then your verdict must be 'not guilty'."

[1] Defendant's first proposition is untenable. An examination of the record discloses substantial evidence taken with the reasonable inferences which the trial jury may have drawn therefrom to sustain the findings of fact set forth above and each and every material fact upon which the judgments of guilty were necessarily predicated. For example, defendant was employed by "The White House Laundry" and as such employee operated a white Ford panel truck. He voluntarily admitted that on December 31, 1939, from 8 p. m. until a few minutes after 11 p. m. he was at the Arena Cafe on South Fair Oaks avenue, Pasadena, and that he had four or five whiskey highballs during that period; that he thereafter drove the laundry's white Ford panel truck to his home and retired; that the next morning, Sunday, he found his truck had a smashed fender and dented hood, whereupon he took it to a garage to have it repaired and stated to the garage man that he had hit a cow. Fragments of headlight glass and screen from an automobile horn found at the scene of the accident, upon spectrographic analysis, were determined to be identical with particles of headlight glass and screen of the horn on the truck driven by defendant which were removed by the garage man when he repaired the truck. Also, fragments of white paint found at the scene of the accident were identical with the paint on the truck driven by defendant.

This evidence, together with the testimony of a watchman who saw defendant at the Arena Cafe at about 1 a. m. of December 31, 1939, and noticed a White House Laundry truck parked near the cafe at the same time, coupled with the testimony that a white Ford panel truck traveling at a high speed struck the decedent and the reasonable inferences which the jury may have drawn therefrom, was substantial evidence that defendant was the driver of the fatal truck.

[2] The instruction set forth in paragraph (a) of defendant's second proposition is an accurate statement of the principles of law contained therein, and does not assume that defendant was the driver of the truck which struck decedent. It clearly leaves to the jury the determination of the question whether or not defendant was driving the vehicle at the time of the accident.

[3] The instruction set forth in paragraph (b) of defendant's second proposi-

tion was properly refused, since the principles of law therein announced were fully covered by an instruction which the trial judge gave to the jury reading thus: "In order to convict the defendant upon the evidence of circumstances it is necessary not only that all the established facts and circumstances concur to show beyond a reasonable doubt that a crime was committed as alleged in the information, but that the defendant was the one who committed such crime and that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances prove, coincide with, account for, and therefore render probable the theory sought to be established by the prosecution, but they must exclude to a moral certainty every other theory but the single one of guilt, or the jury must find the defendant not guilty."

For the foregoing reasons the judgments are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

40 Cal.App.2d 433

SCHWARTING et ux. v. ARTEL et ux.

Civ. 12659.

District Court of Appeal, Second District, Division 2, California.

Aug. 19, 1940.

Rehearing Denied Sept. 10, 1940.

Hearing Denied Oct. 17, 1940.

1. Principal and agent 🔑69(2)

The "principal and agent relation" is of a fiduciary nature, and in any transaction on behalf of his principal the agent is bound to exercise the utmost good faith and honesty and cannot take advantage of fiduciary capacity and make a secret profit for his own benefit.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal and Agent Relation".

2. Principal and agent 🔑78(4)

When the acts of an agent have been questioned by his principal and fiduciary relationship has been established, burden is upon the agent to prove that he acted with the utmost good faith toward his principal, and that he made full disclosure prior to transaction questioned of all the facts relating to the transactions under attack.

3. Principal and agent 🔑69(2)

An agent is bound to the utmost good faith and cannot make a secret profit or take advantage of his agency for his own benefit. and where he does so he will be required to account to his principal for any such benefit or profit received.

4. Trusts 🔑72

Where consideration for property is paid by one person while title is taken by another, a trust results in favor of him who advanced the consideration. Civ.Code, § 853.

5. Principal and agent 🔑85

Where an agent has secretly profited as result of fiduciary relation, he is entitled to be reimbursed for any portion of the purchase money advanced by him and for expense necessarily incurred by him in protecting and conserving the property of his principal.

6. Principal and agent 🔑85
Trusts 🔑101

Where agent effecting an exchange of properties withheld from principal part of offer to exchange both an apartment house and bungalow court for the principal's business and agent exchanged his own property for the bungalow court as result of which the agent made a profit of some $8,000 while principal lost on the exchange, a "trust" in the bungalow property resulted in favor of the principal, but the agent was entitled to be reimbursed in the amount of the value of the property which he utilized in effecting the exchange for the principal. Civ.Code, § 853.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust"

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Suit to impress a trust upon certain realty and for an accounting by Emil F. Schwarting and wife against John G. Artel and wife, wherein defendants filed a cross-complaint. After entry of judgment denying plaintiffs relief sought, John G. Artel died and his administrator was substituted in his place. From a judgment for the defendants, plaintiffs appeal.

Reversed, with directions.

Clyde C. Triplett, of Los Angeles, for appellants.

Vernon P. Spencer, of Inglewood, for respondents.

MOORE, Presiding Justice.

From a judgment in favor of defendants, denying plaintiffs' suit to impress a trust upon certain real property and for an accounting, plaintiffs appeal. Inasmuch as the appeal is based upon the insufficiency of the evidence to support the findings and judgment, an intimate familiarity with the facts will enliven the understanding and increase the appreciation of the conclusion at which we have arrived. After the entry of judgment defendant John G. Artel departed this life and his administrator was substituted in his place. All references are to decedent and not to the administrator.

The plaintiffs, Mr. and Mrs. Schwarting, owned and operated a ready-to-wear clothing business in St. Louis, Missouri, during and prior to 1936. At that time deceased and his wife resided in Inglewood, California. Mrs. Schwarting and Mrs. Artel are sisters. In the year 1930 Mrs. Schwarting sojourned in California, where she visited with her said sister and achieved a desire to make her home in that community. Following her return to her city of St. Louis her new wishes were communicated by letter to her sister and to Mr. Artel. Inasmuch as a removal from the great metropolis of the Mississippi valley was out of the question unless they could dispose of their said business, she and her husband requested the Artels to report any opportunities for the exchange of the said St. Louis business for property in California.

Subsequently Mr. Artel advertised in Los Angeles newspapers for an exchange of the St. Louis business, but none of the offers received therefrom was seriously considered. On the 28th day of May, 1936, one Harry Goodman, a real estate broker, addressed a communication to Artel suggesting the possibility of an exchange of the Schwarting business for the Hartman apartments in Los Angeles, and at the same time forwarded a copy of said letter to Schwarting in St. Louis, where the Artels were visiting at the time.

The Goodman proposition at once appealed to Schwarting and he directed Artel to investigate the property upon his return to California. This Artel did, as agent for Schwarting, and the negotiations between Artel and Goodman ultimately resulted in the exchange of the Schwarting business for the Hartman apartments. But the purchaser had no knowledge of the said apartments prior to the consummation of the transaction, except such as was transmitted to him by the said Artel. It turned out that the party who owned said apartments was also the owner of a bungalow court which occupied an adjoining lot. Both properties were encumbered with a single loan.

As the hour approached for the final arrangements Artel conceived the scheme of disposing of a small bungalow which he owned in Inglewood. It was on a lot with a 32½-foot frontage, its rental value was $18 per month and it was appraised at $2,000. It must be said, however, that this brilliant inspiration of Artel was the fruition of a proposal which came from Goodman on June 20, 1936, when Goodman by letter suggested to Artel that Schwarting take the Hartman apartments subject to $22,500 and said bungalow court subject to a mortgage of $5,000 in exchange for the St. Louis business.

Without communicating said proposal to Schwarting, Artel wrote Schwarting on June 29th for the first time after his return from St. Louis. His letter contained, in elaborate form, the features of the Hartman apartments, giving it a gross value of $98,500, an equity of $76,000 and, after deducting ten per cent of that sum of repairs, it showed the value of the apartments to be $68,400. Further to enlarge upon the background of Artel's dream of gaining profits from the transaction, it appears that when Goodman first proposed the said last-mentioned exchange of the St. Louis business for the Hartman apartments, according to the broker's testimony, he prepared at Artel's request a draft of a contract providing for the exchange which had been suggested in Goodman's said letter of June 20th. In transmitting the proposal to Schwarting with said letter of June 29th, in a draft prepared by his own hand, Artel utilized practically all of the phraseology contained in the draft of the contract presented to him by Goodman; but when it came to a description of the property, he included only the apartments and omitted the bungalow court which was a part of the proposal of Goodman in both his letter and his draft of contract for exchange.

Having signed the contract of exchange, Artel provided for an escrow in which the Hartman apartments were to be conveyed to Schwarting in exchange for his St. Louis business, and as a part of the same escrow Artel instructed that the bungalow court, valued at $15,000, was to be conveyed to himself subject to an encumbrance of $5,000, and he deposited his deed as his contribution to the purchase price of the bungalow court. Also by the same escrow Schwarting's business in St. Louis, valued at $35,000 was to be exchanged for the Hartman apartments, valued at $45,000, but subject to an encumbrance of $20,000. It is thus made to appear by written evidence prepared by him that Artel, while representing Schwarting, in an effort to negotiate the exchange of his St. Louis business for property of equivalent value in California, by exercising the powers of his agency managed secretly to exchange his little bungalow, worth $2,000, for an equity in said bungalow court of the value of $10,000, whereas Schwarting's business worth $35,000 was exchanged for an equity valued at $25,000 in said apartment house.

Within a month after the close of the transaction the Schwartings took up their home in California, where they soon discovered the facts above related and subsequently filed this action.

[1] In support of their contention that Artel, while acting as agent for Schwarting, made a secret profit for himself out of the transaction without disclosing the facts, plaintiffs urge the familiar principle that the relation of principal and agent is of a fiduciary nature and that in any transaction on behalf of his principal the agent is bound to exercise the utmost good faith and honestly. They assert that such an agent cannot take advantage of such fiduciary capacity and make a secret profit for his own benefit. Whitnack v. Ellworthy, 63 Cal.App. 411, 218 P. 631; Curry v. King, 6 Cal.App. 568, 92 P. 662; 1 Cal.Jur. 794, sec. 82. There can be no question of the soundness or of the applicability of said principle to the facts of this case. That Artel, while acting as agent for Schwarting in a transaction where he was offered the bungalow court as one of two properties in exchange for the St. Louis business, came out with a personal net profit of $8,000 cannot be denied.

This leaves for consideration the question whether Artel disclosed all the facts to Schwarting prior to his closing the transaction as the latter's agent on July 29th. That Artel withheld a full disclosure of the facts from Schwarting appears definitely established by the following uncontroverted facts:

(1) The original offer from Goodman was to exchange the Hartman apartments for the Schwarting business, but on June 19th, after Artel and Goodman had inspected said apartment house, Artel had raised some objection to the exchange when Goodman suggested to Artel that both the apartment house and the adjoining bungalow court might be traded for the St. Louis business.

(2) While Goodman's testimony that he made said suggestion was denied by Artel, he could not deny the receipt of Goodman's letter of June 20 wherein Goodman referred to the fact that while the negotiations had commenced for the exchange of the Hartman apartments alone, subject to $30,000, for the business in St. Louis, yet *he was hopeful that the exchange might be made of the St. Louis business for said apartment house "subject to $22,500 and the Oak St. property bungalows and duplex property, subject to $5000"*.

(3) While Artel denied the receipt of the draft of the proposed contract for the exchange of the St. Louis business for both of said properties, that he did receive it is established by two conspicuous events:

(a) Artel failed to send to Schwarting either said letter of June 20th or the draft of the proposed agreement, and in no way disclosed that such an offer had been made.

(b) When Artel prepared his own draft of the agreement for the exchange *he used correct orthography (contrary to his practice) and substantially all the phraseology contained in the Goodman draft.* But he omitted the description of the bungalow court and duplex, which were contained in the Goodman draft.

(4) In his letter to Schwarting of June 29, 1936, accompanying the Goodman draft of said proposed agreement of exchange, he wrote (to Schwarting) as follows: "Now this party will make the trade with other arrangements made with Owner and my self making a three corner trade, involving other prop. and will trafe providing your stock will invoice $40,000 to $44,000 net, not including fixtures Please advise". Said letter was accompanied by said *draft of the agreement for exchange in Artel's own handwriting.* From said communication and said inclosed draft of contract it

appears that Artel was to receive the bungalow court; but from expressions in former communications Schwarting might very properly have gained the impression that the conveyance of said court to Artel was the result of the "three corner deal" which to that time was a mystery to Schwarting. Evidently the omission to mention his own bungalow in his letter and in his said draft of the contract was for the definite purpose of avoiding the suspicion of Schwarting, or to give Schwarting complete information that Artel was personally participating in the deal. In view of the identity of the language and the logic of the draft of contract prepared by Artel, as transmitted on June 29, it must have been a strain upon the credulity of the trial court to give any credence to the testimony of Artel.

(5) After Schwarting had received said letter and draft of Artel under date of June 29th he wrote Artel under date of July 2d inquiring about the "three corner" trade. Under date of July 4th Artel replied thereto as follows: "I may half to put in more property or money in the three way deal, will give you all the dope just as soon as I can get it all arranged, it takes time and a lot of arranging and travelling back and forth."

(6) But on July 8, 1936, Artel again wrote Schwarting without deigning to mention anything about the "three way deal".

(7) On July 10, 1936, Schwarting answered said last-mentioned letter and said "Go ahead and see what you can do and get me the receipts and expenses, and if party will come here to inspect stock, before we go there to see the apartment, also diagram of Apartment, rentals, insurance, etc., and your proposition to him, so that I can see the deal in better light and figure same out."

(8) On July 17th Artel's answer to the letter of July 10th did not contain any mention of the bungalow court.

(9) Schwarting's answer of July 20, 1936, does not refer to the three-way deal but it did say that he would like to inspect the Los Angeles property.

(10) Artel's letter under date of July 20th again failed to mention the "three way deal", but expressed his preference that Schwarting see the property before the consummation of the exchange.

(11) On July 24th, Schwarting wired Artel to close the deal and on the same day wrote confirming Artel's authority to represent him in the transaction.

(12) The exchange agreement having been signed July 25th by Artel, in his letter of July 29th he advised Schwarting of the execution of the agreement but did not inclose a copy of the exchange agreement which provided for the exchange of the Schwarting business for the apartment house and the exchange of Artel's Inglewood bungalow for said bungalow court; also said agreement failed to reserve to Schwarting the right to inspect the Hartman apartments notwithstanding he had communicated such desire to Artel.

(13) On July 31st Schwarting in a letter inquired of Artel, "Can't you tell me the whole deal." Also in a letter to Artel under date of August 3d Schwarting stated, "If you could tell me what Seymour (optionee of Hartman apartments) is getting from Turner, Rosenberg, Tauber and also what your consideration is * * * I would be better able to work the deal."

(14) As a part of his escrow instructions by means of which said exchanges were finally consummated, Artel inserted the following provision: "This escrow is contingent upon the closing of the escrow between Schwarting and Seymour."

(15) One commission only was paid to Goodman and that was paid by Schwarting in the sum of $1,000. Artel paid no commission.

(16) Schwarting sustained a net loss of $10,000 in the transaction; Artel made a profit of $8,000 in the transaction.

(17) Artel's Inglewood bungalow was exchanged as an integral part of the single transaction in which he represented Schwarting; he had no contract for the exchange of said Inglewood bungalow except that contained in the agreement between Schwarting and Seymour of July 25, 1936. The entire transaction was handled through one escrow and all of the facts and circumstances indicate that Artel's exchange was so inextricably interwoven with that of his principal that its consummation depended entirely upon the successful exchange of Schwarting's business for the Hartman apartments.

When confronted with the foregoing proofs indicating his infidelity to his trust, Artel testified at the trial that on July 22, 1936, he told Schwarting over the telephone that he was exchanging his Inglewood property for the bungalow court

Also, on August 11th he says he told Schwarting over the telephone that he was trading his Inglewood bungalow for the bungalow court, assuming a $5,000 mortgage.

These telephone conversations were denied by Schwarting, and in view of the numerous facts above recited which appear definitely to support the claim of Schwarting, we are unable to perceive how any reliance could have been placed upon Artel's said testimony. There could be no reasonable doubt that Artel realized a profit by his transaction as agent for Schwarting.

Viewing the evidence most generously in favor of defendants, we can see no form but that of an agent who was extremely reticent with his principal concerning the subject of the agency. The offer of Goodman on June 20th to exchange both the apartment house and the bungalow court for Schwarting's business was withheld from Schwarting; the draft of a contract by Artel providing for the conveyance of the bungalow court to Artel, for which he was to pay nothing, was withheld from Schwarting; to all inquiries by Schwarting relative to the details of the three-way deal Artel made no reply. Concerning his own participation in the transaction Artel maintained a sphinx-like silence until July 22d, when he informed Schwarting that he was exchanging his bungalow in Inglewood for the bungalow court, but he withheld from Schwarting the details and manner of exchange. While the exchange agreement was executed on July 25th, never did Artel, the agent, forward a copy thereof to his principal.

On August 1st, in his conversation with Schwarting, Artel was kind enough to repose in him the gentle confidence that in taking the bungalow court he was also assuming a $5,000 mortgage. In his letter he said much to Schwarting concerning the value of the apartment house, its condition and capacity, but never did he give the details concerning the bungalow court. As to it only vague references appear in the correspondence.

[2] When the acts of an agent have been questioned by his principal and the fiduciary relationship has been established, the burden is cast upon the agent to prove that he acted with the utmost good faith toward his principal (Curry v. King, supra; Patterson v. De Haven, 88 Cal.App. 418, 425, 263 P. 568) and that he make a full disclosure prior to the transaction of all the facts relating to the transactions under attack. Franklin v. Mortgage Guaranty & Security Co., 9 Cir., 57 F.2d 834; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; 2 Cor.Jur. 704; 3 C.J.S., Agency § 138.

[3] There is no substantial evidence in the record tending to prove that Artel acted with good faith toward Schwarting or that he made a full and fair disclosure of the facts relating to the bungalow court. On the contrary, all of the evidence indicates an attempt to conceal from Schwarting Artel's actual interest, as well as the secret that Artel was making huge profits from the deal. It is a rule of universal application that an agent is bound to the utmost good faith and cannot make a secret profit or take advantage of his agency for his own benefit (Teats v. Caldwell, 28 Cal.App. 206, 151 P. 973; Whitnack v. Ellworthy, 63 Cal.App. 411, 218 P. 631); and where he does so he will be required to account to his principal for any such benefit or profit received by him. United States v. Carter, 217 U.S. 286, 30 S.Ct. 515, 54 L.Ed. 769, 19 Ann.Cas. 594.

[4-6] It is likewise the law that where the consideration for property is paid by one person while the title is taken by another, a trust results in favor of him who advanced the consideration. Civ.Code, sec. 853; Thompson v. Bank of California, 4 Cal.App. 660, 88 P. 987; Kirk White & Co. v. Bieg-Hoffine Co., 6 Cal.App.2d 188, 44 P.2d 439. In those cases where an agent has secretly profited, as a matter of course, to the end that equity be done to all parties he is entitled to be reimbursed for any portion of the purchase money advanced by him and for all expense necessarily incurred by him in protecting and conserving the property of his principal. 3 C.J.S., Agency, p. 14, § 140. Under this hypothesis, Artel is entitled to be reimbursed in the amount of $2,000, the value of his said Inglewood bungalow, which he utilized in effectuating said exchange for Schwarting.

For the reasons assigned above, the judgment is reversed. The trial court is directed to require an accounting of the revenues earned by said bungalow court and of all disbursements properly made on its behalf; that the findings be amended in accordance with the views of this decision; that judgment be awarded plaintiffs quieting title of said court in plaintiffs, requiring defendants to convey said title to plaintiffs and awarding the net revenue so ascertained to plaintiffs less the sum of $2,000.

We concur: WOOD, J.; McCOMB, J.

40 Cal.App.2d 643

PEOPLE v. MEGLADDERY.

Cr. 2109.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1940.

Hearing Denied Oct. 14, 1940.

1. False pretenses 🔑29

An indictment, which charged defendant with uttering and delivering a check with intent to defraud payee knowing at the time of making check that defendant had not sufficient funds in or credit with bank to meet check in full, was sufficient to charge a crime under statute making it an offense to issue worthless checks under certain conditions, notwithstanding that indictment did not include "upon its presentation" with reference to check. Pen.Code, § 476a.

2. False pretenses 🔑5

Under statute making it an offense to willfully, with intent to defraud, issue a check without sufficient funds or credit, gist of offense is fraudulent intent with which check was drawn or delivered and knowledge by person issuing it that at the time he is without funds or credit in bank upon which check is drawn. Pen.Code, § 476a.

3. False pretenses 🔑49(4)

In prosecution for issuing worthless checks, where defendant claimed to have had a pre-arranged credit with bank upon which checks were drawn, evidence taken from records of bank concerning approximately 245 of defendant's checks which bank had rejected for insufficient funds over a two-year period, and showing that defendant had been notified by bank concerning rejection of such checks, was admissible to prove defendant's knowledge that he did not have sufficient credit with bank to meet checks involved in indictment, although the state did not prove that the 245 checks were written by defendant or to whom they were payable or delivered. Pen.Code, § 476a.

4. Criminal law 🔑789(3)

In prosecution for issuing worthless checks where evidence relating to rejection, for insufficient funds, by bank of checks other than those involved in indictment was admitted to rebut defendant's claim of pre-arranged credit with bank whereby checks would be paid, refusal of defendant's proposed instruction that, with regard to checks other than those involved in indictment, unless evidence established beyond reasonable doubt all essential elements of offense denounced by statute, defendant was entitled to presumption of innocence and that it was the duty of jury to find that defendant did not issue any of such checks with intent to defraud, was proper, since proposed instruction did not state the law upon any issue involved. Pen.Code, § 476a.

5. Criminal law 🔑370

In a criminal prosecution where proof of knowledge by defendant is involved, although information conveyed to defendant tends to show that defendant was guilty of some other crime, proof of such information is admissible for limited purpose of showing that information was conveyed to defendant and that defendant thereby had knowledge of circumstances in issue.

6. Criminal law 🔑371(3)

In prosecution for issuing worthless checks, worthless checks other than those involved in indictment were admissible to prove fraudulent intent with which checks named in indictment were issued and to meet defendant's claim of a pre-arranged credit with bank upon which checks were drawn whereby checks would be paid. Pen. Code, § 476a.

7. Criminal law 🔑1171(6)

In prosecution for issuing worthless checks where defendant, who had previously been tried in same county on charges of soliciting and receiving a bribe as secretary to governor, claimed to have had a pre-arranged credit with bank whereby checks would be paid, assistant district attorney's remarks relating to defendant's use of his official position with governor to "shake down" those having business with governor's office were not prejudicial against defendant, in view of the evidence. Pen.Code, § 476a.

8. False pretenses ⚷49(3)

Evidence sustained conviction for issuing worthless checks, as against claim that defendant thought that checks would be paid by bank because of a pre-arranged credit. Pen.Code, § 476a.

9. Criminal law ⚷112(5)

A trial court in Alameda county had jurisdiction of prosecution for issuing a worthless check, although defendant claimed that check was written in Sacramento and there mailed to payee addressed to Oakland, where evidence warranted finding that check was mailed in Oakland, Alameda County. Pen.Code, §§ 476a, 781.

10. Criminal law ⚷814(6)

In prosecution for issuing worthless checks, refusal of defendant's proposed instruction that ability and honest intention to deposit sufficient funds in bank to meet checks in full upon their presentation in due course of business constituted a defense was proper, where defendant did not raise such defense and there was no evidence upon which instruction could be founded. Pen. Code, § 476a.

11. Criminal law ⚷745

A jury is entitled to draw inferences from facts proved in a criminal case as well as in a civil case.

12. Criminal law ⚷759(1)

In a criminal prosecution where facts are in evidence from which knowledge of another fact might be inferred, it is error to instruct jury that actual knowledge alone must be proved.

13. Criminal law ⚷830

Refusal to give an instruction as a whole which contains substantial matter not in accordance with the law is not error.

Appeal from Superior Court, Alameda County; Warren Steel, Judge.

Mark Lee Megladdery, Jr., was convicted of an offense under an indictment charging violations of the Penal Code, § 476a, and he appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Leo R. Friedman, of San Francisco, for appellant.

Earl Warren, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., and Nathan Harry Miller, Deputy Dist. Atty., all of Oakland, for respondent.

NOURSE, Presiding Justice.

The defendant was tried by a jury upon an indictment charging four separate violations of section 476a of the Penal Code. He was found guilty on each of the four counts of the indictment, and thereafter moved for a new trial as to each count. These motions were all denied, and the appeal is taken from those orders and from the judgment following the verdict.

Neither the appellant nor the respondent has complied with the court rule requiring a statement of the issues involved upon the appeal. The appellant has not made a statement of the facts upon which the judgment is founded. The respondent has made such a statement which we find to be fairly in accord with the transcript, and from which we quote:

"Mark Lee Megladdery, Jr., the appellant, was private secretary to Governor Frank F. Merriam during the years 1935 to 1938 inclusive. On April 27, 1936, he opened an account with the main office of the Bank of America in Sacramento.

"It was the custom of the bank when a check was rejected for insufficient funds that a rejected check charge slip was prepared and a charge of fifty cents was made for each check rejected. This custom was also followed with respect to Megladdery's checks which were rejected, and at the end of each month the notices of check rejections and charges were mailed to him along with his bank statement.

"On December 24, 1937, Megladdery gave a check payable to cash for $60 to C. W. Wright, an Oakland druggist, which check is charged in the first count of the indictment and will in this brief frequently be called 'the first Wright check.' On this occasion Megladdery received some $15 in merchandise and the balance in cash. Wright then put the check through the bank, and it was rejected for insufficiency of funds. When Wright asked Megladdery about the check, Megladdery said that 'he would take care of it.'

"Megladdery passed the first Wright check in December, 1937. From the time he opened his account in the bank until December 1, 1937, sixty-six (66) checks that Megladdery uttered and delivered were rejected by the Bank of America because of insufficiency of funds in or credit with the bank, and he was notified at the end of each month of the specific checks rejected, the date of the rejection, and the fact that a charge of fifty-cents was made for each of such rejections.

"On June 25, 1938, Megladdery gave another check for $35, payable to cash to C. W. Wright, which check is charged in the second count of the indictment and will in this brief frequently be called 'the second Wright check.' He received cash for this check. The check was put through the bank several times, but was returned unpaid. When Wright asked Megladdery for the money, Megladdery told Wright that he would pay the check, but up to the date of this trial on August 15, 1939, neither the first nor second Wright check had been paid.

"From December 1, 1937, the month in which Megladdery passed the first Wright check, to June 1, 1938, the month in which Megladdery passed the second Wright check, sixty (60) checks which Megladdery had uttered and delivered were rejected by the bank for insufficiency of funds. Megladdery was notified by mail that his checks had been rejected and that a charge of fifty cents had been made for each rejection.

"On July 8, 1938, Megladdery gave a check payable to cash in the sum of $30 to the Leamington Hotel, which check is charged in the third count of the indictment and will in this brief frequently be called the 'Leamington Hotel check.' Miss Mable Rea, an employee of the Leamington Hotel gave Megladdery cash for this check. The check was put through the bank but was rejected for insufficiency of funds. Several efforts were made to collect the check but without success. Several communications were addressed to Megladdery concerning the transaction which Megladdery ignored. More than five months after the indictment was returned on July 15, 1939, someone came in and paid the $30 check on behalf of Megladdery.

"From June 1, 1938, the month in which Megladdery passed the second Wright check, to July 1, 1938, the month in which Megladdery passed the Leamington Hotel check, fifteen (15) checks which Megladdery had uttered and delivered were rejected by the bank for insufficiency of funds. Megladdery was notified by mail that his checks had been rejected and that a charge of fifty cents had been made for each rejection.

"Megladdery gave a check dated September 1, 1938, in the sum of $115.11 to the Firestone Supply Company, which check is charged in the fourth count of the indictment and will in this brief frequently be called 'the Firestone check.' The check was received by the Firestone Company on September 2d, but when it was deposited in the bank it was returned with the notation 'Insufficient Funds and Account Attached.'

"The details of this transaction indicate the intent of the defendant at the time of his passing the Firestone check. In the early part of January, 1938, Louis A. Alborelli was Manager of the State Department of Motor Vehicles for Alameda and Contra Costa counties. Megladdery asked Alborelli where the state purchased tires and was told by Alborelli that tires were purchased from the Firestone Company. Megladdery then asked Alborelli to speak to Mr. Gordon, the manager of the Firestone Company, and tell him that he, Megladdery, wanted to purchase some tires for some friend. This Alborelli did. On January 24, 1938, a woman came to the Firestone store in Oakland and introduced herself as Mrs. Jackson and presented a letter from Megladdery, written on the stationery of the governor's office, which letter Megladdery admitted writing.

"The tires were put on a Cadillac automobile, 1937 license number 8D 66. The woman who drove the car and signed her name as M. E. Jackson, when she received the tires was not Mrs. Jackson, but was one Helen Devine.

"For the limited purpose of showing fraudulent intent, it was shown that seven bills for the tires were mailed to Megladdery, but Megladdery ignored them. Five letters were written to Megladdery which Megladdery likewise ignored. Members of the Firestone Company staff called on Megladdery at the governor's office numerous times for the payment of this bill, but he evaded them. Finally, on August 17, 1938, two representatives of the Firestone Company contacted Megladdery. He stated that he had contacted his Oakland office with instructions to mail them a check. When the check failed to come, the Firestone Company contacted Megladdery on September 1st, at which time he told them that the check was being put in the mail that day.

"From July 1, 1938, the month in which Megladdery passed the Leamington Hotel check, to September 1, 1938, the month in which Magladdery passed the Firestone check, forty-five (45) checks which Megladdery had uttered and delivered during the months of July and August, 1938, were rejected by the bank for insufficiency of funds. Megladdery was notified by mail that his checks had been rejected and that a charge of fifty cents had been made for each rejection.

"For the limited purpose of showing that Megladdery had knowledge that the checks which he had passed were returned unpaid, and for the purpose of showing that passing the checks without funds was in pursuance of a plan or scheme on the part of Megladdery to exploit his official position for the purpose of obtaining money or property by fraud and false pretenses testimony was admitted to show the dealings between several individuals and Megladdery.

"Mr. E. H. Johnston of the Bank of America testified concerning approximately 245 of Megladdery's checks which the bank rejected for insufficiency of funds. In some instances the amounts of the checks rejected are the same and possibly the same check was rejected more than once but that is conjectural and the bank officials could not state that the checks were identical.

"Megladdery admitted that he knew that some of his checks had been rejected but had never gone to Mr. Vandenberg, or anyone else at the bank to inquire the reason for it; that monthly statements from the bank reached him right after the first of the month.

"He also admitted that J. I. MacDonald told him about the rejection of the check by the bank; that Mr. Yount advised him of the rejection of his $35 check in October, 1937; that on some occasions he post dated checks for small amounts; that various people called his attention to the fact that his checks had been rejected.

"Megladdery admitted that he assisted C. W. Wright to get an appointment to the State Pharmacy Board and also assisted Phil Riley, manager of the Leamington Hotel, to get an appointment to the State Board of Agriculture."

[1, 2] The appellant first complains of the order overruling his demurrer to the indictment which charged the defendant with uttering and delivering the several checks "with intent to defraud" the payee "knowing at the time of such making * * * that he had not sufficient funds in or credit with said bank to meet the said check and draft in full." It is contended that the charging part of the indictment was insufficient because it did not contain the words "upon its presentation" in the words of section 476a of the Penal Code. These words are plainly superfluous. "Payment of a check involves its full, and not partial, payment when presented." People v. Westerdahl, 316 Ill. 86, 146 N.E. 737, 739. "The gist of the offense is the fraudulent intent with which the check was drawn or delivered and knowledge by the person issuing it that at the time he was without funds or credit in the bank upon which the check was so drawn." People v. Bullock, 123 Cal.App. 299, 304, 11 P.2d 441, 443; People v. Sherman, 100 Cal.App. 587, 590, 280 P. 708; People v. Zimmer, 23 Cal.App.2d 581, 585, 73 P.2d 923. There is no substantial difference between the words "to meet the said check in full" and "for the payment of such check * * * in full upon its presentation." To provide funds in, or credit with, the bank "to meet the check" can mean nothing else than to provide for its payment "upon presentation."

[3] Objection is made to the admission of the evidence taken from the records of the bank showing the circumstances concerning approximately 245 of Megladdery's checks which the bank rejected for insufficiency of funds over a period of about two years. The appellant's complaint is that the state did not prove that these checks were written by him, and did not prove to whom they were payable or delivered. Such proof was not necessary. The evidence was admitted for the limited purpose of proving appellant's knowledge that he did not have sufficient credit with the bank to meet the checks involved in the indictment. Throughout the trial the appellant maintained that he had made an arrangement with the manager of the bank upon which the checks were drawn whereby he would be permitted to overdraw his personal account in return for his having used the influence of his official position to have public moneys transferred to such bank for deposit. He testified that, because of this arrangement, he was justified in believing that the bank was extending him credit, and that the checks mentioned in the indictment would be paid by the bank upon presentation, notwith-

standing the condition of his account. To meet this fantastic testimony the state offered evidence directly denying that any such arrangement had been made by the bank, directly denying that any credit was extended him by the bank, and proving that over a period of about two years the bank notified the appellant on every occasion when his account was overdrawn and charged him fifty cents for each occasion. As part of this line of proof officers of the bank were permitted to testify from the books of the bank concerning the numerous overdrafts occasioned by the presentation of checks with insufficient funds for payment. This evidence was not offered to prove other and similar offenses, hence, it was not necessary to identify each check and prove the signature of appellant, or that there was not in fact sufficient funds to meet payment at the time. It was sufficient to show that the bank so notified appellant and that it thereby informed him that he had no credit during the period when he issued the checks named in the indictment, and that, throughout that period his checks were not being honored by the bank. This information officially conveyed to the appellant by the bank was direct evidence of his knowledge of his lack of credit and for that reason was clearly admissible. 20 Am.Jur., pp. 312-313; 22 C.J., p. 284; People v. Cortze, 108 Cal. App. 111, 114, 290 P. 1083.

[4, 5] Appellant complains of the refusal to give his proposed instruction telling the jury that, with regard to these other checks, unless the evidence established to a moral certainty and beyond a reasonable doubt "all the essential elements of the offense" denounced by the Penal Code the defendant was entitled to the presumption of innocence and that it was the "duty" of the jury to find that the defendant "did not issue any of such checks with intent to defraud". The proposed instruction was properly refused as it did not state the law upon any issue involved in the trial. The evidence showing that these other checks had been issued did not purport to be evidence showing the commission of another criminal offense. It was admitted to show knowledge of the condition of appellant's dealings with the bank and to rebut appellant's special defense that he believed he had credit with the bank to take care of all checks. As part of the state's showing in this connection an officer of the bank testified that he frequently notified appellant that his account was overdrawn, and that each month a statement was sent to appellant showing the number and amount of unpaid checks charged to his account. The simplest way of proving knowledge is to show that the individual was given direct information of the matter in issue, either by the spoken or written word. If the information so conveyed tends to show that the defendant was guilty of some other crime it is nevertheless admissible for the limited purpose of showing that such information was conveyed to the defendant and that he thereby had knowledge of the circumstances in issue. But the jury is not to find the defendant either guilty or not guilty of the other offenses; it is not to give him the presumption of innocence, or the benefit of a reasonable doubt. It is to apply the evidence for the sole purpose of determining whether knowledge was had of the circumstances in issue. To this effect and for this purpose, the instructions given were carefully drawn. The particular issue covering these other checks was fully covered by correct instructions properly given, and that proposed by appellant was properly refused in that it did not state the law in any particular.

[6] For the same purpose of showing appellant's knowledge of his standing at the bank, the state offered two checks which appellant gave to C. W. Wright, one in May, 1937, and the other in September, 1937. The May check was for $250 representing a loan made appellant by Wright on appellant's statement that the check "will be good right after the first of next month", and "don't put it in until I will let you know, and I will let you know when it is good." The second check was for the same amount and was given in August in exchange for the May check which appellant said was "a little old." The second check was nearly two years old at the time of the trial, and the payee was still without his money. All this testimony strongly tended to show appellant's knowledge of his bank account, and went to prove the fraudulent intent with which the checks named in the indictment were issued. The same may be said regarding the testimony of the witnesses Ogle and Yount. Here testimony was insufficient to prove a violation of section 476a, but it was clearly pertinent and competent evidence to meet the special defense of a prearranged credit.

[7] The appellant makes the usual criticism of the conduct of the assistant district attorney. It would serve no purpose to refer to these matters in detail or to reprint the remarks objected to. Stress is placed upon the objection to the remark relating to the appellant's use of his official position with the governor to "shake down" those having business with the governor's office, and to create situations whereby he was able to receive bribes from such persons. The appellant had been tried in the same county on charges of soliciting and receiving a bribe as secretary to the governor, and, on May 1, 1939, was convicted of the charge, but was granted a new trial. He now asserts that it was a matter of common knowledge among the people of Alameda county that the appellant was charged with such offenses, and assumes that there might have been some prejudice to him when the district attorney made these remarks. In the light of all the circumstances it does not appear that the appellant could have been prejudiced by the district attorney's remarks to the jury when we bear in mind that the evidence in this case disclosed the political background of the check transactions between appellant and Wright, the Firestone tire deal, and the insistent claim of appellant that he had used his official position to make an illegal deal with the bank whereby the latter would illegally extend him credit. In thus referring to "shake down" and interest in "bribery" the district attorney was within the record. In the only instance when the prosecutor stepped beyond the record the admonition of the trial court, followed by the instruction to the jury erased all possible claim of prejudice.

[8] The argument that the evidence was insufficient to support the verdict does not require extended treatment. The appellant admitted that he issued the several checks without sufficient funds for their payment. His answer was that he had arranged credit through which he believed the checks would be paid. All the witnesses called denied this assertion and all the circumstances proved the falsity of the defense. On this appeal we must assume that the jury believed the witnesses called by the state. Under such a case it is useless to argue that the evidence was insufficient to support the verdict.

[9] The appellant urges that the court had no jurisdiction over the offense set forth in the fourth count because the check involved in that count was written in Sacramento and there mailed to the payee addressed to Oakland. Such was the testimony of the appellant but other witnesses gave conflicting testimony from which the jury could have found that the check was mailed in Oakland, Alameda county. Furthermore, the question is answered by section 781 of the Penal Code which provides: "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." See People v. Boggess, 194 Cal. 212, 220, 228 P. 448; People v. Twedt, 1 Cal.2d 392, 397, 35 P.2d 324; People v. Thorn, 138 Cal.App. 714, 732, 33 P.2d 5.

[10] The appellant complains of the refusal of the trial court to give his proposed instruction to the effect that "ability and honest intention to deposit sufficient funds in the bank to meet the check in full upon its presentation in due course of business constitutes a defence to the charge". The proposed instruction was properly refused. The appellant did not raise that defense, and there was no evidence upon which the instruction could be founded. There is a wide difference between financial ability and honest intentions, and the prearranged credit with the bank to which the code section refers.

[11-13] Appellant complains of the refusal of the trial court to give his proposed instruction relating to actual and constructive knowledge. The proposal is not a correct statement of the law. A jury is entitled to draw inferences from the facts proved in a criminal case as well as in a civil case. Where facts are in evidence from which knowledge of another fact might be inferred, it would be error to tell the jury that actual knowledge alone must be proved. People v. Juehling, 10 Cal.App.2d 527, 531, 52 P.2d 520. And there is no error in refusing to give an instruction as a whole which contains substantial matter not in accordance with the law.

People v. Woollacott, 80 Cal.App. 275, 278, 251 P. 826.

The judgment and the orders denying a new trial are each affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

EMPIRE VINTAGE CO. et al. v. COLLINS et al.

Civ. 11468.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1940.

Hearing Denied Nov. 14, 1940.

1. Intoxicating liquors 🔑1

The right of a wholesaler of distilled spirits to do business in state is a privilege granted by virtue of provisions of State Constitution and the statutes enacted to carry such provisions into effect. St.1935, p. 1123 et seq., § 1 et seq.; Const. art. 20, § 22.

2. Intoxicating liquors 🔑91

The State Board of Equalization, in making its findings that an additional excise tax was due from wholesaler of distilled spirits, was acting as a fact-finding body, and board's findings, though not conclusive, should not be ignored in absence of showing that they were arbitrary and capricious, but should be treated as findings of a referee. St.1935, pp. 1123 et seq., 1143–1146, §§ 1 et seq., 40–48.

3. Intoxicating liquors 🔑91

Failure of State Board of Equalization, in making its findings that an additional excise tax was due from wholesaler of distilled spirits, to make allowance for loss by evaporation, was not arbitrary and capricious, where there was no showing that any container was open for evaporation. St.1935, pp. 1123 et seq., 1143–1146, §§ 1 et seq., 40–48.

4. Intoxicating liquors 🔑91

The State Board of Equalization, in determining whether an additional excise tax was due from wholesaler of distilled spirits, was not bound by testimony of wholesaler's manager as to certain gifts and exchanges, where manager testified he could not give name, place, and time of a single transfer. St.1935, pp. 1123 et seq., 1143–1146, §§ 1 et seq., 40–48.

5. Intoxicating liquors 🔑91

The State Board of Equalization, in finding that an additional excise tax was due from wholesaler of distilled spirits, found at least by inference that wholesaler had made sales which were not accompanied with stamps as required by statute, and such finding should be given effect by trial court, where it was not in any respect successfully attacked. St.1935, pp. 1123 et seq., 1127, 1132, 1139, 1143–1146, §§ 1 et seq., 6, 24, 33, 38, 40–48.

6. Intoxicating liquors 🔑96

In action by wholesaler of distilled spirits to recover an installment of excise tax paid under protest and to have declared that there was no tax due, wholesaler had burden of showing that it had paid taxes on all sales, legal or illegal, for the period that State Board of Equalization found additional tax due, and that board arbitrarily compelled it to pay the amount sued for. St. 1935, p. 1123 et seq., § 1 et seq.

7. Intoxicating liquors 🔑91

The tax upon all distilled spirits sold in state is an "excise tax", and hence finding of State Board of Equalization that an additional tax was due from wholesaler of distilled spirits did not involve an assessment or reassessment. St.1935, pp. 1123 et seq., 1132, §§ 1 et seq., 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Excise Tax".

8. Intoxicating liquors 🔑45

The Alcoholic Beverage Control Act imposing a tax upon all distilled spirits sold in state is a "revenue act". St.1935, pp. 1123 et seq., 1132, §§ 1 et seq., 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Revenue Act".

9. Intoxicating liquors 🔑91

Under Alcoholic Beverage Control Act imposing an excise tax upon all distilled spirits sold in state, State Board of Equalization is authorized to ascertain whether there is a deficiency in amount of tax due from wholesaler and the amount thereof, and board's findings are subject to judicial review. St.1935, p. 1123 et seq., § 1 et seq.

◆

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by the Empire Vintage Company, and the Empire Vintage Company, doing business as the Imperial Distributing Company, against R. E. Collins and others, as members of the State Board of Equalization, the State Board of Control and others, and Charles G. Johnson, State Treasurer, to recover an installment of excise tax paid under protest and to have declared that there was no tax due. From a judgment for plaintiff, defendants appeal.

Reversed.

Hearing denied; EDMONDS, HOUSER, and CARTER, JJ., dissenting; GIBSON, C. J., and TRAYNOR, J., not participating; YORK and MOORE, JJ., acting pro. tem.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellants.

Sefton & Quattrin, of San Francisco, for respondent.

STURTEVANT, Justice.

The defendants have appealed from a judgment directing the repayment of an alleged instalment of excise taxes and declaring there was no tax due. Before we proceed to state the contentions of the defendants it is necessary to set forth the conditions of the record. In its complaint the plaintiff alleged:

"I. That the defendants, R. E. Collins, Harry B. Riley, Andrew J. Gallagher, Fred E. Stewart and Wm. G. Bonelli, are members of the State Board of Equalization of the State of California, duly appointed and qualified as such, and that they constitute said Board of Equalization of the State of California.

"II. That Arlin E. Stockburger, Harry B. Riley and Webb Shadle, are members of the State Board of Control of the State of California, duly appointed and qualified as such and they constitute said Board of Control of the State of California.

"III. That Charles G. Johnson is, and at all times hereinafter mentioned was, the State Treasurer for the State of California, duly appointed and qualified as such.

"IV. Plaintiff, Empire Vintage Company, is now and was at all the times herein mentioned a corporation, organized and existing under and by virtue of the laws of the State of California, duly qualified to do business in the State of California, and having an office and place of business in the City and County of San Francisco, in said State; that plaintiff Empire Vintage Company also does business under the fictitious style and name of Imperial Distributing Company and is duly qualified so to do.

"V. That plaintiff is now and was at all times herein mentioned, a duly authorized and licensed distributor of distilled spirits under the Alcoholic Beverage Control Act of the State of California.

"VI. That by the provisions of Section 24 of said Alcoholic Beverage Control Act, it was provided that an Excise Tax was imposed upon all distilled spirits sold in this state on and after July 1, 1935.

"VII. That plaintiff above named at all times complied with and performed the provisions of the said Alcoholic Beverage Control Act as the same was then in force and effect, and purchased and delivered as required therein Excise Stamps on all sales made by it upon which the said Excise Tax was imposed.

"VIII. That during the year 1938, and pursuant to the authority conferred upon it by said Alcoholic Beverage Control Act said State Board of Equalization caused an examination to be made of the books and records of plaintiff kept at its place of business and as a result of said examination, said State Board of Equalization determined that the sum of $6,148.38 as additional excise tax was due and payable from plaintiff and caused a complaint to be filed against the plaintiff as a result thereof;

"That thereafter and pursuant to the provisions of said Alcoholic Beverage Control Act, plaintiff filed a petition for reconsideration of said additional assessment and complaint and demanded an oral hearing upon said petition, which was granted. That said petition was heard before said State Board of Equalization and thereafter said State Board of Equalization notified plaintiff that it had ordered the amount of $6,148.38 to be levied upon plaintiff as and for additional excise tax and that said levy was final and said sum of $6,148.38 was immediately due and payable at the time of said levy and that plaintiff's licenses would be suspended on October 10, 1938, if said $6,148.38 was not paid. That thereafter the said defendants agreed that plaintiff could pay the same under protest at the following rate: $1,500.00 by October 10, 1938, and the remainder in five equal monthly instalments;

"That immediately thereafter and before the 10th day of October, 1938, plaintiff paid the State Board of Equalization the sum of $1,500.00 pursuant to said agreement;

"That said $1,500 was paid under protest and the grounds of said protest were as follows:

"(1) That the order made at the meeting of September 28, 1938, was and is in excess of the authority granted the Board by the Alcoholic Beverage Control Act;

"(2) That no evidence was presented to the Board and the Board had no evidence before it upon which to act, to establish the fact that the Empire Vintage Company, doing business as Imperial Distributing Company, sold any of the distilled spirits within the State of California involved in the complaint before the State Board of Equalization;

"(3) That no evidence was presented to the Board, and the Board had no evidence before it upon which to act, to establish the fact that the Empire Vintage Company, doing business as Imperial Distributing Company, delivered any of the distilled spirits involved in the complaint within the State of California, to any on- or off-sale licensee or that such distilled spirits packages, if in wholesale packages, were opened by any on- or off-sale licensee; or that such distilled spirits, if not in wholesale or original packages, were received by any on- or off-sale licensee;

"(4) That none of the distilled spirits involved in the complaint were delivered by Empire Vintage Company, doing business as Imperial Distributing Company, to any on- or off-sale licensee;

"(5) That none of the distilled spirits involved in the complaint were received by any on- or off-sale licensee in original cases or wholesale packages and opened by such on- or off-sale licensee; or were received by any on- or off-sale licensee in cases other than original cases or in broken case lots.

"IX. That no excise tax was due under said Alcoholic Beverage Control Act of the State of California from plaintiff, and said sum of $6,148.38 was illegally levied and plaintiff is entitled to recover the said sum of $6,148.38 with interest as provided in Section 32 of said Alcoholic Beverage Control Act of the State of California."

In their answer the defendants admitted all of the foregoing allegations excepting paragraphs VII and IX. The allegations of those two paragraphs, VII and IX, were denied.

The trial court found that all the allegations of the complaint contained in paragraphs I, II, III, IV, V, and VIII, are true and continuing it found as follows:

"II. That on the trial of this action the plaintiff waived all right to a refund of the sum of $11.48 which was charged in the audit of the Board to represent a sale of distilled spirits to a retail licensee.

"III. That, other than as found in Paragraph II, the Board had no information, facts or evidence before it at its hearings that any other distilled spirits owned by the plaintiff had been sold and delivered to, or ever received in broken cases or ever received in original cases which were opened by, on- or off-sale licensees under the Alcoholic Beverage Control Act.

"IV. That, other than as found in Paragraph II, none of the distilled spirits involved in the orders of the Board of June 14, 1938 and September 28, 1939, were ever sold and delivered to on- or off-sale licensees under the Alcoholic Beverage Control Act, or were ever received in broken cases or ever received in original cases and opened by on- or off-sale licensees under the Alcoholic Beverage Control Act;

"V. That during the period July 1, 1935, to June 30, 1937, the plaintiff made exchanges of distilled spirits with other wholesale distilled spirits licensees and failed to keep a record of such exchanges; that during said period the Board provided no form for, nor issued any instructions concerning, the keeping of records of sales of distilled spirits, except sales to on- and off-sale retail licensees."

The defendants present the contention that the findings do not support the judgment. As we think that point is well founded, we will discuss it and it will not be necessary to discuss the other contentions they have made.

[1] The record discloses that the plaintiff is a wholesaler of distilled spirits, duly licensed, and engaged in that business. The record does not disclose that it manufactures, rectifies, or otherwise deals in broken packages. The plaintiff's right to do business is, in this state, a privilege granted by virtue of the provisions of section 22, article XX, of the Constitution of the state of California and the statutes enacted to carry said section into effect. State Board of Equalization v. Superior Court, 5 Cal.App.2d 374, 42 P.2d 1076. Heretofore the plaintiff applied for a license and one was issued to it to act as a wholesaler of distilled spirits. By the terms of section 24 of the Alcoholic Beverage Control Act (Stats. 1935, p. 1123, 1132) it is

provided: "Sec. 24. An excise tax is hereby imposed upon all distilled spirits sold in this State on and after July 1, 1935, at the following rates: * * *" (then follows a table of rates and grades). It should be noted in passing that the levy is made *"upon all distilled spirits sold."* In section 6, it is provided that the plaintiff's license authorized it to sell to on-sale and off-sale licensees of the state board of equalization of the state of California (hereinafter referred to as the "board"). In section 33 it is provided how the tax levied in section 24 will be collected. Briefly stated, it provides that the board will cause to be printed stamps representing various sums and will sell them to the wholesaler, and that in making a sale of spirits the wholesaler will see that stamps in proper sums will *"accompany"* each delivery made by the wholesaler. In section 38 it is provided that the board shall prescribe all necessary rules and regulations to carry out the provisions of said act, to require reports from any licensee, to examine the books and records of such licensee, and that the agents of the board may visit and inspect the premises of such persons. The act contains no authorization permitting a wholesaler to sell to any person except as above mentioned. On the contrary, it contains penal provisions regarding any sales made in violation of the terms of the act. Section 40 provides that the board shall have the power to suspend or revoke a license for the violation of said act, and sections 41–48 provide the procedure to be followed.

[2-6] Taking up the findings, and the pleadings therein referred to, there is no finding that the plaintiff paid its taxes on "all distilled spirits sold in this state" by it between July 1, 1935, and June 30, 1937. There are findings that it paid taxes on sales, recorded in its books, made to on-sale and off-sale licensees. But there is no finding that it did not make sales to other persons, nor, if it did that such deliveries were "accompanied" by stamps. Paragraph VI of the complaint alleged conclusions of law. It was not denied nor was there a finding thereon. In paragraph VII of its complaint the plaintiff alleged performance of all provisions of the Alcoholic Beverage Control Act. That paragraph was denied. There was no finding thereon. It is appropriate at this point to add that, except as herein noted, there was no evidence purporting to prove the allegations thereof. In paragraph VIII the plaintiff alleged that the defendant board caused an examination to be made of plaintiff's books and records and determined there was due from the plaintiff $6,148.38 as additional excise tax; that plaintiff was granted a rehearing; that the board thereafter affirmed its determination; and that later the plaintiff paid $1,500 under protest. The contents of the protest are set forth. All of these allegations were found to be true. But no one of said allegations purports to affirm that the plaintiff had made no sale not contained in its books; nor, if it had, that such delivery was "accompanied" by the necessary stamps. The finding of the defendant board was, at least by inference, that numerous sales had been made which were not "accompanied" with necessary stamps. In making its findings the board was acting as a fact finding body. McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205. In doing so, it was clearly authorized by the provisions of the statute (secs. 40–44). That its findings were not conclusive is true. Power to review said findings is expressly granted to any court of competent jurisdiction. (Sec. 46.) But, in the absence of a showing that they were arbitrary or capricious, the findings should not be ignored but should be treated as the findings of referees. The plaintiff contends the board made no allowance for loss by evaporation. But there was no showing that any container was open for evaporation. Again, it contends it made exchanges and gifts for which the board made the plaintiff no allowance. In reply it should be noted that the discrepancy between the disbursements, and the returns, amounted to 1280 cases per annum; but the plaintiff's manager did not, and testified he could not, give the name, place, and time of a single transfer. The board was not bound by such testimony to the extent that the courts may say as a matter of law that the board's finding, ignoring the claimed gifts and exchanges, was "arbitrary and capricious". 10 Cal.Jur. 1145, "Evidence", sec. 363. It follows that the finding of the board was not in any respect successfully attacked in the trial court and that it should stand and be given effect. The other findings are to the effect that the plaintiff had paid its taxes on those sales to on-sale and off-sale licensees. There is no finding that other sales, whether legal or not, were not made or that the tax had been paid thereon.

But to support a judgment in favor of the plaintiff it is obvious the findings of the court should clearly show that the plaintiff, for the period July 1, 1935, to June 30, 1937, had paid taxes on all sales, legal or illegal, and that the defendants arbitrarily compelled it to pay the amount sued for. The findings do not make that showing.

[7-9] The plaintiff claims the amendments (Stats.1937, chaps. 681 and 758, pp. 1934, 2126) are not applicable. Conceding, without deciding the point, the claim is immaterial. In no place do we find the question involved. Again the plaintiff contends the board could not collect the alleged deficit except by making a reassessment and that under the act of 1935 it was not given power to reassess. That it was not given power to reassess is true. But bearing in mind we are dealing with an excise tax, it is obvious no assessment or reassessment is involved. Section 24 in effect was both the assessment and levy of the tax. Dollar Savings Bank v. United States, 19 Wall. 227, 86 U.S. 227, 240, 22 L.Ed. 80. He who would object to the amount of the tax was bound to present his objection to the legislature having said section under consideration. Finally the plaintiff contends that under the statute no provision is made for collecting a deficiency tax. It says the following questions must be answered: "From whom? Under what procedure? Was there a deficiency in this case?" Of course, the answers are immediately at hand. The tax is to be collected from the wholesaler, this plaintiff (sec. 33). It is to be collected under the procedure hereinabove indicated and the amount of the deficiency is to be ascertained as the board ascertained it in the present case. Bearing in mind that the Act of 1935 was a revenue act, that the very gist of it was to collect revenue, and that efficiency was of the utmost importance, the record presents no serious questions. The statute makes no distinction between acts whether past or present. It provides one procedure. It is not even claimed that such procedure is not fair and just. The same procedure applies whether there is one violation or several violations of the statutory duty to collect and pay over the tax imposed. These conclusions find complete support in State Board of Equalization v. Superior Court, 5 Cal.App.2d 374, 42 P.2d 1076.

The judgment appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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40 Cal.App.2d 636

NOWACK v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

Civ. 11447.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1940.

Rehearing Denied Oct. 16, 1940.

Hearing Denied Nov. 9, 1940.

1. Justices of the peace ⟜166(2)

The "stipulation", contemplated by statute requiring dismissal of appeal from justice's court not brought to trial within one year in absence of a written stipulation extending time, is a written stipulation from which it must clearly and definitely appear that the statutory time was deliberately intended to be extended by both parties. Code Civ.Proc. § 981a.

See Words and Phrases, Permanent Edition, for all other definitions of "Stipulation".

2. Justices of the peace ⟜166(2)

Under statute requiring dismissal of appeal from justice's court not brought to trial within a year in absence of written stipulation extending time, a "waiver" by equitable "estoppel" may not be relied upon as a substitute for the required written stipulation. Code Civ.Proc. § 981a.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Waiver".

3. Justices of the peace ⟜166(2)
Mandamus ⟜57(1)

Where appeal from justice's court was not brought to trial within a year and no written stipulation extending time was made, oral stipulation of parties extending time was insufficient to toll the running of the one-year period and could not create an equitable "estoppel" against assertion of right to dismissal of appeal, hence in original proceeding in District Court of Appeal, peremptory writ of mandate would issue to compel superior court to dismiss the appeal. Code Civ.Proc. § 981a.

Original proceeding by William Nowack against the Superior Court of the State of California in and for the County of San Mateo, Honorable Maxwell McNutt, Judge, for a writ of mandamus requiring the respondent to dismiss an appeal from a judgment of the justice's court.

Peremptory writ of mandate granted.

Hearing denied; CARTER, J., dissenting.

Meurice N. Swim, of San Francisco, and Joseph A. Branson, of San Mateo, for petitioner.

Theodore M. Stuart, of San Francisco, and J. E. McCurdy, of San Mateo, for respondent.

NOURSE, Presiding Justice.

Petitioner seeks a writ of mandamus requiring the respondent to dismiss an appeal from a judgment of the justice's court. The facts are not in dispute upon any material matter. On January 26, 1938, petitioner as plaintiff commenced an action in the justice's court against Barbara H. Clark to recover damages for injuries to personal property. He recovered judgment for $80.56 from which the defendant appealed on February 27, 1939. Upon motion of the appellant said cause was set for trial on July 6, 1939, before the respondent court, and, after numerous continuances, was dropped from the calendar by order of said court. On January 26, 1940, counsel for defendant and appellant had the cause again set for trial for February 13, 1940. Prior to said date, upon request of counsel for defendant and appellant, the parties stipulated in writing that the trial should be continued until February 26, 1940. On the latter day counsel for both parties met in another department of the superior court and, it appearing that February 26th was a day set aside for the hearing of law and motion matters, the respondent asserts that they orally agreed to continue the trial for two weeks and counsel for defendant and appellant notified the clerk of the department in which said case was pending that said cause should be marked continued for two weeks upon agreement of counsel. This oral agreement is disputed by counsel for petitioner herein. The cause was not tried on February 26, 1940, nor within two weeks thereafter and on April 1, 1940, the respondent therein and petitioner here presented his motion to dismiss the appeal because of the appellant's failure to bring the cause for trial within one year from the date of filing notice of appeal. This motion was denied after a hearing which disclosed no other facts material to this proceeding.

It should be noted at this point that the time within which the appeal should have been heard expired February 27, 1940; that the written stipulation extended the time of trial to February 26, which was within that period; that no written stipulation was made continuing the time beyond the statutory period; and that the disputed oral stipulation agreeing to a continuance of two weeks was not complied with by the appellant.

The rules of law controlling the decision herein are not open to further controversy. The statute applicable, section 981a of the Code of Civil Procedure, reads: "No action or order heretofore or hereafter appealed from the justice court to the Superior court, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions or orders heretofore, or hereafter appealed, must be dismissed by the court to which the same shall have been appealed, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal in said superior court, unless such time be otherwise extended by a written stipulation by the parties to the action filed with the clerk of the superior court to which the appeal is taken; * * *."

[1] "The stipulation provided for in the exception must be in writing and it must clearly and definitely appear therefrom that the statutory time was deliberately intended to be extended by both parties." Bank of America v. Superior Court, 22 Cal.App.2d 450, 452, 71 P.2d 296, 297; Swim v. Superior Court, 193 Cal. 539, 542, 226 P. 2; Emerson v. Superior Court, 7 Cal.2d 685, 686, 62 P.2d 363, 364; vol. 6, Cal.Jur., 10 Yr.Suppl., p. 681.

[2, 3] The expression of the Supreme Court in Emerson v. Superior Court, supra, so clearly covers the question of the need of a written stipulation, as well as the question of equitable estoppel raised by respondent herein that we quote at length from the decision:

"Petitioner contends that the written stipulation by which it was agreed that the case 'shall go off-calendar * * * and be reset upon the said court's calendar at its earliest convenience' extended the period within which it might be tried. To this we cannot agree. A review of the authorities construing section 981a of the Code of Civil Procedure and similar statutes shows that nothing short of a written stipulation extending in express terms the time of trial to a date beyond the statutory period, or expressly waiving the right to move for a dismissal will toll the running of the statutory time. Pacific Gas Radiator Co. v. Superior Court, 70 Cal.App. 200, 232 P. 995; Miller & Lux v. Superior Court, 192 Cal. 333, 219 P. 1006; Prudential Ins. Co. v. Superior Court, 117 Cal.App. 528, 4 P. (2d) 294; 6 Cal.Jur.Supp. pp. 679 et seq., § 136. A stipulation for a continuance for an indefinite period, or an agreement that the cause 'go off-calendar' to be reset at the court's convenience does not meet the requirements. * * *

"The further contention of petitioner that respondent's joinder in the stipulation constituted a waiver of the advantage of having his case tried within one year and created an equitable estoppel cannot be sustained. A waiver by equitable estoppel may not be relied upon in cases of this character as a substitute for the required written stipulation. Miller & Lux v. Superior Court, supra; Abbott v. Superior Court, 79 Cal.App. 746, 251 P. 221; Middlebrook v. Superior Court, 75 Cal.App. 35, 241 P. 914; 6 Cal.Jur.Supp., § 137, pp. 682, 683."

Let a peremptory writ of mandate issue as prayed.

We concur: STURTEVANT, J.; SPENCE, J.

16 Cal.2d 208

EWING v. EWING.

L. A. 16931.

Supreme Court of California.
Sept. 16, 1940.

1. Divorce 🔑37(17)

Where one spouse withdraws in good faith from the other because it would be improper to live together while divorce proceedings are pending, such separation will not constitute "desertion" within the meaning of the divorce statute, but the rule applies only where the party prosecuting the action for divorce acts in good faith. Civ. Code, § 90 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Desertion".

2. Divorce 🔑133(3)

To sustain divorce decree in favor of wife on her cross-complaint on ground of desertion, the evidence was required to show that the husband left her with intention to desert her, that his desertion continued for one year, and that the wife was willing to have her husband return and resume marital relations during that period. Civ.Code, § 90 et seq.

3. Divorce 🔑37(7)

Though it be assumed that husband acted in bad faith in bringing suit for divorce on ground of cruelty, there was no showing of willful "desertion" of the wife by the husband for one year within meaning of the divorce statute, where wife by cross-complaint filed less than 10 months after they separated sought absolute divorce and charged her husband with numerous acts of cruelty, since wife's conduct in the suit was in effect an assent to the separation and an expression of desire to terminate the marriage as of that date before prescribed period of one year elapsed. Civ.Code, § 90 et seq.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Suit for divorce by Jacob O. Ewing against Marian W. Ewing, wherein the defendant filed a cross-complaint. From a judgment in favor of the defendant on her cross-complaint, the plaintiff appeals.

Judgment reversed.

Nicholas & Davis, of Los Angeles, for appellant.

Wood, Crump & Rogers and Guy Richards Crump, all of Los Angeles, for respondent.

EDMONDS, Justice.

This case came on for trial upon pleadings by which each of the parties charged the other with cruelty. The appellant then filed an amended complaint alleging a cause of action for wilful desertion and the respondent filed an amended cross-complaint upon the same ground. At the time the suit was brought they had been separated less than three months, but more than one year had elapsed between the date of separation and the filing of the amended pleadings. An interlocutory decree granted the respondent upon her cross-complaint is challenged by the appellant upon two grounds. He asserts that the time during which an action for divorce is pending may not be included in computing the one-year period during which wilful desertion must continue if it is to be the basis for divorce, and that if such period may properly be included, the evidence does not support a finding that his desertion continued for one year prior to the filing of the amended cross-complaint.

[1] Where one spouse withdraws in good faith from the other because it would be improper to live together while divorce proceedings are pending, such separation will not constitute desertion within the meaning of the divorce statute, Civil Code, § 90 et seq. Kusel v. Kusel, 147 Cal. 52, 81 P. 297; Vickers v. Vickers, 95 W.Va. 323, 122 S.E. 279, 41 A.L.R. 266; Hurning v. Hurning, 80 Minn. 373, 83 N.W. 342; Floberg v. Floberg, 358 Ill. 626, 193 N.E. 456; Locher v. Locher, 112 N.J.Eq. 25, 163 A. 251. In such a case the parties are not only justified in living apart, but necessarily must do so. However, the rule applies only where the party prosecuting the action for divorce acts in good faith. So it has been held that a wife who deserts her husband cannot destroy the effect of the desertion by immediately beginning an unfounded action for divorce. "In the absence of good faith, it is clear that the beginning of the action cannot transform a causeless abandonment of the marital domicile into an innocent absence, or into a separation brought about through the fault of the husband." Kusel v. Kusel, supra [147 Cal. 52, 81 P. 298.]

[2] To sustain the decree in this case, the evidence must show that the appellant

left his wife with the intention to desert her, and that his desertion continued for one year. Benkert v. Benkert, 32 Cal. 467; Strupelle v. Strupelle, 59 Cal.App. 526, 211 P. 248. Also, Mrs. Ewing must have been willing to have her husband return and resume marital relations during that period. This court has repeatedly held that to constitute a cause of action for divorce, absence must continue for one year without the consent of the spouse seeking the decree.

The parties were married in Minneapolis and were living there in the fall of 1935 when the appellant came to California. Admittedly there was no separation until that date. He filed suit for divorce less than three months later. When the case came on for hearing, the trial judge stated that "this court is not going to sit through the evidence in support of the allegations of the pleadings in this kind of a case. * * * The case should be tried on an issue of desertion, so I am going to permit each of you to prepare amendments to the pleadings, stating an additional cause of action for desertion." At that time a few days more than one year had elapsed since the commencement of the action.

[3] In conformity with the court's requirement, amended pleadings were filed in which each party asked for a divorce on the ground of desertion. Also, by these pleadings the issue of the appellant's good faith in commencing the action was directly raised. The wife alleged that the suit against her was commenced "without justification or cause". In his answer the husband specifically denied his wife's charge, and affirmatively alleged that he has a good cause of action upon the grounds stated in his complaint. The court made no findings upon this issue, but even if it be assumed that the appellant acted in bad faith, there is no showing of wilful desertion for one year within the meaning of the statute because of the allegations of a cross-complaint filed by the wife less than ten months after the parties separated.

Mrs. Ewing then charged her husband with numerous acts of cruelty and prayed for "an absolute divorce". This action on her part was in effect an assent to the separation and an expression of her desire to terminate the marriage as of that date. From that time until the complaint and cross-complaint were amended, neither party could justly claim that the necessary elements for desertion were present. Even had the trial court found that in October, 1935, the appellant left his wife against her wishes and that his desertion continued although she was willing that he return to her, that attitude certainly did not continue after August 4, 1936, when she asked the court to grant her a divorce upon the ground that her husband's conduct had been such "as to render the continuance of their present relationship intolerable". Silva v. Silva, 32 Cal.App. 115, 116, 162 P. 142. The record therefore affirmatively shows that at the time the interlocutory decree was granted, the absence of Mr. Ewing had not continued for the prescribed period without the consent and against the objections of his wife.

The judgment is reversed.

We concur: GIBSON, C. J.; HOUSER, J.; SHENK, J.; CURTIS, J.; SPENCE, Justice pro tem.

16 Cal.2d 226

C. S. SMITH METROPOLITAN MARKET CO. et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 17472.

Supreme Court of California.

Sept. 21, 1940.

1. Prohibition 🔑10(1)

The function of the writ of prohibition is to provide a remedy when rigidity of ordinary procedure fails to protect a litigant from wrongful exercise of jurisdiction by a court, but mere showing that an inferior court is about to do an act beyond scope of its powers is not enough to justify issuance of writ, since prohibition cannot be used to regulate or control procedure. Code Civ. Proc. § 1103.

2. Prohibition 🔑3(1)

Prohibition will not lie on ground that trial court erred in issuing subpœna duces tecum upon which charge of contempt might be based, but remedy of one against whom such an order is directed is to present his defense upon hearing of contempt proceeding, and then, if found guilty, to apply for a writ of certiorari or habeas corpus. Code Civ.Proc. § 1103.

3. Prohibition ⚷5(2)

Prohibition would not lie to prevent superior court from enforcing compliance with a subpœna duces tecum and requiring petitioner to answer certain questions. Code Civ.Proc. § 1103.

In Bank.

Prohibition proceeding by the C. S. Smith Metropolitan Market Company and Duncan W. Drucquer against the Superior Court of the State of California in and for the County of Los Angeles, to prevent the Superior Court from enforcing a mandate of a subpoena duces tecum issued by it in action seeking injunction for alleged violation of the Unfair Practices Act, in which the C. S. Smith Metropolitan Market Company was defendant.

Writ denied.

For prior opinion, see 98 P.2d 555.

Pierson & Block, Ralph K. Pierson, and Samuel P. Block, all of Compton, for petitioners.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, for respondent.

Cupp, Hunt & Henderson, of Los Angeles, amici curiæ.

EDMONDS, Justice.

The petitioners are seeking a writ of prohibition to prevent the Superior Court from enforcing compliance with a subpoena duces tecum and requiring one of them to answer certain questions.

The Food and Grocery Bureau of Southern California has brought an action to enjoin certain acts of the petitioner C. S. Smith Metropolitan Market Co., Ltd., a corporation, which, it charges, violate the Unfair Practices Act. (Stats.1913, p. 508, as amended; Deering's Gen.Laws, Act. 8781.) The complaint alleges that upon various occasions in 1939, the Market company offered for sale and sold certain merchandise below cost. For the purpose of obtaining a subpoena duces tecum in that suit, the Grocery Bureau presented to the Superior Court an affidavit of one of its attorneys stating that the petitioner Drucquer, whose testimony is sought as a witness, has in his possession the original work sheets and working papers made by him in an examination and analysis of the market company's books and records. Upon the showing made in this affidavit, a court commissioner ordered the issuance of a subpoena, which in due time, the petitioners moved to recall. This motion was denied.

Thereafter the petitioner Drucquer complied with the subpoena to the extent of appearing at the time and place fixed in it, but he refused to produce the documents called for and to answer certain question. These facts being reported to the court, it issued an order requiring the witness to appear and show cause why he should not do so. After a hearing, the court ordered him to answer the questions and to produce his work sheets. This proceeding followed.

The petitioners contend that prohibition is the proper remedy for them to invoke because the respondent court is acting in excess of its jurisdiction and they have no plain, speedy and adequate remedy at law. They also attack the sufficiency of the affidavit upon which the subpoena was issued and the authority of the court commissioner to make the order therefor. The respondent, by way of return to an alternative writ issued by the District Court of Appeal, filed a general demurrer challenging the sufficiency of the petition. It asserts that the petitioners have mistaken their remedy; that the question of jurisdiction was not raised in the proceedings before it and that a court commissioner may order the issuance of a subpoena although the clerk has authority to do so. Southern Pacific Co. v. Superior Court, Cal.Sup., 100 P.2d 302.

[1] The function of the writ of prohibition is to provide a remedy when rigidity of the ordinary procedure fails to protect a litigant from the wrongful exercise of jurisdiction by a court. Sec. 1103, Code of Civ.Proc. But the mere showing that an inferior court is about to do an act beyond the scope of its powers is not enough to justify the issuance of the writ. In other words, the writ may not be used to restrain the commission of error or to regulate or control procedure. Many orders which are made during the progress of a case depend for their validity upon the jurisdiction of the court, but, ordinarily, prohibition may not be invoked to challenge such rulings. If that were allowed, the trial of an ordinary civil action would be constantly interrupted by attacks upon procedural orders which are properly reviewable upon appeal. County of Sutter v. Superior

Court, 188 Cal. 292, 204 P. 849; Apartment & Hotel Financing Corp. v. Will, 69 Cal. App. 276, 231 P. 349; 21 Cal.Jur. 583.

[2, 3] These basic principles have been applied in cases where it is claimed that one must either comply with an order, which it is asserted the trial court had no jurisdiction to make, or be subjected to the penalties for contempt of court. In such cases, it has been repeatedly held that prohibition will not be granted upon the ground that the trial court has erred in making the order upon which the charge of contempt is, or may be, based. The remedy of the one against whom such an order is directed is to present his defense upon the hearing of the contempt proceeding, and then, if found guilty, to apply for a writ of certiorari or habeas corpus. Wessels v. Superior Court, 200 Cal. 403, 253 P. 135; Commercial Bank v. Superior Court, 192 Cal. 395, 220 P. 422; Drew v. Superior Court, 43 Cal.App. 651, 185 P. 680; Monjar v. Superior Court, 12 Cal.2d 715, 87 P. 2d 694.

For these reasons the demurrer of the respondent court is sustained and the alternative writ issued by the District Court of Appeal discharged.

We concur: GIBSON, C. J.; HOUSER, J.; SHENK, J.; SPENCE, Justice pro tem.; McCOMB, Justice pro tem.

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16 Cal.2d 204

In re SMEAD'S ESTATE (two cases).

LOUIS v. BIRD et al. (two cases).

L. A. 16599, 16600.

Supreme Court of California.

Sept. 19, 1940.

Rehearing Denied Oct. 17, 1940.

1. Trusts ⚷330

Trial court, in settling accounts of testamentary trustee, was acting in exercise of its probate jurisdiction, which jurisdiction was continuing and attached to corpus of trust when it passed from respondent as executor to himself as testamentary trustee, and hence it was proper for the court to make provision for fees of trustee's attorney in decree settling trustee's accounts in conformity with the law applicable to decedent's estates. Probate Code, §§ 911, 1122.

2. Trusts ⚷330

Where trial court, in settling accounts of testamentary trustee, was acting in exercise of its probate jurisdiction, manner of payment of fees of trustee's attorney, whether by credit against amount owed to estate by trustee or pursuant to provisions of decree entered in probate proceeding, was primarily for determination of trial court. Probate Code, §§ 911, 1122.

3. Trusts ⚷194

Where decree settling testamentary trustee's accounts and providing for payment of $1,000 from trust estate to trustee's attorney had become final, questions relating to exercise of trial court's discretion in relation to manner of payment of attorney's fees were not properly before Supreme Court on appeal by remaindermen from order for sale of trust property made in execution of provisions of final decree. Probate Code, §§ 911, 1122.

In Bank.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Proceeding in the matter of the estate of Elnora Garrie Smead, deceased, by Irvin C. Louis, as trustee, against Phillip Smead Bird and another, contestants, and proceeding in the matter of the estate of A. Amelia Smead, deceased, by Irvin C. Louis, as trustee, against Phillip Smead Bird and another, contestants. From an order in each of the proceedings authorizing the testamentary trustee to sell sufficient of the trust property to pay attorney's fees totaling $1,000 before distribution to remaindermen, contestants appeal.

Orders affirmed.

Joseph D. Taylor and Taylor, Tarr & Reed, all of Los Angeles, for appellants.

H. B. Pool, of Los Angeles, for respondent.

SHENK, Justice.

An appeal has been taken from an order in each of the above-entitled proceedings, authorizing the testamentary trustee to sell sufficient of the trust property to pay attorney's fees totaling $1,000 before distribution to the remaindermen.

This court denied motions to dismiss said appeals in Matter of Smead's Estate, 12

Cal.2d 20, 82 P.2d 182, the opinion in which is referred to for a more detailed statement of the facts. By its decision therein this court dismissed appeals from the consolidated decree which settled the trustee's accounts, provided for payment of $1,000 from the trust estate to the trustee's attorney, and ordered distribution to the remaindermen after payment of such fees. Those appeals were dismissed on the ground that they were taken too late. Appeals from orders denying motions to strike a notice of intention to move for a new trial and a modification of the decree settling the trustee's accounts were dismissed on the ground that the orders were nonappealable. It was held that the order to sell the trust property was an appealable order. Subsequently a motion to dismiss the appeal from that order, made on other grounds, was denied.

The appellants, who are the remaindermen, contend that that portion of the decree which provided for payment of the attorney's fee directly to the attorney and out of the trust estate before distribution to the remaindermen was beyond the court's jurisdiction. They insist that that portion of the decree is void and may be attacked collaterally on this appeal, notwithstanding the fact that the decree has long since become final. It is urged that the court had no power to order payment of the fees directly to the attorney, nor any power to make payment thereof a condition precedent to the distribution of the corpus of the trust, and that the proper procedure would have been to make an allowance of the attorney's fees as a credit on the trustee's account.

The controversy arose by reason of the fact that the court found that the trustee was indebted to the estate in a sum larger than the amount of the attorney's fees ordered paid. The indebtedness of the trustee resulted from certain losses suffered by the trust estate, and judgment was rendered in favor of the remaindermen against the trustee in the amount found to be due from him.

The appellants concede that the decree and order for sale of property pursuant thereto are proper when the subject-matter is the estate of a decedent, referring to section 911 of the Probate Code. But they contend that the estate here involved is a trust as distinguished from a decedent's estate, and that section 1122 of the Probate Code, within the chapter on "Administration of Trusts", is the applicable section. Section 1122 does not include provisions similar to section 911 (formerly a portion of section 1616 of the Code of Civil Procedure). It is claimed that pursuant to section 1122 the court had power only to allow attorney's fees as a credit to the trustee in accordance with the practice prevailing in the administration of decedents' estates prior to the amendment of section 1616 of the Code of Civil Procedure, adopting the provisions which now comprise section 911 of the Probate Code, citing Estate of Ogier, 101 Cal. 381, 385, 35 P. 900, 40 Am.St.Rep. 61; Estate of Kruger, 143 Cal. 141, 144, 76 P. 891; and Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 97, 141 P. 922, 52 L.R.A.,N.S., 1152, Ann.Cas. 1915D, 742.

[1] A complete answer is found in the decision in the Matter of Smead's Estate, supra, wherein it was determined that the court in settling the accounts of the testamentary trustee was acting in the exercise of its probate jurisdiction. That jurisdiction was continuing and attached to the corpus of the trust when it passed from the respondent as executor to himself as testamentary trustee. Thus it was proper for the court to make provision for attorney's fees in its decree settling the trustee's accounts in conformity with the law applicable to decedent's estates. The order to sell sufficient property of the estate to carry out the provisions of the decree followed as a matter of course. The appellants do not contend that the order to sell was improper, if the pertinent provisions of the decree were within the probate court's jurisdiction.

[2, 3] The manner of payment of attorney's fees, whether by credit against the amount owed to the estate by the trustee, or pursuant to the provisions of the decree entered in the probate proceeding, was primarily for the probate court to determine. That decree has become final, and any questions relating to the exercise of the court's discretion in relation to the matter in controversy are not properly before this court on the appeal from the order for the sale of trust property made in execution of the provisions of said final decree.

Our determination that the questioned provisions of the consolidated decree were within the exercise of the continuing probate jurisdiction of the court and were therefore valid disposes of all contentions of the appellants.

The orders are affirmed.

We concur: GIBSON, C. J.; CARTER, J.; HOUSER, J.; SPENCE, Justice pro tem.

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40 Cal.App.2d 736

BENJAMIN et al. v. FRENKE.

Civ. 11967.

District Court of Appeal, Second District, Division 1, California.

Sept. 24, 1940.

1. Attorney and client 🔑148(3)

Provision of retainer agreement, "You are to receive and retain out of any recovery obtained on my behalf, either by way of settlement of said claim, in or out of court, or collection of judgment", constituted a statement of contingencies with which attorneys and client were confronted and was a preliminary statement only, and subsequent provision that attorneys were to receive 15 per cent. of sums collected out of court and 30 per cent. of sums collected through court action and/or trial constituted a clear statement of fee to be paid to attorneys.

2. Attorney and client 🔑148(3)

Under retainer agreement whereby attorneys were to receive 15 per cent. of any sums recovered out of court and 30 per cent. of all sums collected through court action and/or trial, attorneys were entitled to 30 per cent. of amount recovered through settlement, after matter in controversy had been set for trial.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by I. B. Benjamin and others, copartners under the name of Benjamin, Lieberman & Elmore, against Eugene Frenke to recover attorneys' fees. From an adverse judgment, defendant appeals.

Affirmed.

Leon Kaplan, of Los Angeles, for appellant.

Benjamin, Lieberman & Elmore, of Los Angeles, for respondents.

YORK, Presiding Justice.

The factual situation presented by the record herein is briefly as follows:

Appellant, a scenario writer and motion picture director, engaged the respondent attorneys at law to represent him in connection with certain claims which he had against the Universal Pictures Corporation, herein referred to as Universal, and on January 28, 1937, respondents delivered to appellant a retainer agreement which provided that they were "to receive and retain out of any recovery obtained on my behalf either by way of settlement of said claim, in or out of court, or collection of judgment, 35% of any and all sums so recovered, received or collected. In the event action of an appeal in the litigation aforesaid or in the event of a new trial being granted and the case being tried a second time or a second trial being commenced, then your percentage is to be 40%." This agreement was never signed, but on February 6, 1937, appellant prepared, signed and his secretary delivered to respondents a retainer agreement which contained, among other things, the following recital: "You are to receive and retain out of any recovery obtained on my behalf either by way of settlement of said claim, in or out of court, or collection of judgment, fifteen (15%) per cent of any and all sums so recovered, received or collected out of court; thirty (30%) per cent of any and all sums so recovered, received or collected through court action and/or trial. In the event action of an appeal in the litigation aforesaid or in the event of a new trial being granted and the case being tried a second time or a second trial being commenced, then your percentage is to be thirty-five (35%) per cent."

On February 17th, respondents wrote to appellant at London, England, with respect to the terms contained in the retainer of February 6th, to the effect that the 15 per cent provided therein meant they could collect 15 per cent in the event a settlement was effected without filing a complaint, and that the fee would be 30 per cent if an action were filed. Respondents enclosed with this letter a new retainer agreement which provided that they proceed "on the basis of one-third to us of any amount or amounts recovered, in any event, except in case of a new trial being granted * * * or a second trial being commenced, or in the event of an appeal * * * it would be 40%".

On March 11, 1937, appellant wrote respondents from London: "I acknowledge your letter of February 17th and enclose the documents you wished me to sign. I have only changed 33⅓ to 30% and I know you will agree with this." No documents were enclosed.

Meanwhile, respondents had commenced negotiations with Universal for a settlement of appellant's claim and on March 29th Universal disclaimed any liability therefor. On April 9th respondents mailed to appellant a preliminary draft of a complaint which they had prepared in the matter, and after several discussions between appellant and respondents, this was redrafted and filed on May 4, 1937. Thereafter, counsel for Universal filed a motion to strike which was denied on July 8, 1937, after the same had been argued and briefed by respondents on behalf of appellant, whereupon counsel for Universal filed their answer to the complaint, and in connection therewith took appellant's deposition in the presence of two attorneys from respondents' office. The cause was set for trial on April 4, 1938, and continued to April 14, 1938. After several months' delay, the negotiations which had theretofore been commenced culminated in a settlement between Universal and appellant for the sum of $17,500 shortly before the date set for trial. At this point, the question of the amount of respondents' fees arose, when it was mutually agreed that Universal should issue three checks, one to appellant for 70 per cent of the amount agreed upon in the settlement, one to respondents for 15 per cent thereof, and another to respondents and appellant jointly for the remaining 15 per cent, the latter check to remain in the hands of attorneys for Universal pending settlement between the parties hereto.

A settlement did not materialize and respondents filed the instant action to recover the $2,625 represented by the joint check in the custody of Universal's attorneys, alleging in their complaint that "between January 28, 1937 and March 11, 1937, * * * plaintiffs and defendant entered into an agreement, by which defendant retained plaintiffs to recover certain moneys claimed to be due defendant by reason of an alleged breach of contract previously entered into between the defendant and Universal Pictures Corporation * * *. Defendant agreed to pay plaintiffs as and for their fee the following sums: (1) Fifteen per cent (15%) of all sums recovered, received or collected out of court; (2) Thirty per cent (30%) of all sums recovered, received or collected through court action and/or trial; and (3) Thirty-five per cent (35%) of all sums recovered, received or collected in the event of an appeal or second trial."

Appellant's answer denied generally and specifically the allegations of the complaint and alleged "that any agreement which may have been entered into between plaintiffs and defendant was entered into on the 6th day of February, 1937; that the terms and conditions of said agreement were contained and set forth in a letter dated February 6, 1937, a full, true and correct copy of which is attached * * *".

The trial court interpreted the letter of February 6, 1937, as allowing respondents 30 per cent of the amount recovered. From the judgment which was thereafter entered, appellant prosecutes this appeal upon the grounds (1) that no express agreement between the parties with respect to fees has been proved; and (2) assuming an agreement existed it must be interpreted as limiting respondents' compensation to 15 per cent of appellant's total recovery.

A review of the record herein reveals that there is no merit in this appeal. Appellant by his affirmative allegation in his answer, in arguing his motion for a nonsuit, and in fact throughout the trial in the court below, relied upon the letter of February 7, 1937, as being an exact statement of the terms agreed upon between him and the respondents. His disagreement is with the interpretation placed upon the language of the letter by the trial court.

[1] We agree with the trial court that the words: "You are to receive and retain out of any recovery obtained on my behalf, either by way of settlement of said claim, in or out of court, or collection of judgment," constitute a statement of the contingencies with which the parties were confronted at that time and is a preliminary statement only, to the effect that they might settle the matter out of court, or they might go to court; and that the following language, "15% of any and all sums so recovered, received or collected out of court; 30% of any and all sums so recovered, received or collected through court action and/or trial", is an unambiguous and clear statement of the fee to be paid to respondents.

[2] The matter in controversy was set for trial, consequently respondents were entitled to 30 per cent of the amount recovered by appellant through the settlement with Universal.

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

40 Cal.App.2d 667

PEOPLE v. CARROL.

Cr. 3375.

District Court of Appeal, Second District, Division 1, California.

Sept. 18, 1940.

1. Criminal law 🔑553

Testimony is inherently improbable and unbelievable per se only when it indicates something has been done that it would not seem possible could be done under circumstances described, or where such testimony involves conduct that no one but a person of a seriously calentured mentality would be likely to do.

2. Criminal law 🔑1159(2, 4)

Appellate courts are not in a position to determine credit which can be accorded to witnesses, or to weigh their testimony, and they are not authorized under the Constitution to review evidence except where, on its face, it may justly be held that it is insufficient to support ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. Const. art. 6, § 4.

3. Criminal law 🔑1159(2)

Before a verdict can be set aside by a reviewing court, it must clearly appear that upon no hypothesis whatever is there in the record substantial evidence to support verdict.

4. Criminal law 🔑741(1), 742(1), 1159(2), 1159(4)

In criminal prosecution tried before trial court without a jury, it was province of trial court to determine weight of the testimony and credibility of the respective witnesses, and its determination thereof could not be disturbed on appeal.

5. Criminal law 🔑572

Evidence warranted defendant's conviction for grand theft from the person, as against alibi defense. Pen.Code, § 487, subd. 2.

Appeal from Superior Court, Los Angeles County; Thomas J. Ambrose, Judge.

O. D. Carrol was convicted of grand theft from the person, and he appeals.

Affirmed.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F Nelson, Deputy Atty. Gen., for respondent

WHITE, Justice.

Following trial before the court sitting without a jury defendant was found guilty of the crime of "grand theft * * * from the person". Pen.Code, sec. 487, subd. 2. Upon this appeal from the judgment of conviction and an order denying his motion for a new trial, appellant urges a reversal upon the single ground that the "verdict is contrary to the law and the evidence".

Viewing the evidence in the light most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the salient facts in the instant case are that the complaining witness, on February 12, 1940, was walking on 54th street in the city of Los Angeles, carrying groceries in a shopping bag in his left hand. He noticed appellant walking ahead of him on the street and also observed that appellant stopped several times and turned around and looked at the complainant. When the witness had walked up to within a few feet of appellant the latter suddenly turned and spit on him. Appellant immediately pulled out his handkerchief and said, "Oh, so sorry," and started to wipe and rub the spittle off the complainant's clothing with the handkerchief in his right hand. Appellant then changed the handkerchief to his left hand and rubbed up against the victim. The latter had a purse in his left pocket containing something over six dollars. The complainant had examined his purse at the corner just prior to meeting appellant, about 200 or 250 yards distant, and testified that it was his habit to feel of his purse from time to time. While appellant was cleaning the victim's clothing he rubbed up against him on the side where the purse was carried. The complaining witness did not feel his purse taken, but after appellant had wiped the spittle off the victim's clothing and backed away, the witness saw something in appellant's hand that was dark and was wrapped in appellant's handkerchief. He testified the missing purse was dark. When appellant was backing away the complainant asked him if he was looking for some special house number along there. Appellant replied in the negative, stating he wanted to go to Hollywood. He thereupon turned away and started across the street; an automobile drove up, appellant got into it, and drove on down the street. Before the automobile had proceeded half way in the block the victim put his hand in his pocket and discovered his purse was gone. Appellant was subsequently apprehended after his identification had been established by the victim from several pictures exhibited to him by the police.

Appellant took the witness stand and testified on direct examination that he was not in Los Angeles on the day the alleged offense was committed; that he had gone to San Francisco to live with a friend, but that the friend could not be present because at the time of the trial he was on a fishing boat in Alaska.

Upon this appeal it is appellant's contention that the money might have been lost instead of stolen; that there might have been a mistake in the identification of appellant, and that the alibi of appellant was uncontroverted. Appellant's testimony concerning his alibi is hazy and unimpressive. It is replete with improbabilities and much confusion upon his part as to dates and people. The court was entitled to give it little if any weight.

[1-5] Appellant's claim that the testimony of the complaining witness is inherently improbable cannot be sustained. It is only when the testimony indicates something has been done that it would not seem possible could be done under the circumstances described, or where such testimony involves conduct that no one but a person of a "seriously calentured mentality" would be likely to do, that such testimony can be branded as inherently improbable and said to be unbelievable per se. People v. Haydon, 18 Cal.App. 543, 556, 123 P. 1102, 1108, 1114. The testimony of the complainant in the instant case cannot be thus strictured. As has been often stated, reviewing judges are obviously in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. And just as often it has been said that for this reason our Constitution provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. Const. art. 6, § 4. As was said by this court in People v. Taylor, 104 P.2d 846, 847, "Before a verdict can be set aside it must clearly appear that upon no hypothesis whatever is there in the record substantial evidence to support the judgment." Our examination of the record herein impresses us that there was sufficient evidence, considered in connection with such inferences as the trial judge may have reasonably drawn therefrom, to sustain the findings of fact upon which the judgment was predicated. While appellant's evidence that he was not in the city of Los Angeles on the date of the alleged offense raised a conflict with the testimony of the complaining witness positively identifying appellant, it was the province of the trial court to determine the weight of the testimony and the credibility of the respective witnesses. His determination thereof cannot be disturbed upon appeal. We find no prejudicial error in the record.

The judgment and the order from which this appeal is taken are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.

40 Cal.App.2d 670

PEOPLE v. KALPAKOFF.

Cr. 3381.

District Court of Appeal, Second District, Division 1, California.

Sept. 18, 1940.

1. Sodomy ⚿6

Evidence *held* sufficient to sustain conviction of attempt to commit infamous crime against nature, as against contention that no intent to commit such offense was proved. Pen.Code, §§ 21, 286.

2. Criminal law ⚿741(1), 742(1)

Determination of weight of evidence and credibility of witnesses, including defendant, is for trial court in case tried without jury.

3. Criminal law ⚿1159(2)

Where evidence discrediting defendant's testimony is accepted by fact trier as true and evidence sufficiently supports conviction, appellate court is bound by trial court's findings to such effect.

4. Criminal law ⚿1137(2)

Defendant was not prejudiced by testimony as to his previous imprisonment in state penitentiary, where testimony regarding such servitude was first brought out in cross-examination of police officer by defendant's counsel and again during defendant's testimony on direct examination.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Michael Kalpakoff was convicted of an attempt to commit the infamous crime against nature, and he appeals.

Affirmed.

C. M. Mooslin, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Defendant was charged by information with a violation of section 286 of the Penal Code and with a prior conviction of a felony, to which accusations he entered a plea of not guilty and admitted the prior conviction. After trial before the court, a jury having been waived, defendant was adjudged guilty of an attempt to commit the crime charged. From such judgment and an order denying his motion for a new trial he prosecutes this appeal, asserting as his sole ground for reversal that "the verdict is contrary to the evidence".

Briefly epitomizing the facts as disclosed by the record, it appears that between ten and ten-thirty on the night of April 8, 1940, two police officers drove their police radio car into the alley between Grand and Beach streets at Watts in Los Angeles county. They saw one Ernest Rininger lying on the ground face downward, with his pants and underwear off. Appellant was on top of Rininger. The officers lifted appellant off Rininger and discovered that appellant's pants were open and his privates were exposed and erect. The victim had been badly beaten up; his face was swollen and cut and he was apparently unconscious. It was apparent to the officers that both appellant and Rininger had been drinking. In a statement to the officers appellant said that he had been out of the penitentiary only three weeks; did not want to go back; that he had never done anything like that before and if the officers would give him a chance he would never do it again. Rininger testified that he and appellant had been doing some drinking—consuming gin and beer—and finally left a saloon together and walked side by side down the alley. The witness said he did not see any one other than appellant around; that he was struck, and did not remember anything until the next morning. Appellant took the stand in his own behalf and testified that he and Rininger, who had been friends for some years, visited several drink emporiums together that evening; that Rininger said he wanted to go out to the toilet and that he proceeded outside without the company of appellant. That after about 15 minutes appellant went out to look for his friend, and going down the alley discovered Rininger lying prostrate on the ground. Appellant denied attempting to commit or committing any unnatural or perverted act upon or with Rininger, stating that he saw an automobile coming, and that he "got over him to cover him up, because his body was nude and I was going to get him out of there and get him cleaned up and get some clothes on him". Appellant denied that he was lying on top of Rininger and claimed he was simply leaning over him.

[1-3] We are satisfied that the conviction is sustained by the facts testified to by

the police officer. Appellant's contention that no intent was proved is answered by the statement that the intent or purpose with which an act is done is manifested by the circumstances connected with the offense. Pen.Code, sec. 21. The testimony of the police officer, if believed by the court, as evidently it was, warranted the conclusion that the conduct and actions of appellant manifested an intention to commit the offense denounced by section 286 of the Penal Code. Determination of the weight of the evidence and the credibility of witnesses, including the defendant, is for the trial court. Where, as here, the evidence which discredits the defendant's testimony has been accepted by the trier of fact as true, and the evidence in question sufficiently supports a conviction, this court is bound by the findings to that effect. People v. Tedesco, 1 Cal.2d 211, 219, 34 P. 2d 467.

[4] Appellant's complaint that he was prejudiced by testimony relating to his imprisonment in San Quentin penitentiary is not supported by the record, which shows that testimony in regard to his penal servitude was first brought out in cross-examination of the police officer by appellant's counsel and again by appellant himself during his own testimony on direct examination by his own counsel.

The judgment and the order are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.

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40 Cal.App.2d 591

CENTRAL HEIGHTS IMPROVEMENT CO. v. MEMORIAL PARKS, Inc., et al.

Civ. 6392.

District Court of Appeal, Third District, California.

Sept. 14, 1940.

Hearing Denied Nov. 9, 1940.

1. Pleading 🔑84

A defendant appearing separately is not required to answer allegations in complaint which relate solely to other defendants, and one of several defendants may allege matters as an affirmative defense which are not available to, or sought to be availed of, by, his codefendants.

2. Pleading 🔑193(5)

Where an answer alleged evidentiary facts but no motion to strike was made, and there were sufficient allegations of ultimate facts to state a valid defense, demurrer to answer was properly overruled.

3. Corporations 🔑448(2)

A corporation may adopt contracts made on its behalf by promoters in advance of its organization, as effectively as if made by it after incorporation, but such rule is not an absolute one.

4. Cemeteries 🔑5

In action to recover alleged unpaid purchase price of realty sold for cemetery purposes, evidence sustained finding that defendant cemetery corporation did not adopt or become bound by contract between plaintiff corporation and promoter, and that acceptance of benefits of contract by defendant corporation was conditioned on defendant corporation's securing permit for issuance of stock.

5. Evidence 🔑424, 461(1)

In an action to recover unpaid purchase price allegedly due under contract for sale of realty for cemetery purposes, conversations between parties occurring before, during, and subsequent to execution of contract, were admissible, not to vary or modify terms of contract but to aid court in ascertaining true intent and meaning of language used, and objection to evidence would not apply especially to corporation which was not a party to the contract but was sought to be held on ground that it had adopted contract.

6. Evidence 🔑271(2, 18), 314(1), 318(3)

In action to recover unpaid purchase price allegedly due under contract for sale of realty for cemetery purposes, oral and documentary evidence from an officer of state corporation department that defendant corporation had filed application for issuance of stock pursuant to the contract and amended application pursuant to subsequent agreement, and that amended application was granted and stock issued pursuant thereto, was not objectionable as "hearsay" because plaintiff was not a party to proceedings before corporation department, or as being "self-serving" where such testimony and documents were received only as evidence of acts of defendants which were required of them under the contract, and which formed a part of the entire transaction in dispute, as distinguished from that portion alleged in the complaint.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay" and "Self-Serving".

7. Evidence ⚷314(5)

When the good faith of a party is in question, information upon which he acted whether true or false is original and material evidence and admissible. Code Civ.Proc. § 1850; § 1870, subd. 7.

8. Appeal and error ⚷1050(1)
Evidence ⚷471(2)

In an action to recover unpaid purchase price alleged to be due under contract for sale of realty for cemetery purposes, testimony of a certified public accountant, that in his opinion an entry made by another in defendant corporation's records indicated that realty had been acquired by defendant corporation in consideration of issuance to plaintiff and another defendant of shares of defendant corporation's common stock, was objectionable as constituting nothing more than an opinion as to the understanding or belief of another, but admission of such testimony did not constitute reversible error.

9. Trial ⚷395(5), 396(3)

In action to recover unpaid purchase price alleged to be due under contract for sale of realty for cemetery purposes, wherein defendant corporation alleged that its only contract with plaintiff changed terms of a previous agreement between plaintiff and promoter, court's finding that plaintiff's contract with corporation "terminated and canceled" prior contract, constituted a finding of an ultimate fact and was within the issue presented by the pleadings.

10. Vendor and purchaser ⚷317

In action to recover unpaid purchase price allegedly due under contract for sale of realty for cemetery purposes, wherein court found that promoter had "tendered and delivered" a deed and an assignment of his rights under contract to defendant corporation, and that "tender" of deed was made conditional for its acceptance upon the securing by corporation of a permit to issue stock, which permit was denied, question whether there was a "tender" or a "tender and delivery" of deed was not such a material issue as to render conflict fatal to judgment, especially where court specially found that there was only a "tender", which finding was controlling.

11. Trial ⚷397(6)

Where court found substantially in accordance with facts alleged as an affirmative defense in amended answer of defendant corporation, allegations in answers of other defendants in conflict with court's findings must be deemed to have been found untrue, without an express finding to that effect.

12. Appeal and error ⚷1071(5)

In action to recover the unpaid purchase price alleged to be due under contract for sale of realty for cemetery purposes, a finding as to value of land was surplusage but harmless where value of land was not in issue.

13. Vendor and purchaser ⚷281(3)

In action to recover unpaid purchase price allegedly due under contract for sale of realty for cemetery purposes and to have a vendor's lien declared and enforced thereon, evidence sustained finding that plaintiff deeded realty to defendant corporation for stock of defendant corporation, and that plaintiff had no vendor's lien or any other right or interest in the property.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by the Central Heights Improvement Company, a corporation, against Memorial Parks, Incorporated, and others, to recover alleged unpaid purchase price of realty. From an adverse judgment, plaintiff appeals.

Affirmed.

Clyde C. Shoemaker, of Los Angeles, for appellant.

Paul E. Younkin, Howell Purdue, and Arthur C. Webb, all of Los Angeles, for respondents.

GEARY, Justice pro tem., delivered the opinion of the court.

Appellant, a California corporation, brought this action to recover the alleged unpaid purchase price of real property situated in Los Angeles county, and to have a vendor's lien declared and enforced thereon. The complaint alleged in substance that on or about April 14, 1933, respondents Clark and Glouner entered into an agreement for the benefit of respondent corporation to purchase twenty acres of land from appellant for a total price of $40,000, upon which there had been paid the sum of $6,000. That thereafter Clark and Glouner transferred all their rights under the contract, as well as title to three acres of the land in question acquired by them, to respondent corporation, and the latter had assumed and agreed to pay the balance of $34,000 upon the purchase price, with interest according to the terms of the agreement of April 14, 1933. That on or about August 15, 1933, appellant, at the instance and request of respondents Clark, Glouner and Memorial Parks, Inc., conveyed the remaining seventeen acres of the land in question to respondent corporation; that no part of the balance of the purchase price therefor had been paid; that respondents are indebted for the balance of $34,000, with interest; that appellant had a vendor's lien on the seventeen acres for the unpaid purchase price, and prayed judgment accordingly.

At the conclusion of plaintiff's case, by stipulation, respondents, through respective counsel, filed separate amended answers to the complaint. Respondent corporation therein denied that the contract of April 14, 1933, between appellant and respondent Clark was entered into for its benefit, and that it had assumed and agreed to pay the balance of the purchase price mentioned therein. As a separate defense, respondent corporation alleged that respondent Clark had tendered to it his deed to the three acres to which he had acquired title and respondent had applied for a permit to issue stock pursuant to the agreement of April 14th between appellant and Clark, but that the application had been denied. That thereafter and about June 29th, appellant, respondent corporation and Clark entered into a contract in writing, which by mutual agreement of appellant and Clark, modified the agreement of April 14th between the last-named parties. That pursuant to the agreement of June 29th, respondent corporation applied for and secured a permit to issue stock to appellant and respondent Clark in consideration of their respective deeds for three acres and seventeen acres of the land. That pursuant to such permit and the terms of the agreement of June 29th, stock was issued to Clark and appellant as consideration for their respective deeds; that following respondent corporation's acquirement of title to the land, and pursuant to the permit of the corporation commissioner, it had sold and issued approximately $39,000 worth of stock to the public; and that all the terms of the agreement of June 29th had been complied with by the parties thereto.

Respondent Clark denied that the contract of April 14, 1933, was entered into for the benefit of respondent corporation; alleged that by its express terms he was relieved of further liability thereunder; admitted that he and respondent Glouner incorporated respondent corporation, and that title to the twenty acres was transferred to respondent corporation, and alleged that title was transferred in consideration of stock in respondent corporation, and denied that either he or respondent corporation owed appellant therefor. As an affirmative defense Clark alleged that appellant, about June 29, 1933, had negotiated with respondent Glouner a modification of the agreement of April 14, 1933, and that the same was modified thereby and by virtue of an agreement made June 29, 1933, between appellant, the respondent corporation and Daniel Clark; that pursuant to the modified agreement of June 29, 1933, he, Clark, had deeded three acres theretofore acquired, and appellant deeded seventeen acres to respondent corporation in consideration of the issuance to appellant of 5666 shares of the capital stock of the latter. Other allegations were substantially the same as those set forth in respondent corporation's amended answer.

[1, 2] Respondent Glouner admitted that he and Clark caused respondent Memorial Parks, Inc., to be incorporated, and that the latter contracted with, and agreed to pay appellant the purchase price for the land in question. He further alleged he was not a party to the agreement of April 14, 1933, other than to accept the provision therein contained that all stock to be issued to him pursuant thereto would be forfeited as liquidated damages in the event respondents Memorial Parks, Inc., or Clark, failed to comply with the provisions of said agreement. That the commissioner of corporations refused to issue a permit for the issuance of stock as provided in such agreement, and the same was thereafter modified by the mutual written agreement between appellant and respondent Memorial Parks, Inc., and appellant and Glouner, which alleged agreements were attached as exhibits thereto; that all the terms of said agreement have been fully complied with by Glouner, and appellant was, by reason thereof, entitled to take

nothing by its action. Appellant filed demurrers, both general and special, to the amended answers, which were overruled. The ruling was proper. A defendant, appearing separately, is not required to answer allegations in the complaint which relate solely to other defendants. Hibernia Sav., etc. v. Dickinson, 167 Cal. 616, 619, 140 P. 265; Bancroft's Code Pleading, vol. 1, sec. 241. By a parity of reasoning, one of several defendants may allege matters as an affirmative defense which are not available to, or sought to be availed of by his codefendants. Although the answer of respondent corporation goes far in alleging evidentiary facts, no motion to strike was made. There were sufficient allegations of ultimate facts to state a valid defense. McCaughey v. Schuette, 117 Cal. 223, 224, 225, 46 P. 666, 48 P. 1088, 59 Am.St.Rep. 176; Ahlers v. Smiley, 11 Cal.App. 343, 346, 104 P. 997.

The evidence discloses that appellant, a "closed" California corporation, on November 29, 1932, and for many years prior thereto, was the owner of real property in Los Angeles county, a portion of which had been theretofore dedicated and zoned for cemetery purposes. Upon that date appellant, for a recited consideration of $2,000, gave Charles M. Glouner, one of the respondents, an exclusive one hundred and twenty day option to purchase twenty acres of its land for the further sum of $38,000 to establish a memorial park thereon. The option provided that $18,000 of the purchase price was payable on or before one hundred and twenty days from date, whereupon ten acres would be deeded to the purchaser "outright"; the balance of $20,000 was payable on or before three years from date, secured by a mortgage or trust deed upon the remaining ten acres of the twenty-acre tract. This option was not exercised in accordance with its terms.

Thereafter, on April 14, 1933, appellant, after further negotiations, entered into an agreement in writing with respondent Daniel B. Clark, an associate of Glouner, for the sale of the same property for cemetery purposes. This agreement granted Clark *"an option"* to purchase the twenty acres in question for a total purchase price of $40,000, receipt of $2,000 (theretofore paid by Glouner) on account thereof being therein acknowledged, the balance of the purchase price payable as follows: The sum of $4,000 payable on or before the 20th of April, 1933; the sum of $14,000 payable in twelve equal monthly instalments, commencing with the month of November, 1933, until the $14,000 was paid, and thereafter the sum of $1,000 per month until the entire purchase price had been paid. All of the balance of the unpaid purchase price was to bear interest at 7 per cent per annum, payable quarterly, in addition to the payments on the purchase price. Appellant agreed that upon the payment by Clark of the additional sum of $4,000, as provided therein, it would convey a free and unencumbered title to Clark of the three acres of the property particularly described therein.

In addition the agreement contained provisions of a rather unusual nature, the construction of which is so directly involved herein that we deem it advisable to set forth at length the substance of the same, which we have italicized in part. It was specifically agreed that Clark should forthwith organize a California corporation for the establishment of a cemetery upon all of the twenty acres of land described therein, and that he would, *pursuant to a permit* to be applied for from the state corporation commissioner, convey the above-mentioned three acres of real property, and all his right, title and interest in and under the agreement in question to the "Cemetery Corporation", when the same was organized;

That the capital of the Cemetery Corporation should consist of 10,000 shares of preferred stock, no par value, enjoying a preferential cumulative dividend of seventy cents per annum, payable semi-annually, from and after January, 1934, and preferred as to any asset upon liquidation, at the rate of $10 per share; and 20,000 shares of common stock of the par value of $1 per share;

That the preferred stock should not be entitled to vote, except upon the failure of the corporation to pay preferential dividends for a period of two consecutive years, in which event the preferred stock, as a class, should, for the remainder of the period of default in payment of dividends, elect a majority of the board of directors, and the common stock, as a class, electing the balance of the board;

That the articles of incorporation of the Cemetery Corporation should provide that upon payment of the entire corporate debt, the remaining assets, including the entire purchase price of the 20 acres, should be set aside to the retirement of the preferred stock at $10 per share, and that no dividend should be paid upon the common stock until such retirement of the preferred stock;

That the consideration Clark should receive from the Cemetery Corporation to be so organized by him, for his conveyance to it of the three acres of land he was to acquire, and his rights and interests under the agreement, should not exceed 1200 shares of the preferred and 1200 shares of the common stock, subject to the approval of the corporation commissioner;

That as a consideration for services theretofore, and to be thereafter rendered to the Cemetery Corporation by respondent Glouner, the application to the corporation commissioner should request permission to issue to him, one share of common stock for every share of preferred stock issued or sold, including the 1200 shares of preferred stock to be issued to Clark; and Glouner, as part of the consideration therefor, agreed that any and all shares issued to him—or his associates—pursuant to the terms of the permit of the corporation commissioner, should be deposited in escrow under an agreement between Glouner and the appellant-corporation; in the event the Cemetery Corporation should default in the performance of the terms and conditions of the agreement, and the appellant-corporation should terminate the same, then the stock issued to Glouner should be "forthwith transferred and delivered to Central Heights Improvement Company as liquidated damages for the injury suffered by the 'Company' by the failure of said Clark and/or his successor in interest, the Cemetery Corporation to comply with the terms hereof";

That in the event appellant-corporation terminated the agreement by reason of the default of Clark and/or the Cemetery Corporation, and appellant became the owner and holder of the stock issued to Glouner, that when, and as the balance of the purchase price of $34,000 and interest and other charges thereon of the real property was realized by appellant from the Cemetery Corporation, appellant would surrender to the latter for cancellation all of the shares of common stock so held by it, together with such other shares as might be received by it under the corporation commissioner's permit;

That should Clark or the Cemetery Corporation be in default of any of the terms of the agreement, appellant could terminate the same after notice in writing of such default and thirty days continued default thereafter, whereupon, by declaration of default, the rights of Clark "and/or the Cemetery Corporation", except as otherwise provided, should cease and determine, and appellant *should become the owner of said shares of capital stock of the Cemetery Corporation issued to Glouner and as such stockholder in the Cemetery Corporation should proceed as such,* and the Cemetery Corporation should then proceed *to complete the purchase of the real property according to the terms of the agreement;*

That respondent Clark assumed no personal liability from and after the payment of the sum of $6,000 for the three acres in question, except to convey the same and all of his rights under the agreement to the Cemetery Corporation;

That upon the payment of $14,000 and the discharge of the other terms and conditions mentioned, and if the Cemetery Corporation were free of debt, it might, from surplus only, retire any or all its preferred stock.

Thereafter, and about April 21, 1933, Clark and his associates paid the further sum of $4,000 towards the purchase price of the real property, whereupon appellant conveyed a free and unencumbered title to the three acres to Clark. About April 27, 1933, Clark and Glouner proceeded to organize respondent Memorial Parks, Inc., a corporation, pursuant to the terms of the agreement. The legal work in connection with the formation of this corporation was performed by Rex B. Goodcell, and the incorporators were Clark, Glouner and C. Roy Hunter. Thereupon, respondent corporation filed its application with the corporation commissioner for a permit to issue stock pursuant to the agreement between appellant and Clark, of April 14th. The application recited, by reference to exhibits attached, the terms of the agreement of April 14th, the acquirement of title to three acres by Clark pursuant thereto, and the tender of same to applicant, and declared the value of the three acres to be $2,000 per acre for ordinary purposes, and that having been zoned for cemetery purposes, the reasonable value thereof for such purposes was $4,000 per acre.

The stock plan agreed upon by appellant and Clark, however, encountered immediate difficulty when appraisers for the corporation commissioner fixed a value upon the land of but $250—$350 per acre instead of the $4,000 per acre claimed as the reasonable value thereof. Thereafter, a series of conferences were held between the officers of appellant and respondent corporations, in the offices of Rex B. Goodcell, attorney. Not a little attention is devoted in the briefs to the question for whom Goodcell was acting throughout these transactions. The evidence indicates that Goodcell's formal employment originated with the promotors, and his compensation was met by respondent corporation. It further appears, his conduct of the negotiations resulted—as is frequently the case—in a relationship of mutual trust and confidence in his ability and integrity upon the part of all the parties. That Goodcell discharged this trust with fidelity to all, appears beyond question. As a result of the conferences mentioned, Goodcell, on June 19, 1933, addressed a letter to W. T. Bill, president of appellant-corporation. After reciting the difficulties encountered with the corporation commissioner, a modification of the original stock plan to meet his objections was therein suggested, in part as follows:

"By the terms of said contract, (of April 14, 1933), Central Heights Improvement Co. is now in the cemetery business, as indeed it was before that contract was executed, by reason of the dedication of the west ten acres of the twenty acres involved for cemetery purposes.

"* * * Under the circumstances, I am suggesting a modification of the said contract between Memorial Parks, Inc., and Central Heights Improvement Co. along the following lines. You will remember by the terms of the contract, Clark was to receive $12,000.00 worth of preferred stock for the three acres; that the balance of $100,000.00 worth of stock was to be sold, a brokerage of 20% being paid thereon, which was designed to net the Corporation sufficient money to pay the balance of $34,000.00 due to Central Heights Improvement Co., and to fully develop the entire twenty acres. Further, should the promoters fail in making payment to the Central Heights Improvement Co., in accordance with the terms of the contract, the Improvement Co. was to step into the place of the promoters and carry on the project until they had received the full payment as provided by the terms of the contract. Such being the condition, I believe that the proposal herein made for the modification of the now (new) contract places the Central Heights Improvement Co. in about the same position it now occupies under the terms of the contract.

"Let Clark deed the three acres to Memorial Parks, Inc., and at the same time Central Heights Improvement Co. should deed the remaining seventeen acres of the proposed twenty acre cemetery to Memorial Parks, Inc., receiving as consideration for such deed such amount of the common shares of capital stock of Memorial Parks, Inc., as the Commissioner is willing to give; presumably approximately 7500 shares. Whatever amount of such common shares the Commissioner will authorize to be issued, but not less than 6000 shares, shall be divided into two parts: one-third thereof going to Clark, or his nominee, and two-thirds thereof going to Central Heights Improvement Co. (or some ratio of division upon which you may later agree), the common stock going to the Central Heights Improvement Co. to be escrowed for a period not to exceed five years, and to be returned to Messrs. Myers and Morrison, or their nominees, if during said period of five years said Central Heights Improvement Co. has received dividends, or has otherwise been paid, the sum of $34,000.00, plus interest at 7% per annum from the date of said deed. * * *

"You will remember that the preferred stock does not vote until dividends are in default for a period of two years. The small amount of proposed issued preferred shares would seem to make it incredible that such dividends could not be paid. Personally, on paper, the proposition looks very attractive, and we all know that cemeteries, when properly managed, have been great dividend-payers. Central Heights Improvement Co. has already received $6000.00 in cash and, as above stated, it has already definitely dedicated ten acres of the property involved to cemetery purposes. * * *

"I forgot to state above that no further promotional shares should be issued, and all to the end that if those responsible for this cemetery idea are over-estimating the situation, they will ultimately receive no benefit whatsoever, but leave the entire property in the hands of the Central

Heights Improvement Co. and Mr. Clark. I anticipate no difficulty at all in securing a permit along the lines herein suggested."

Within a few days thereafter, and following a further conference, C. T. Norwood, an officer of appellant, objected to the proposed amended plan in a letter to Goodcell, which read in part (italics ours):

"Mr. Bill and I have been talking this over, as to how it would work out on that basis, with 5000 shares issued to us, as was also suggested yesterday. Mr. Clark would receive one-half as much stock for his three acres as we would for our seventeen acres, which does not seem equitable. *On this basis it would take nearly 800 per cent in dividends to pay us out, to say nothing about the interest. This, to us, seems impossible, and would put us permanently into the cemetery business, where we only intended to be temporary. Under the former agreement our interest was recognized as an indebtedness and not as a stock interest.*

"We would be willing that the set-up be made on this basis, provided the dividends on Mr. Clark's stock be assigned to us until our $34,000.00 and interest is paid, at which time his stock would be returned to him, or his assigns. Under this arrangement we would be willing to deposit our stock in escrow to protect Mr. Clark's interest, if he so desired. Otherwise, we feel that only his proportionate share, 3/20 of the total stock issued to him and ourselves, should be issued to him, and our share should be 17/20 of the total. * * * The more common stock you can get the Commissioner to allow us, the better, as it gives us a larger proportion in relation to the bonus given with the preferred stock. Probably your set-up would call for one share of preferred stock to ten shares of common. * * *"

To which letter Goodcell addressed the following reply on June 26, 1933:

"I have your letter of June 22nd. We discussed all of the points brought up in your letter as to the portion of stock which Mr. Clark would be receiving, and the Central Heights Improvement Co. would receive.

"Mr. Clark is not willing to assign to you the dividends on his stock until the $34,000.00 is paid. In viewing this situation, just remember the following facts: Clark paid $6000.00 in cash for three acres of ground which was included in the cemetery permit; he was to receive as consideration for deeding the three acres to the Cemetery Corporation 1200 shares of preferred stock, drawing 7%, and 1200 shares of common. The charter of the Corporation provides that no dividends shall be paid on the common until all of the preferred has been retired.

"Central Heights Improvement Co. was to get $34,000.00 and interest, supposedly to be paid out of stock sales, on a set-up which the Commissioner of Corporations refuses to approve because the price to be paid for the land was eight times as much as the State Appraiser fixed as the value of the land, permit and all included. Further, just remember under the terms of the contract, if the payments aren't made in accordance therewith, that the Improvement Co. takes over the promoters' stock and is in the cemetery business with its twenty acres, and obliged to carry on until the preferred stock is retired, before it can take anything in payment for its seventeen acres of land. I explained this in detail to Mr. Veach before the contract was signed, but assumed that the unusually onerous provisions of the contract were acceptable to the Improvement Co. because of the $6000.00 in cash being paid, and because of the high price which would have to be paid for the remaining seventeen acres.

"As the matter stands today under the contract, the Improvement Co. will have to go ahead with the cemetery, and will have to make some adjustment with Clark for the proposed three acres covered by the permit. Now, just consider what position in which Clark is placed by this change of program. Instead of 1200 shares of preferred drawing 7%, and 1200 shares of common, he proposes to take one-third of the common issue as payment for the land. If the Commissioner sticks to his $250.00 an acre, this will mean but 5000 shares, or at most, 6000 shares, making an allowance for the 20% brokerage which is to be paid on the other stock sold. He gets no preferred stock at all. He does not get back the $12,000.00 before any dividends could be paid to the Improvement Co. on its holdings of common stock, if the Improvement Co. takes over the deal under the contract. It strikes me that your proposed ratio of three for Clark and seventeen for you is not equitable when viewed in the light of the now existing contract. Further, remember that under this new proposal there will be no common stock issued for the promoters as stock is sold.

"Frankly, *I believe that the now proposed set-up, and the one which I thought we had agreed to, that the Improvement Co. will have its money much earlier than is expected. In any event, if you don't get it within five years, plus your interest, you will at least own about 60% of the cemetery and will have had considerable paid on account.*

"I am enclosing a letter form of modification of contract which I trust that you and the other members of the Central Heights Improvement Co. will execute upon further consideration of the subject. * * *"

Thereafter, on June 29, 1933, following further communications and discussions, appellant corporation executed and delivered to respondent Glouner a letter containing a proposed "modification" of the agreement of April 14th, substantially as follows:

"In consideration of your waiving your rights under and by virtue of the terms of said contract, (of April 14, 1933), Central Heights Improvement Co. agrees with you as follows:

"The certificates evidencing the ownership of Central Heights Improvement Co. of shares of the common capital stock of Memorial Parks, Inc., issued to it pursuant to the terms of said last named Company's application for a permit to sell and issue shares of its capital stock, will be escrowed with some agent to be agreed upon between you and Central Heights Improvement Co., and so escrowed upon the following terms and conditions:

"(1) The terms of the escrow shall be five (5) years from and after July 1, 1933:

"(2) If, during said period of time, Central Heights Improvement Co. has been paid, in dividends, or otherwise, $34,000.00 plus 7% upon the principal sum thereof (and payments made on the principal sum to be deducted as and when made), all of such certificates shall be surrendered to you, or your nominees; otherwise, to be and remain the property of Central Heights Improvement Co., your right to receive any or all of said certificates, or stock represented thereby to absolutely terminate on July 1, 1938. * * *

"(4) The stock issued said Central Heights Improvement Co. and the stock issued to Mr. Daniel B. Clark in accordance with the terms of said suggested modification of the contract of April 14, 1933, shall be pooled and shall be voted in all regular and/or special meetings of stockholders of Memorial Parks, Inc., as may be directed by a majority of the pool; provided, however, that so long as dividends have been regularly paid on the outstanding preferred stock, there shall be elected to the Board of Directors of said Memorial Parks, Inc., at least two persons designated by yourself and associate, two persons designated by Daniel B. Clark and/or his successors in interest, in the ownership of stock to be received by him as aforesaid, and two persons designated by the Central Heights Improvement Co. The remaining directors shall be elected by other owners of stock of Memorial Parks, Inc.

"Central Heights Improvement Co. has executed the foregoing letter in duplicate and encloses both copies thereof herewith. If you concur in the foregoing suggestions, please execute both copies and have Mr. Myers and Mr. Morrison likewise execute the same, returning one copy for our files and retaining one for your files. * * *"

Upon the same date, and following the conferences mentioned, appellant corporation sent a letter prepared by attorney Goodcell to respondent Memorial Parks, Inc., in part as follows:

"In view of the refusal of the Commissioner of Corporations to issue to Memorial Parks, Inc., a permit in accordance with the terms and provisions of that certain contract between the Central Heights Improvement Co., a corporation, and Daniel B. Clark, a copy of which contract was filed by said Memorial Parks, Inc., with its application for permission to sell and issue shares of its capital stock, we submit for your consideration the following change in the terms of said contract:

"Central Heights Improvement Co. will deed to Memorial Parks, Inc., the seventeen acres of land described in said contract and said Clark shall deed to said Memorial Parks, Inc., the three acres described in said contract. *As the consideration for said deeds there shall be issued common stock of Memorial Parks, Inc., in such amount as the Commissioner of Corporations of the State of California will approve,* one-third thereof to said Daniel B. Clark, and two-thirds thereof to Central Heights Improvement Co. Said application for permission to sell shares of its capital stock shall be amended by Memorial Parks, Inc., so as to provide for the sale of 2500 units of such capital stock, being two of preferred and one of common, at and for the gross selling price of $20.00 per unit, the same to net Memorial Parks, Inc. $16.00 per unit. The total amount received from the sale of said stock shall be used for the development of said twenty acres as a cemetery.

"No 'promotion stock' shall be issued to any person whomsoever.

"Central Heights Improvement Co. has executed this letter in duplicate and encloses both copies hereof herein. If Memorial Parks, Inc. and Mr. Clark concur in the foregoing suggestion, you both should execute two copies, returning one of them to us for our files and retaining the other for your files. * * *"

The proposals set forth by appellant in the above letters were duly accepted by respondents Glouner and Memorial Parks, Inc., by execution of the same as therein requested. Thereafter, on July 7, 1933, an amended application to issue stock was filed by respondent corporation with the corporation commissioner, and as a part thereof, appellant's letter of June 29th to Memorial Parks, Inc., was attached as an exhibit. No reference was made in the application to appellant's letter to Glouner of the same date. The application also contained as an exhibit a certified copy of an amendment to the articles of incorporation of Memorial Parks, Inc., conforming with the agreement of June 29th, relative to the issuance of stock, the period of default of dividends upon preferred stock, and in the event of such default, the domination of the board of directors by preferred stockholders. A permit to sell and issue stock of respondent corporation pursuant to this application was granted by the corporation commissioner, and thereupon appellant and respondent Clark deeded their seventeen acres and three acres, respectively, to Memorial Parks, Inc. Subsequently, 5666 shares of stock, being appellant's agreed portion of the stock issue approved by the corporation commissioner, were issued in the name of appellant, and delivered in escrow by Glouner and his associates to Goodcell, pursuant to the agreement of June 29th, where it still remains. In addition, stock to the approximate value of $39,000 was subsequently sold and issued to the public. In November, 1933, W. T. Bill and C. T. Norwood, president and vice-president of appellant corporation, were duly elected to the board of directors of respondent corporation, and appellant corporation thereafter continued to be represented thereon.

The cemetery venture failed to achieve the success that either its promoters or the officers of appellant hoped for it, with the result that at the annual stockholders' meeting in February, 1936, the preferred stockholders assumed control pursuant to the terms of the agreement of June 29th. Shortly thereafter appellant filed this action.

We have carefully examined the entire record in the light of appellant's voluminous objections, and are convinced the judgment must be affirmed. The trial court found that appellant and Clark entered into the agreement of April 14, 1933, with the contemplation that the same would not become binding upon the corporation to be organized unless and until a valid permit were obtained from the corporation commissioner to issue stock according to the forms of the agreement. That Clark, acting for himself and associates, paid appellant the sum of $6,000 and received title to three acres of land which he tendered with an assignment of his rights under the contract of April 14th, to respondent corporation, conditioned upon his receiving the stock as therein provided. That as a consequence of the refusal of the corporation commissioner to grant the original application for a permit to issue stock, respondent corporation never became a party to, nor bound by the agreement of April 14th. That by the subsequent agreements of June 29th, set forth in the letters of appellant, the agreemnt of April 14th was terminated and canceled. That none of the respondents were indebted to appellant, and that the latter had no lien as a vendor upon the property.

[3, 4] It will be observed from the pleadings that the question whether respondent-corporation adopted and became bound by the contract of April 14, 1933, between appellant and Clark, was directly in issue. The court found that it neither adopted nor became bound thereby, and there is substantial evidence to support such finding. That a corporation may adopt the contracts made on its behalf by promotors, in advance of its organization, as effectively as if made by it after in-

corporation, is recognized. The rule is not an absolute one, however. Biggart v. Lewis, 183 Cal. 660, 665, 192 P. 437; Detwiler v. Clune, 77 Cal.App. 562, 566, 247 P. 264. In the instant action not only the terms of the agreement of April 14th, but the acts of the parties as well, convince us that the acceptance of benefits thereunder by respondent-corporation, was expressly conditioned upon the permit from the corporation commissioner. Nannizzi v. Caprile, 43 Cal.App. 498, 500, 185 P. 673; Michell v. Grass Valley Mines Co., 206 Cal. 609, 615, 275 P. 418. The fact that the evidence shows that at the time of filing of the original application to the corporation department for a permit, Clark had merely tendered the deed to his three acres, and an assignment of his rights under the April 14th agreement, further indicates the qualified act of respondent-corporation.

[5] The trial court admitted, over the objections of appellant, parol and extrinsic evidence consisting of conversations between the parties and Goodcell occurring before, during, and subsequent to the execution of the agreement of April 14th. The rulings were proper. The evidence was admissible, not to vary or modify the terms of the contract of April 14th, but for the purpose of aiding the court in ascertaining the true intent and meaning of the language used there. Payne v. Commercial Nat. Bank, 177 Cal. 68, 72, 169 P. 1007, L.R.A.1918C, 328; "not by showing that the parties meant something other than what they said, but by showing what they meant by what they said". Barnhart Aircraft, Inc. v. Preston, 212 Cal. 19, 23, 297 P. 20, 21; Wachs v. Wachs, 11 Cal.2d 322, 326, 79 P.2d 1085; Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P.2d 785. The pleadings placed before the court not only the contract of April 14th, but those of June 29th as well. An examination of the language of each reveals the difficulty confronting the trial court in the respect mentioned. Furthermore, since respondent-corporation was not a party to the agreement of April 14th, and its rights and liabilities thereunder were directly in question, it would seem that the objection would not properly apply in so far as the respondent-corporation is concerned. Auditorium Co. v. Barsotti, 40 Cal.App. 592, 595, 181 P. 413.

[6, 7] Respondent-corporation was permitted to show by oral and documentary evidence from an officer of the state corporation department that it had filed an application for the issuance of stock pursuant to the agreement of April 14th and of the amended application therefor under the agreements of June 29th. The evidence was relevant and material as showing respondents' effort to comply with the condition set forth in the contract of April 14th, and the impossibility of performance in accordance therewith. Nannizzi v. Caprile, supra, 43 Cal.App. at pages 500, 501, 185 P. 673; Coalinga Mohawk O. Co. v. R. H. Herron Co., 53 Cal.App. 75, 78, 199 P. 813. Evidence of the amended application, the granting of the same, and the issuance of stock pursuant thereto and to the agreements of June 29th, was admissible for the purposes offered. Nor was the evidence inadmissible as hearsay because appellant was not a party to the proceedings before the corporation department. The testimony and documents were received not as evidence of the truth of the matters therein contained or stated, but as evidence of acts of respondents which were required of them under the contract, and which formed a part of the entire transaction in dispute—as distinguished from that portion alleged in the complaint. When the good faith of a party is in question, the information upon which he acted, whether true or false, is original and material evidence, and admissible. Young v. Benton, 21 Cal.App. 382, 390, 131 P. 1051; People v. Shea, 8 Cal. 538, 539, citing Greev Evi., sec. 101; Code Civ.Proc., secs. 1850, 1870, subd. 7. For the same reasons this evidence was not objectionable as being self-serving, since it merely related to specified acts which appellant itself contracted should be performed.

[8] The trial court, over appellant's objection, permitted a certified public accountant to testify that in his opinion as an expert, an entry made by another in respondent-corporation's records indicated that the land in question had been acquired by respondent-corporation in consideration of the issuance to appellant and respondent Clark of a total of 8500 shares of its common stock. It might be added that the court permitted appellant to completely rebut this testimony through the testimony of a certified public accountant called as an

expert witness in its behalf. The objection should have been sustained. Obviously, the particular entry in the corporate records was the expression of the party making the same, and the testimony of the experts amounted to nothing more than an opinion as to the understanding or belief of another. Huyck v. Rennie, 151 Cal. 411, 415, 90 P. 929. The point is not analogous to that presented in Law v. Northern Assurance Co., 165 Cal. 394, 402, 132 P. 590, which involved the interpretation of technical terms in a contract between the parties to the action. The error, however, is not such as to require, or warrant, a reversal of the judgment.

[9, 10] Great stress is placed upon the contentions that the findings are not supported by the evidence; that they are at variance with the pleadings, are contradictory and incomplete as to material issues presented. Sufficient of the evidence has been heretofore presented herein to dispose of the first contention. As to the variance claimed, the same is more apparent than real. As above noted, respondent-corporation alleged that the only contract between appellant and respondent-corporations was that of June 29, 1933, and that this contract and that of the same date between appellant and Glouner changed the terms of the agreement of April 14th between the parties thereto. The court found substantially in accordance with these allegations except that it found that the agreements of June 29th "terminated and cancelled" the agreement of April 14th as between the parties thereto. The allegations of the amended answers were sufficiently broad to present to the court the interpretation of the agreements mentioned therein, and its finding is one of an ultimate fact and within the issue thus presented by the pleading. Brady v. Fowler, 45 Cal.App. 588, 592, 188 P. 319; Starkweather v. Eddy, 87 Cal.App. 92, 98, 261 P. 763; Taylor v. Taylor, 192 Cal. 71, 81, 218 P. 756, 51 A.L.R. 1074. The court found in paragraph XIII that the allegations of paragraph VI of the amended answer of respondent-corporation were true, thus finding by reference that Clark "tendered and delivered" to it his deed to the three acres, together with an assignment of his rights, duties and obligations under the agreement of April 14th. In paragraph XIV, subdivision f, the court expressly found that on or about the 8th day of May, 1933, Clark "tendered" to respondent-corporation his deed to the three acres, together with an assignment of his right, title and interest in, to, and under the agreement of April 14th. By paragraph XIV, subdivisions g and h, the court further found that the agreement was executed and the tender of the deed was made conditional for its acceptance by respondent-corporation upon the securance of a permit from the corporation commissioner. The court then found that the permit was denied, as alleged in the amended answer. It is apparent that the question whether there was a mere tender or a tender and delivery of the deed is not such a material issue as to render the conflict fatal to the judgment. Wiles v. Hammer, 66 Cal.App. 538, 540, 226 P. 651. Since the court expressly found that the tender —or tender and delivery, if such there were—and the contract from which they necessarily arose, were conditioned upon an event which never occurred, the determination whether there was a tender or delivery, or both, is not such an essential conflict as to justify a reversal. Turner v. Wilson, 171 Cal. 600, 606, 154 P. 2. Further, since the court specially found that there was only a tender, it would appear such finding must control. McCormick v. National Surety Co., 134 Cal. 510, 511, 66 P. 741; Hammond Lumber Co. v. Barth Invest. Corp., 202 Cal. 606, 609, 262 P. 31.

[11, 12] It is likewise contended that the court failed to find upon certain issues presented by the allegations set forth as an affirmative defense in the amended answers of other respondents. An examination of the findings reveals that the court found substantially in accordance with the facts alleged as an affirmative defense in the amended answer of respondent-corporation. It necessarily follows that allegations in the answers of other respondents in conflict therewith must be deemed to have been found untrue, without an express finding to that effect. The court found that at the time of the execution of the agreement of April 14th, the reasonable value of the land was the sum of $5,000. Since no issue was involved as to the value of the land, the finding was wholly surplusage, but certainly harmless in character.

[13] The court found that appellant deeded the seventeen acres to respondent-corporation and received "as full consideration for said transfer and as the only

payment therefor due and payable from respondent Memorial Parks, Inc., to appellant, fifty-six hundred sixty-six (5666) shares of the capital stock of said respondent * * *" and as a conclusion of law, that appellant had no vendor's lien, or any other right or interest in the property. The evidence clearly supports such finding. The agreements of the parties, of June 29, 1933, and their subsequent conduct pursuant thereto, are so clearly inconsistent with, and even repugnant to the theory of a vendor's lien as to have precluded a different conclusion by a court of equity. Royal Con. Min. Co. v. Royal Con. Mines, 157 Cal. 737, 747, 110 P. 123, 137 Am.St.Rep. 165; Jones v. Allert, 161 Cal. 234, 237, 118 P. 794; Doty v. California Rice Milling Co., 37 Cal.App. 449, 460, 174 P. 389; Cowan v. Security-First Nat. Bank, 10 Cal.App.2d 390, 393, 51 P.2d 440.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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40 Cal.App.2d 620

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. McLAUGHLIN LAND & LIVESTOCK CO.

Civ. 11350.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1940.

Hearing Denied Nov. 9, 1940.

1. Courts 🔑97(1)

The decisions of federal courts determining the jurisdiction of their own courts is controlling on the state courts, as well the decisions interpreting and declaring the purport and effect of the judgments of the federal courts.

2. Courts 🔑97(1)
Judgment 🔑829(3)

Where a judgment of a federal court is received in a state court, it is to be accepted with the full faith and credit accorded that judgment in the jurisdiction where it was rendered, and in the light of its interpretation in the federal decisions.

3. Bankruptcy 🔑38

Federal court had authority to pass on its own jurisdiction in proceeding under the section of the Bankruptcy Act dealing with agricultural compositions and extensions, and the question of the ownership of the property listed by the petitioner in its debtor's schedule was equally jurisdictional, and the federal court had the power to determine that issue. Bankr.Act § 75, 11 U.S.C.A. § 203.

4. Judgment 🔑720

If the questions involved in a suit are tried and decided, no matter how numerous they may be, the estoppel of the judgment will apply to each point so settled, in the same degree as if it were the sole issue in the case.

5. Judgment 🔑829(3)

Where Federal District Court, in proceeding under that section of the Bankruptcy Act dealing with agricultural compositions and extensions, on issues squarely presented by debtor, found that debtor was not a farmer within meaning of act and that prior trustees' sale was valid, that bank became the owner of the property by purchase at trustees' sale, and that debtor owned no interest therein, which findings were incorporated in Federal District Court's judgment, it would be assumed that, when the Circuit Court of Appeals affirmed the judgment, the judgment became "res judicata" of both issues tendered and tried, including issue whether debtor was a farmer, notwithstanding that Circuit Court of Appeals, in affirming judgment, based its conclusions on the other issue. Bankr.Act § 75, 11 U.S.C.A. § 203.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

6. Judgment 🔑642

A general affirmance of a judgment on appeal makes it "res judicata" as to all the issues, claims, or controversies involved in the action and passed on by the court below, although the appellate court does not consider or decide on all of them.

7. Judgment 🔑951(2)

Where findings of bankruptcy court that trustees' sale was valid, that bank became owner of farm in controversy by purchase at trustees' sale, and that debtor did not own any interest therein, were matters adjudicated, findings were properly admissible in suit in unlawful detainer in state court to recover possession of part of the farm by the bank. Bankr.Act § 75, 11 U.S.C.A. § 203.

8. Judgment ⚷951(2)

In bank's suit in unlawful detainer against land and livestock company to recover portion of realty which was covered by trust deed executed by land and livestock company, and which bank purchased at trustees' sale, trial court properly received in evidence over company's objection the judgment roll in an action brought by assignee of bank to recover deficiency after sale under trust deed, without any showing that the assignee was an assignee for collection only, as against contention that the parties were not the same.

9. Judgment ⚷676

A judgment is binding on the real parties in interest although they are not nominal parties.

10. Judgment ⚷634

Before a former adjudication may operate as an "estoppel" as to issues in a later action, it is fundamental to the doctrine of "res judicata" that there must be an identity of parties, as well as an identity of issues, and the subsequent action must be between the parties or their privies.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

11. Judgment ⚷676

Where one case holds that a prior judgment is res judicata in favor of the assignor of the judgment and the other holds that it is binding against him, the same principle supports both decisions, namely, that the prior judgment is binding against the real parties in interest, irrespective of how the nominal parties appeared in the proceeding.

12. Judgment ⚷951(2)

In bank's suit in unlawful detainer to recover portion of realty which was covered by trust deed executed by land and livestock company, and which bank purchased at trustees' sale, trial court properly received in evidence over company's objection the judgment roll in action by an assignee of bank against company to recover deficiency after sale under the trust deed, as against contention that the question of whether the trust deed had been foreclosed was not within the issues of the action for deficiency, where company by its denials in action for deficiency put bank's assignee to proof that security of trust deed was exhausted, since foreclosure and sale under trust deed were relevant to the issues and within the scope of that action.

13. Judgment ⚷956(2)

In bank's suit in unlawful detainer to recover portion of realty which was covered by trust deed executed by land and livestock company, and which bank purchased at trustees' sale, trial court properly admitted transcript of prior action by bank's assignee against company to recover a deficiency after the sale under the trust deed, since extrinsic evidence is admissible to prove the issues in a prior judgment, if they do not appear on the face of the judgment.

14. Evidence ⚷383(7)

Where trust deed provided that recitals contained in any deed or deeds made pursuant to any sale of the property with reference to regularity or validity of sale should be conclusive proof of the truthfulness thereof, and trustees' deed recited that property covered by trust deed was "sold" at the time and place noticed, borrower executing trust deed was "estopped" to claim that no sale was in fact made, and could not in suit in unlawful detainer introduce evidence tending to refute the recitals in the trustees' deed.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

15. Judgment ⚷736

Where land and livestock company and its stockholders had claimed, in prior suit for unlawful detainer against them by bank to recover possession of realty after foreclosure and sale under trust deed, that they were entitled to possession of a portion of the premises under an oral seven-year lease, and they made no claim to ownership, and the only issue tried was that concerning the oral lease, company could not contend in a subsequent suit in unlawful detainer that the prior judgment was "res judicata" of issue concerning the ownership of that portion of the realty.

16. Forcible entry and detainer ⚷6(1)

In a suit in unlawful detainer, the sole question at issue is the right of present possession, and questions of title cannot be litigated therein.

17. Judgment ⚷951(2)

Where a judgment in second suit in unlawful detainer was reversed on ground that judgment in the first suit in unlawful detainer was "res judicata" because it held that defendants were entitled to possession under an oral lease, offer of the judgment in second unlawful detainer suit in third unlawful detainer suit as "res judicata" of the issues in the third suit was properly refused, where the oral lease had expired by that time.

18. Pleading ⚷8(11)

An allegation that, pursuant to a power of sale contained in trust deed and in accordance with certain statute, property was sold on certain date, to the plaintiff in suit in unlawful detainer, was not a "conclusion of law." Civ.Code, § 2924.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

19. Appeal and error ⚷762

Statement, in respondent's brief, that appellant in its answer in suit in unlawful detainer admitted the regularity of foreclosure proceedings and validity of the foreclosure sale under which the respondent claimed, was not a "conclusion", but was an "allegation of fact", and hence the appellant was not relieved from denying the truth of the statement.

See Words and Phrases, Permanent Edition, for all other definitions of "Allegation of Fact" and "Conclusion".

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action in unlawful detainer by the Bank of America National Trust & Savings Association against the McLaughlin Land & Livestock Company, to recover possession of certain farming land. From a judgment in favor of the plaintiff on a directed verdict, the defendant appeals.

Judgment affirmed.

Garth V. Lacey, of Salinas, and Wyckoff, Gardner & Parker, of Watsonville, for appellant.

Rosendale & Thomas, of Salinas, and Keyes & Erskine, of San Francisco (J. Benton Tulley, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

The plaintiff sued in unlawful detainer to recover possession of approximately six hundred acres of farming land in the county of Monterey. Plaintiff had judgment upon a directed verdict, and the defendant appeals upon a typewritten record.

We take the statement of facts from respondent's brief since appellant does not controvert it, except in immaterial matters hereafter noted, and we find it a full and fair statement for all purposes of the discussion of the issues involved:

"On March 17, 1931, the appellant and one William Brinan made, executed and delivered a note to the respondent, hereinafter called Bank, in the sum of $173,800.00. Appellant conveyed 6640 acres of land, including the 600 acres involved in the instant case, to Corporation of America, as trustee for Bank, as security for the loan made by the Bank. Appellant defaulted under the note, and the property was foreclosed and the trustee's sale held on March 28, 1932. A trustee's deed was executed, delivered and recorded.

"Immediately following the sale, the appellant surrendered possession of all but the 600-acre 'Home Place', which is involved in this action.

"The Bank since 1932 has been attempting to recover possession of this remaining 600-acre parcel. A considerable amount of litigation has ensued. The following is a brief statement of the litigation.

"On May 27, 1932, the Bank commenced an action in unlawful detainer under the provisions of section 1161a Code Civ.Proc., seeking to recover possession of the entire 6400 acres of land covered by the deed of trust, against the appellant and the stockholders of appellant, who are the members of the McLaughlin family. This action we shall call the first unlawful detainer action. The appellant in its answer in the first unlawful detainer action admitted the regularity of the foreclosure proceedings and the validity of the foreclosure sale and set up as an affirmative defense that the Bank had given appellant and the individual stockholders an oral seven-year lease to the 'Home Place'. No claim was made to the remaining 5800 acres. The jury found for the defendants in that action and judgment was entered accordingly.

"On July 11, 1933, the Bank commenced a new unlawful detainer action, which we shall call the second unlawful detainer case, under the provisions of section 1161, subd. 1, Code Civ.Proc. This action involved only the 600-acre 'Home Place' and was prosecuted on the theory that the tenancy of the defendants, including the appellant, had terminated. In the second unlawful detainer action the appellant denied that it was in possession of the property and claimed that the oral seven-year lease was made between the Bank and the stockholders and officers of appellant as individuals. In other words, the appellant in the second unlawful detainer action, contrary to its verified claim in the first unlawful detainer action, pleaded that it was not a party to the lease. The defendants in the second unlawful detainer action pleaded the first unlawful detainer judgment as res judicata. Judge Dooling, who presided at the trial, entered judgment in favor of the Bank, but the District Court of Appeal reversed the judgment on the ground that the judgment in the first unlawful detainer action was res judicata. Bank of America v. McLaughlin, 1937, 22 Cal.App.2d 411, 71 P.2d 291, 72 P.2d 554.

"The Bank then waited until the expiration of the lease and commenced a new action in unlawful detainer against the stockholders and officers of appellant. In their answers they denied that they were in possession of the property and alleged that appellant took possession of the 'Home Place' on December 1, 1938, which was the day following the expiration of the oral seven-year lease.

"The Bank then commenced this action against appellant for the possession of the 'Home Place'. The Bank introduced in evidence the deed of trust and the trustee's deed to prove a prima facie case. It also introduced the judgment rolls and transcripts in two previous cases wherein the regularity of the foreclosure proceedings and the validity of the foreclosure sale were in issue and passed upon. Appellant sought to introduce certain evidence seeking to attack the regularity of the foreclosure proceedings which was excluded by the trial court. No other evidence was offered by the appellant. The court directed the jury to return a verdict for the Bank, and judgment was accordingly entered for the Bank.

"The three stockholders and officers of appellant commenced proceedings under section 75 of the Bankruptcy Act, 11 U.S.C.A. § 203, during the pendency of the second unlawful detainer action. On petition of the Bank these proceedings were dismissed by the Federal Court.

"While the appeal in the second unlawful detainer action was pending, execution was issued on the judgment in favor of the Bank and levied upon certain crops which were stored in a warehouse in the Bank's name by the defendants as performance under the lease. After the reversal ordered by the District Court of Appeal in the case cited, the defendants sought restitution, which was denied by the trial court. This court affirmed the order denying restitution. Bank of America v. McLaughlin, 1940, 99 P.2d 548."

It may be added that, since the appeal in this case, appellant commenced a new proceeding under section 75 of the Bankruptcy Act, but, upon stipulation, action in that proceeding has been postponed and the parties were permitted to proceed to final judgment in all proceedings pending in the state courts.

There is no substantial difference in the statements of issues involved made by the respective parties, but a logical discussion of these may be had by following the topical order of presentation adopted by the respondent, as appellant has done in submitting the appeal.

During the course of the trial the court received in evidence over appellant's objection the record of the first proceeding in bankruptcy brought under section 75 of the Bankruptcy Act. Appellant asserts that this was error because the bankruptcy court did not have jurisdiction of the proceeding, that the judgment was void in so far as it adjudicated the issue of title to the property here involved, and hence is not res judicata as to these issues. Respondent answers that the appellant tendered to the bankruptcy court two issues—that it was a "farmer" under the terms of the Bankruptcy Act, and that it was the owner of the property which it claimed to be farming. When the matter was submitted to the bankruptcy court, upon motion of the respondent to dismiss, both of these issues were determined adversely to this appellant by the referee to whom they were submitted and these findings were approved by the federal district court in an order dismissing the proceedings. The appellant herein took an appeal from that order to the Circuit Court of Appeals where it was affirmed. McLaughlin Land & Livestock Co. v. Bank of America, 9 Cir., 94 F.2d 491. That the Circuit Court rested its opinion on the one issue of appellant's relation as a farmer, though both issues were involved, will be referred to later.

The appellant states its position in this language: "The application of appellant for relief under section 75 was filed March 9, 1936. * * * The ownership of land, or of an interest in land, is not made a condition precedent to the right of the farmer to relief. He may be a tenant or a cropper and his property may all be personal in character, but if he is a farmer, he has a right to apply for and receive relief." By the terms of subsection "n" of section 75, 11 U.S.C.A. § 203, sub. n, it is provided that: "The filing of a petition * * * praying for relief under this section, shall immediately subject the farmer and *all his property,* * * * to the exclusive jurisdiction of the court, including all real or personal property, *or any equity or right* in any such property, including, among others, * * * where a deed of trust has been given as security, or where the sale has not or had not been confirmed." (Italics ours.)

Appellant construes the section to mean that "all of the property owned by the farmer, or in which he has any interest, both real and personal, passes under the control of the court". It is then argued that if the petitioner is not a "farmer" the court has no jurisdiction of his person and no jurisdiction to assume control over any property in which he has an interest, hence that any decision of the bankruptcy court ruling that the petitioner has no interest in the property listed in the schedule is beyond the issues and beyond the jurisdiction of the court. The respondent concedes appellant's premise, but rejects the conclusion.

[1, 2] The controversy between the parties on this point naturally divides itself into three headings: (1) The power of the bankruptcy court to pass upon its own jurisdiction; (2) its power to adjudicate title to property listed in the debtors' schedule; and (3) the effect of its decree determining more than one issue. Preliminarily we start with the axiomatic observation that the decisions of the federal courts determining the jurisdiction of its own courts is controlling here as well as the decisions interpreting and declaring the purport and effect of its own judgments. Hence, when a judgment of a federal court is received in a state court it is to be accepted with the full faith and credit accorded that judgment in the jurisdiction where it was rendered and in the light of its interpretation in the federal decisions. This is the effect of the recent decision of the Supreme Court of the United States in Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 137, 83 L.Ed. 104, where it rejected the ruling of the Illinois state court refusing to accept certain decrees of a bankruptcy court as res judicata on the grounds that the bankruptcy court had no jurisdiction to enter the decrees. The Supreme Court said: "After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction."

With this rule in mind we turn to the federal decisions as determinative of the first two questions presented. In Chicot County Drainage District v. Baxter State Bank, 1940, 308 U.S. 371, 60 S.Ct. 317, 319, 84 L.Ed. 329, the United States Supreme Court said:

"The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction conferred by statute, and that, as the statute was later declared to be invalid, the District Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally. * * *

"The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action. Stoll v. Gottlieb, 305 U.S. 165, 171, 172, 59 S.Ct. 134, 137, 83 L.Ed. 104."

[3] The question of ownership of the property listed by the petitioner in the debtor's schedule is equally jurisdictional, and the power of the bankruptcy court to determine that issue has been affirmed by many authorities. In Re Weis, 10 F.Supp. 227, 229, the Federal District Court sitting in Iowa said: "The parties agreed to argue only the jurisdictional question whether or not under the facts the debtor is a farmer within the meaning of section 75(r) of the Bankruptcy Act (11 U.S.C.A. § 203(r); but as the other question, to wit, whether or not the court has jurisdiction of the property sought to be reclaimed by the petitioner herein, is also jurisdictional and as the federal court must notice facts which point to lack of jurisdiction, both questions should be here passed upon." In Re Knauft, 10 F.Supp. 785, 786, the Federal District Court sitting in California, in a case where petitioner's interest in the property had been foreclosed and the period of redemption had expired pending the bankruptcy proceedings, said: "The alleged ownership of that property was the only thing that would entitle petitioner to the claim that she possessed the character of a 'farmer.' An added fact here, which was omitted in the foregoing statement, is that the period of redemption has expired and the proper conveyance made to the purchaser after the filing of the petition under section 75, as amended, by the debtor. All interest of the debtor in the land is gone and there is nothing left for the court to act upon under the conditions specified in section 75 as amended or § 75 (s), 11 U.S.C.A. § 203 or § 203(s)." See, also, In re Randall, D.C., 20 F.Supp. 470.

[4-6] The third inquiry suggested above, the effect of the decree determining more than one issue, is answered in the brief statement found in 34 C.J., page 922, reading: "If the questions involved in a suit are tried and decided, no matter how numerous they may be, the estoppel of the judgment will apply to each point so settled, in the same degree as if it were the sole issue in the case." Appellant, of course, must concede that it tendered two issues to the bankruptcy court—its status as a farmer, and its ownership of the property. It is conceivable that the bankruptcy court may have found that petitioner was not a "farmer" under the act because it has no interest in the property described and that would have ended the controversy. But that court, upon issues squarely presented by this appellant, found that appellant was not a farming corporation, and also found that the trustees' sale was valid, that the bank became the owner of the property by purchase at a trustees' sale, and that appellant owned no interest. These findings having been incorporated in the judgment it must be assumed that when the Circuit Court of Appeals affirmed the judgment it became res judicata of both the issues tendered and tried. This rule is stated in 34 C.J. 773 as follows: "A general affirmance of a judgment on appeal makes it res judicata as to all the issues, claims, or controversies involved in the action and passed upon by the court below, although the appellate court does not consider or decide upon all of them." Upon the same subject and to the same result, it was said in State v. City of Cleveland, 60 Ohio App. 395, 22 N.E.2d 223, 226: "However, it is universally held that a court speaks by its record or journal and not by its opinions, and nothing contained in the opinion of the Circuit Court of Appeals can affect the adjudication of the District Court, unless carried into the judgment of the reviewing court. The judgment of the Circuit Court of Appeals was an affirmance of the judgment of the District Court leaving that judgment in its entirety as a final and binding adjudication of the issues presented. (Citing cases.)"

[7] From the foregoing it must follow that, when the bankruptcy court determined that the petitioner therein had no interest in the property listed, such determination became final as to that issue, notwithstanding the fact that the Circuit Court of Appeals, in affirming the judgment, based its conclusions upon the other issue. For this reason the findings of the bankruptcy court that the trustees' sale was valid, that the bank became the owner

of the property in controversy by purchase at the trustees' sale, and that appellant herein did not own any interest therein, must be deemed in this proceeding as matters adjudicated and hence properly admissible in evidence.

[8-11] During the course of the trial the court received in evidence over appellant's objection the judgment-roll in Bechtel v. McLaughlin Land & Livestock Company, an action brought by an assignee of respondent to recover the deficiency after the sale under the deed of trust. Appellant's objections to the offer are that the parties were not the same, and that the question of whether the deed of trust has been foreclosed was not within the issues. The first point is not seriously defended by appellant, reliance being left on the erroneous statement that, since the transcript of the testimony taken in the Bechtel case was not admitted in evidence in this case, there was no evidence here that Bechtel was an assignee for collection only. But it was not necessary to show that. "A judgment is binding upon the real parties in interest although they are not nominally parties." 15 Cal.Jur., p. 190. In Standard Oil Co. v. J. P. Mills Organization, 3 Cal.2d 128, 139, 43 P.2d 797, 802, the Supreme Court said: "However, it is fundamental as to the doctrine of res judicata that, before the former adjudication may operate as an estoppel as to issues in the later action, there must be an identity of parties, as well as an identity of issues. The subsequent action must be between the parties *or their privies.*" (Italics ours.) To the same effect are Foster v. Fernandes, 205 Cal. 128, 131, 270 P. 188; California State Auto. Ass'n v. Brunella, 14 Cal.App.2d 464, 466, 58 P.2d 694. Where one case holds that a prior judgment is res judicata in favor of the assignor and the other holds that it is binding against him, the same principle supports both decisions, namely, that the prior judgment is binding against the real parties in interest irrespective of how the nominal parties appeared in the proceeding.

[12] The argument on the second point takes a wide range which we will not discuss in all its details. The complaint in the Bechtel case alleged the execution by the defendants on March 17, 1931, of a promissory note in the principal sum of $173,800. Paragraph III alleged, "that no part of said promissory note has been paid, save and except that $76,003.46 has been paid on account of the principal thereof, and interest thereon has been paid to March 26, 1932". The defendants answered these allegations in a pleading which is not understandable using the following words: "Answering the allegations in Paragraph III of plaintiff's Complaint, defendants, or either of them, have not sufficient knowledge, information, or belief to answer said allegations, and therefore, deny same. Defendants deny all other allegations in said Paragraph contained." But, on page 8 of the opening brief appellant states: "By the answer, all of the allegations of the complaint, with the exception of the assignment of the note to the plaintiff, were, in legal effect, admitted." It is fair to assume from the peculiar wording of the portion of the answer above quoted that the plaintiff in that action was entitled to infer that the defendants intended to deny the payments alleged and that, upon such assumption was entitled to make proof of those payments though it was not necessary for it to do so. If such proof included evidence of the sale under the deed of trust and that the amount sued for was the deficiency remaining after such sale the case is clear that the judgment in that case was an adjudication that a sale was made. Prior to the enactment of section 580a of the Code of Civil Procedure it was proper to plead a cause for a deficiency judgment in the form employed in the Bechtel case. Herbert Kraft Co. v. Bryan, 140 Cal. 73, 73 P. 745. To such pleading the defendant was accustomed to plead by way of special defense that the note was secured by a deed of trust. Hibernia Savings & Loan Society v. Thornton, 117 Cal. 481, 49 P. 573. If the cause was tried upon this theory then evidence that the note in suit was secured by a deed of trust, evidence of foreclosure and sale under the deed, and evidence that the security of the deed had been exhausted was all within the issues. From the transcript of the testimony taken in the Bechtel case, which was admitted in evidence in this case, it appears that the note pleaded in that case was of the same date, for the same amount, and between the same parties as the note which is the subject of this litigation, and a reasonable inference would follow from this that both suits involved the same transaction. In any event, since by their

denials the defendants put the plaintiff to proof that the security of the deed of trust was exhausted, it becomes apparent that the foreclosure and sale were triable issues in that litigation. However, it is not necessary to indulge in all these inferences. Having shown in this proceeding that both actions involved the same secured promissory note, it became incumbent upon the plaintiff in the Bechtel case to prove that its security had been exhausted before it could maintain any suit upon the note. Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 20 P.2d 940. Hence, the foreclosure and sale under the deed of trust were relevant to the issues and within the scope of that action. This being so the question of the finality of the judgment is answered in the recent case of Sutphin v. Speik, Cal.Sup., 99 P.2d 652, 655, where the court said: "Next is the question, under what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. In Price v. Sixth District, 201 Cal. 502, 511, 258 P. 387, 390, this court said: 'But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. * * * This principle also operates to demand of a defendant that all his defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them.' See, also, Elm v. Suburban Fruit Lands Company, 217 Cal. 223, 17 P.2d 1003; Andrews v. Reidy, 7 Cal.2d 366, 370, 60 P.2d 832; Minnich v. Minnich, 127 Cal.App. 1, 15 P.2d 804. * * * We are not impressed by defendant's assertion that he could not have raised the defense in the first action because it would amount to an admission of trespassing on state land. The defense might have been weak, embarrassing, or dangerous to the defendant; and he may have chosen to refrain from presenting it for reasons important to himself; but this can have no present effect upon the conclusiveness of the determination in the plaintiff's favor. When we say that the issue could have been raised, we mean that it was relevant to or within the scope of the action, and not that it was at the time a defense upon which the defendant might prevail." To the same effect, see 15 Cal.Jur. p. 140; 15 R.C.L. pp. 969, 970; Price v. Sixth Dist. Agr. Ass'n, 201 Cal. 502, 510, 258 P. 387; Lanktree v. Lanktree, 6 Cal.2d 120, 122, 56 P.2d 943.

[13] But if it should be said that these conclusions rest too broadly on inferences and presumptions, it is sufficient to say here that appellant's whole argument rests primarily on the ground that, upon its objection, the trial court refused to admit the transcript of the evidence taken in the Bechtel trial which it concedes would have proved all the facts here stated. After the cause was submitted the appellant by letter confessed error in this respect and admitted that such transcript was received in evidence over its objection. Though the point is not fully argued we hold that its admission was proper. The authorities are uniform that extrinsic evidence is admissible to prove the issues in the prior judgment if they do not appear on its face. Hence the plaintiff was entitled to make that proof if necessary to sustain the judgment. For these reasons we conclude that the judgment-roll in the Bechtel case was properly admitted.

[14] The appellant assigns error in the refusal of the trial court to receive evidence tending to refute the recitals in the trustees' deed on the ground that appellant was concluded by those recitals. The deed of trust provided: "The recitals contained in any deed or deeds made pursuant to any sale of the property hereunder setting forth matters or facts with reference to the regularity or validity of said sale shall be conclusive proof of the truthfulness thereof, and such deed or deeds shall be conclusive against the Trustor and all other persons. The said matters or facts need not be stated specifically but may be stated in general terms and in conclusions."

The trustees' deed contained a recital that the property was sold to the grantee at the time, place, terms and conditions provided in the deed of trust "and in all respects as provided by the laws of the State of California". The appellant argues that though the deed of trust makes the recitals of everything leading up to the sale conclusive, it does not make the recital that a sale was actually held conclusive. For this reason the appellant offered to prove that no sale was had. The language of the deed of trust is not ambiguous. A matter or fact with reference to the regularity or validity of the sale would clearly embrace the fact of sale, and the recital in the trustees' deed that the property was "sold" at the time and place noticed will estop the claim that no sale was in fact made. Leonard v. Bank of America, etc., Ass'n, 16 Cal.App.2d 341, 345, 60 P.2d 325; Central National Bank v. Bell, 5 Cal.2d 324, 327, 54 P.2d 1107; Cobb v. California Bank, 6 Cal.2d 389, 57 P.2d 924.

[15, 16] Appellant complains of the ruling of the trial court refusing its offer in evidence of the record in a prior suit for unlawful detainer. It insists that this judgment is res judicata against respondent, but the claim is untenable. The former action was brought to recover possession of some 6400 acres of land after foreclosure and sale under the deed of trust. This proceeding was brought against the appellant and its individual stockholders. By their answer all these defendants admitted the allegations of the complaint relating to the foreclosure and sale under the deed of trust, but set up, as a special defense, the execution of an oral seven-year lease to a portion of the premises given by the bank to the appellant corporation and to the individual stockholders. This was the issue tried and determined in that action and the judgment for the defendants in that action sustained the plea of an oral lease and nothing more, since the defendants therein did not claim ownership of any of the property involved. In fact by pleading lawful possession under the oral lease from the plaintiff therein the defendants confessed ownership in the lessor under whom they held. Their argument now is, in effect, that their former plea was a false plea and that they formerly held as owners because of irregularities in the foreclosure proceedings. It seems to be settled law that, in a suit in unlawful detainer, the sole question at issue is the right of present possession and that questions of title cannot be litigated therein. Martin v. Bartmus, 189 Cal. 87, 91, 207 P. 550. But, if the question of the regularity of the foreclosure proceedings was one necessary to be determined as incidental to the issue of plaintiff's present right to possession it was one which the defendants chose not to raise when they admitted the pleadings of the complaint adverse to them. They cannot now claim that the judgment is res judicata as having determined in their favor an issue which by their pleadings at that time they consented should be determined against them.

[17] The appellant next complains of the order of the trial court denying admission in evidence of what is called the second unlawful detainer case. This action was commenced in July, 1933, to recover possession of the 600-acre "Home Place" on the theory that the tenancy of defendants under the oral lease had terminated. By its answer the appellant corporation reversed its position of the former case and denied that it was a party to the oral lease, but alleged that such lease had been given to the stockholders as individuals. A judgment for plaintiff in that case was reversed upon the ground that the judgment in the former unlawful detainer case was res judicata. Bank of America v. McLaughlin, 22 Cal.App.2d 411, 71 P.2d 291, 72 P.2d 554. After the seven-year period of the lease had expired, the bank commenced another unlawful detainer action against the individual stockholders, in which they took a position adverse to that of the corporation pleading that they were not in possession but that possession was held by the corporation alone. The offer of this second unlawful detainer judgment as res judicata of the issues in the present trial was properly refused. It held nothing more than that the first judgment was binding upon it. But we have seen that the first action did not involve any of the proceedings now being tried. As in the first proceeding the issue of the validity of the foreclosure and sale was voluntarily withdrawn by the defendants it cannot be said that the second proceeding, which held nothing more than that the plaintiff was bound by the prior determination on the issue of the oral lease, was determinative of any phase of the issues here involved. Bekins v. Trull, 69 Cal.App. 40, 44, 230 P. 24; Martin v. Bartmus, 189 Cal. 87, 91, 207 P. 550.

[18] Appellant next complains of the order overruling its demurrer to the complaint. The particular allegation criticized is: "Pursuant to a power of sale contained in said deed of trust and in accordance with section 2924 of the Civil Code of the State of California, said property was sold on the 28th day of March, 1932, to * * * the plaintiff herein." Appellant's argument is that this is a pleading of conclusions of law. We had occasion to pass upon the same question in Ley v. Babcock, 118 Cal.App. 525, on page 527, 5 P.2d 620, on page 621, where we said: "The first point raised on the appeal is that the demurrer to the amended complaint should have been sustained because the allegation that the trustee 'after due notice of the time and place of sale given in accordance with the terms and provisions of said deed of trust and in full compliance with the provisions of section 692 of the Code of Civil Procedure * * * did * * * sell,' etc., is a mere conclusion of law. The point is without merit. The action is one for a deficiency judgment on promissory notes in which it would have been sufficient to have alleged that a sale had been had and that but $400 was received. Furthermore, the form of pleading is expressly authorized by section 459, Code of Civil Procedure, where it is declared that it is sufficient to plead that the party duly performed all the conditions on his part required by the statute on which he depends."

[19] We heretofore referred to a slight disagreement of appellant with respondent's statement of facts. This disagreement goes to the statement reading: "The appellant in its answer in the first unlawful detainer action admitted the regularity of the foreclosure proceedings and the validity of the foreclosure sale." Appellant does not deny the truth of the statement of fact, but contends that since these allegations were conclusions they did not require denial. In this appellant is in error. The allegation that the plaintiff was the purchaser at the trustees' sale was an allegation of fact which was not denied. The allegations covering the foreclosure proceedings and sale were not all conclusions and were supported by the presumptions of the trustees' deed that all these were regular and valid. The matter is heretofore referred to, however, merely to show that all these allegations were admitted and that the judgment did not in any way rest upon a determination of the regularity of such proceedings.

We find no prejudicial error. The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

IRELAN-YUBA GOLD QUARTZ MINING CO. et al. v. PACIFIC GAS & ELECTRIC CO. et al. *

Civ. 6318.

District Court of Appeal, Third District, California.

Sept. 18, 1940.

Rehearing Denied Oct. 18, 1940.

Hearing Granted Nov. 14, 1940.

1. Evidence 🔑5(2)

It is common knowledge that there may be many contributing causes affecting the going out of an ordinary house light on an unusually windy day.

2. Electricity 🔑19(5)

In action for damages resulting from fire caused by a tree breaking and falling across high-power electric wires on branch circuit line, evidence did not support judgment against electric company either on theory that circuit breaker tripped out when wires broke and was reset without the line being first inspected to determine cause of trouble, or on theory that if circuit breaker did not function and trip out company was negligent in setting circuit breaker at 96 amperage capacity and installing 30 amperage fuses instead of 20 amperage fuses.

3. Electricity 🔑17

Where an electric company furnishing current to consumer neither owns nor controls the electric wires or other appliances which cause an injury, company is not liable; but, where control or even joint control of the wires or appliances is reserved and exercised by the company furnishing the power, such company is liable for a lack of due care.

* Subsequent opinion 116 P.2d 611.

4. Electricity ⚿17

Where defendant electric company contracted to deliver current at convenient place to be designated by defendant mining company subject to electric company's approval, and branch line from electric company's main line was constructed by former lessee of the mining property and was at no time owned, supervised, or inspected by electric company, electric company exercised no control or joint control over the branch line so as to render it liable for alleged negligent maintenance of the branch line as result of which a forest fire, which spread to plaintiff's nearby property, was started when tree fell on and broke wires, notwithstanding transformer and meter were installed at mine rather than at junction of branch line and main line.

5. Appeal and error ⚿1177(6)
Trial ⚿345

In negligence action against two defendants which answered separately, where jury returned verdict against one defendant but verdict was silent as to the other, the verdict was no verdict at all as to such other and plaintiffs' failure to call trial court's attention to fact that verdict was silent as to such defendant was not a "waiver" or an "abandonment" of the cause presented by the issues raised and, on plaintiffs' cross-appeal as to such defendant, the case was still at issue and undetermined as to such defendant and would be remanded for further proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment" and "Waiver".

* * *

Appeal from Superior Court, Sierra County; Raymond McIntosh, Judge.

Action by the Irelan-Yuba Gold Quartz Mining Company, a corporation, and others, against the Pacific Gas & Electric Company, a corporation, the Socorro Mines, Incorporated, and others, for damages resulting from a fire which was caused by a tree breaking and falling across high-power electric wires. From a judgment for plaintiffs, the defendant Pacific Gas & Electric Company appeals, and from an order denying motion for a new trial as to defendant Socorro Mines, Incorporated, the named plaintiff appeals.

Judgment reversed as to defendant Pacific Gas & Electric Company, with directions to enter judgment for that defendant, and cause remanded for further proceedings as to defendant Socorro Mines, Incorporated.

John J. Briare, Frederick Searls, and W. H. Spaulding, all of San Francisco, for appellant Pacific Gas & Electric Co.

Wm. M. Maxfield and Jos. F. Aleck, Jr., both of San Francisco, and A. J. Just, of Downieville, for respondent Irelan-Yuba Gold Quartz Mining Co.

Clinton E. Harber, of Sacramento, and Lynne Kelly, of Grass Valley, for respondent Socorro Mines, Inc.

STEEL, Justice pro tem., delivered the opinion of the court.

The defendant, Pacific Gas & Electric Company appeals from a judgment entered pursuant to a verdict in favor of the respondents for damages suffered as a result of a fire caused by a tree breaking and falling across certain high power electric wires. The plaintiff, Irelan-Yuba Gold Quartz Mining Company, as cross-appellant, appeals on the same record from an order of the trial court denying its motion for a new trial as to the defendant, Socorro Mines, Incorporated.

In substance, the facts are as follows: The defendant, Pacific Gas & Electric Company, maintains a substation at Alleghany in the mining section of Sierra county, from which substation several high power electric lines run to the various mines operated in that vicinity. Among the lines is one known as the "Alleghany-Spanish Mine Line", which extends from the substation to the Spanish Mine in Nevada county. At a point on this line, near the Irelan-Yuba Gold Quartz Mine, a branch line takes off to the Plumbago Mine, a distance of approximately two-thirds of a mile, and referred to as the "Plumbago Tap Line" or "Branch Line", upon which line right of way the fire occurred.

The Plumbago Mine is owned by the defendant, Croesus Gold Mining Company, although it had not been operated by the owner for many years. In 1933 the owner leased the mine to the Yuba-Sierra Development Company, which operated it for a period of time, during which they constructed the "Plumbago Tap Line" for the purpose of supplying the mine with electric power. This lease was subsequently abandoned by the lessee, and at the trial it was stipulated that the tap line was owned by the Croesus Gold Mining Company, the owner of the mine. In 1935 the defendant Socorro Mines Incorporated, came into possession of the Plumbago Mine under an assigned lease, which covered the mining claims "together with the improvements, equipment and appurtenances", and were operating the property under said lease at the time of the fire here complained of.

At about 11 o'clock a. m. on the 16th day of October, 1936, during an unusually high wind, a pine tree approximately fifty to sixty feet in height broke off at about twenty-five to thirty feet from the ground and fell across the transmission lines, breaking two of them, the sparks from which ignited the dry leaves and grass upon the right of way and spread to the underbrush, resulting in a forest fire which covered an area of some twenty-two hundred acres, destroying in its path the property of plaintiffs, consisting of timber, mine buildings, personal property and equipment.

The trial was had before the court sitting with a jury. A judgment of nonsuit was granted the defendant Croesus Gold Mining Company, owner of the mine, and by stipulation the action was dismissed as to all other defendants, except the Pacific Gas & Electric Company and the Socorro Mines Incorporated. The jury returned a verdict in favor of the plaintiffs and against the defendant Pacific Gas & Electric Company, in an amount slightly in excess of twenty thousand ($20,000) dollars, upon which verdict judgment was entered. The jury failed, however, to bring in a verdict as to the defendant Socorro Mines Incorporated, and it is in this respect that the cross-appeal has been taken by the plaintiff Irelan-Yuba Gold Quartz Mining Company.

The record does not disclose under what terms or conditions the Pacific Gas & Electric Company delivered electric current to any prior lessee, although it is conceded that it had no proprietary interest in this "Plumbago Tap Line".

Under the service contract which was introduced in evidence, the defendant Pacific Gas & Electric Company, agreed to sell and deliver to the defendant Socorro Mines Incorporated, the lessee of the property, 2300 volts of electric current to be "delivered by the Power Company to the consumer from the Power Company's transformer at a convenient place to be designated by the consumer, subject, however, to the approval of the Power Company, and delivery of energy hereunder shall commence on date of first service". The transformer and a meter were accordingly installed at the mine, the end of the tap line, and stepped the current of 6900 volts, which passed along the tap line, down to the required 2300 volts for the use of the consumer, Socorro Mines Incorporated. Appellants contend that this equipment was installed at the mine instead of at the junction of the tap line with the main line, for the purpose of saving the consumer the added cost of the line loss in transmission over the tap line.

All of the main lines at the substation were connected through circuit breakers, the Spanish mine line being controlled by a circuit breaker of ninety-six amperage capacity. Upon a pole on the tap line near the junction above referred to, a set of thirty ampere fuses was installed.

The defendant and appellant, Pacific Gas & Electric Company, contends that there was no proof that the cause of the fire was due to the failure of either the fuses or the circuit breaker to function; that there was no suggestion of evidence of any negligence on its part in the installation or maintenance of said substation, equipment therein, or in any of its lines; that the sole basis of claim of negligence is its failure to anticipate that a gale would break a tree over the wires of the tap line and cause a fire.

Plaintiffs' case was presented upon the theories, first: that the circuit breaker at the substation did function, that is, did trip out, upon the breaking of the wires, and must have been reset by an employee of the defendant company, without first inspecting the line to determine the cause of the trouble, thus restoring the current to the broken wires and igniting the leaves and brush, or, on the other hand, that if it did not function it was because of the fact that the 96 amperage capacity, at which it was set, was too high, thus preventing the short, caused by the breaking of the wires, from tripping the circuit breaker and shutting off the current.

In addition, the plaintiffs claim negligence in the operation and maintenance of the branch or tap line.

The volt meter chart maintained by the defendant Pacific Gas & Electric Company, at the substation, and introduced in evidence, shows a drop in voltage on the Spanish mine line at about 11 o'clock a. m. on the day in question, and then a rise back to the normal voltage. Respondents contend that such action indicates most conclusively that the circuit breaker must have tripped out and was reset, particularly in view of the fact that several of the other circuit breakers at the substation did trip on the lesser voltage drops on that day. The evidence shows, however, that these latter circuit breakers were set at lower amperages, which is done in each instance according to the load necessary to be transmitted over the particular circuit, and in this connection the evidence further discloses that no fuses were involved between the source of the trouble, or short, and the several circuit breakers which functioned.

Respondents attach considerable importance to the evidence that the lights in the cookhouse at the Irelan Mine went out temporarily at about 11 o'clock a. m. on this day, contending that this also indicates action of the circuit breaker tripping out and being reset. The only witness who testified in this connection said: "The lights went out; I went outside to see what had happened; I thought the wind might have broken a line." "Q. Where did you go when you went outside? A. Stepped right outside and looked around and went back into the kitchen and got my cup of coffee." The witness then went to the compressor house, where he turned on the lights, and later when he returned to the cookhouse "in the neighborhood of twelve o'clock" to salvage the groceries, "the cook had the lights on again".

[1] It is more or less a matter of common knowledge that there may be many contributing causes affecting the ordinary house light on a rough day such as the one we are here concerned with. As the appellants have suggested, it is not at all improbable that the light globe, or the house fuse, may have burned out from excess current caused by the tap line wires breaking, and were replaced in the meantime by the cook.

It will be recalled that fuses of 30 amperage capacity were installed near the junction of the tap line with the main line, which point was between the substation and the fire. These fuses must have blown out before the circuit breaker could trip, in which event, the trouble having been disconnected from the main line, the circuit breaker would have no cause to function. On the other hand, if in any event, if did function, the resetting thereof could not operate to cause the wires to ignite the brush, for the reason that the blowing of the fuses would have disconnected the tap line from the main line. Furthermore, the expert testimony shows that a spark from one to three amperes at the voltage carried on this tap line would have started the fire. The rapidity with which the fire started, with the breaking of the tree, and undoubtedly before the short would blow out the fuses, is disclosed in the testimony of plaintiffs' witness, J. D. Holmes, who was engaged in cutting wood with his father not more than 150 to 200 feet from where the tree broke and the fire started. This testimony is as follows:

"Q. Did anything unusual occur on that day? A. Had a heavy wind on that day and a tree broke and struck the power line.

"Q. Did you see it break? A. No, I did not.

"Q. Did you hear it? A. I heard it, yes, and turned around.

"Q. What did you do when you turned around? A. I turned around and I saw the puff of smoke coming from there.

"Q. Where was the smoke coming from? A. From where the tree broke off.

"Q. Was it on the ground? A. Yes."

And again:

"Q. How long did it take you to get over there after you saw the smoke? A. A minute or less.

"Q. Did you run? A. Yes.

"Q. And you only had about two hundred feet down hill to go? A. Yes.

"Q. And by the time you got there, the fire was about twenty feet square? A. It was burning some grass and stuff on the ground there."

[2] From a careful examination of the record we are unable to agree with the respondents' theory that the Spanish mine line circuit breaker tripped out and was reset, thereby restoring the circuit and igniting the brush, or can we concur in the theory that if it did not function and trip out, there was negligence on the company's part in setting the circuit breaker at 96 amperage capacity, and the installation of 30 amperage fuses instead of 20 amperage fuses. The record lacks substantial evidence to support either claim, and is, in the main, more or less speculative and materially inadequate to support a judgment for damages based thereon.

[3] Passing now to the question of the alleged negligent maintenance of the tap line, it is the contention of the appellant,

Pacific Gas & Electric Company, that it did not own, control, or have any responsibility of the maintenance, operation or use of this tap or branch line, and therefore, any negligence in the maintenance thereof, cannot, as a matter of law, be chargeable to this defendant. The evidence shows, as already indicated, that this line was originally constructed by a private contractor for a former lessee of the Plumbago Mine, and at the time the fire occurred, was owned by the Croesus Gold Mining Company, the owner of the mine. The rule appears well established, not only in this jurisdiction, but generally, that where an electric company, furnishing current to the consumer, neither owns, nor *controls* the electric wires or other appliances which cause an injury, it is not liable for the damage claimed (9 R.C.L. 1204, sec. 15), but where control, or even joint control of the wires or appliances is reserved and exercised by the company furnishing the power, such company will be liable for a lack of due care. Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 283 P. 353, and cases therein cited; Scott v. Rome Ry. & Light Co., 22 Ga.App. 474, 96 S.E. 569.

The question for decision in this regard, therefore, is whether or not the appellant here exercised control, or even joint control, over this tap line.

In the Roberts case, supra, decided by this court, the defendant company was held liable. The company was using a branch line, belonging to the city of Chico, to serve a golf club, an independent consumer, at the other end of the line. The company had erected a system of poles and wires in Bidwell Park for the city of Chico, under an agreement that when completed, that it should become the sole property of the city, except that the company reserved ownership of transformers, switches and meters. In passing upon the question of liability, the court says [102 Cal.App. 422, 283 P. 356]: "It is ordinarily true that a company which neither owns nor *controls* the wires or appliances over which it merely transmits electric energy is not obliged to inspect the line, and will not be liable for injuries sustained by reason of defective appliances. 9 R.C.L. 1204, § 15; Hoffman v. Leavenworth L. H. & P. Co., 91 Kan. 450, 138 P. 632, 50 L.R.A.(N.S.) 574, Memphis Cons. Gas & Elec. Co. v. Speers, 113 Tenn. 83, 81 S.W. 595; Bristol Gas & Elec. Co. v. Deckard [6 Cir.], 10 F.(2d) 66. Except for the reservation of control and use of the appliances and line to supply the golf club with light and power, the electric company would have been relieved of responsibility. But when control, or even joint control, of an electric line is reserved and exercised as in the present case, the electric company will be liable for a lack of due care."

[4] As we have seen, the service contract heretofore mentioned, provides that the 2300 volt current shall be delivered by the company from its transformers and meters to the consumer at a convenient place to be designated by the consumer, subject to approval of the company. Accordingly, the transformer and meter were located at the opposite end of the tap line from where it intersects the company's main line, that is, at the Plumbago Mine. We do not consider the circumstances of the location of the transformer and meter as controlling upon the question here to be determined. The record discloses that at no time did the Pacific Gas & Electric Company exercise supervision or inspection of this tap line. It was constructed, in so far as the record shows, in a proper manner, by a former lessee of the mine, owned by the mine at the time the fire occurred, and its use was at all times for the sole benefit of the one mine, and those who were beneficially interested in the working thereof. The instant case differs substantially from the facts involved in the Roberts case, supra, in that there, the power company, not only made certain reservations, but also used the line as a medium for the service of power to an independent third party consumer at the end of the line.

We conclude, therefore, that the evidence contained in the record upon the question of control, or joint control of the tap line by the Pacific Gas & Electric Company, is legally insufficient to establish that essential fact.

[5] In view of the conclusion which we have reached herein, it becomes unnecessary to consider or discuss other questions which have been raised and argued in the briefs. As to the cross-appeal presented upon the record, the case is still at issue and undetermined in so far as the defendant Socorro Mines Incorporated is concerned. The verdict returned was complete as to the defendant Pacific Gas & Electric Company, but was no verdict at all as to the defendant Socorro Mines Incorporated. Plaintiffs' failure to call to the court's attention the circumstance that the verdict

was silent as to one of the two defendants separately answering is not a waiver or an abandonment of the cause presented by the issues raised. Rankin v. Central Pac. R. R. Co., 73 Cal. 93, 15 P. 57; Benson v. Southern Pac. Co., 177 Cal. 777, 171 P. 948.

The judgment is reversed as to the defendant Pacific Gas & Electric Company, with directions to enter judgment for said defendant. The cause is remanded for further proceedings as to the defendant Socorro Mines Incorporated.

We concur: PULLEN, P. J.; THOMPSON, J.

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40 Cal.App.2d 713

PEOPLE v. BUENAFLORE et al.

Cr. 2070.

District Court of Appeal, First District, Division 1, California.

Sept. 20, 1940.

1. Homicide ⇨17

One who willfully, premeditatedly, and of his malice aforethought, commits or attempts to commit an assault upon a certain person with the intention of killing him, but in the execution of his design unintentionally kills another instead, is nevertheless guilty of murder, on theory that the intent in such case is transferred by law from his intended victim to the person killed, and the crime is exactly what it would have been if the person against whom the intent to kill was directed had been in fact killed.

2. Homicide ⇨254

Evidence that defendant entered cafe with intention of engaging in shooting affray with another, and evidence regarding position of the parties engaged in the shooting with relation to proprietor of cafe who was unintentionally struck by a bullet, and regarding absence of powder marks on wound as indicating which of the parties fired shot which struck proprietor, sustained conviction for murder in the second degree on ground fatal shot was fired by defendant.

3. Criminal law ⇨1129(3)

An assignment of error based upon the giving of an instruction does not call for consideration on appeal where there is an absence of citation of authorities and appellant fails to point out wherein instruction is erroneous, or how or in what manner he was prejudiced thereby.

4. Criminal law ⇨829(5)
Homicide ⇨17

In homicide prosecution, instructions, stating law with respect to guilt of one who unintentionally killed third party while assaulting another with intent to kill, were proper, and failure to instruct on law of self-defense in such instructions was not error where law of self-defense was fully expounded in another portion of court's charge to jury.

5. Criminal law ⇨1129(3)

On appeal in criminal prosecution, mere naked assignment of error, without argument or citation of authority to show wherein remarks of prosecuting attorney to jury constituted error or were prejudicial to appellant, was insufficient to warrant inquiry into merits of the assignment of error.

6. Criminal law ⇨1037(1)

Where accused made no objection during trial to any portion of prosecuting attorney's opening argument to jury, objection thereto could not be raised for first time on appeal.

7. Criminal law ⇨1129(3)

Where accused assigned as error on appeal remarks of prosecuting attorney during closing argument to jury wherein prosecuting attorney stated his view on a matter of law, accused had burden of pointing out clearly and concisely not only the matters claimed to be erroneous but the reasons why they were so, and upon his failure to do so by argument or citation of authorities, or otherwise, the matters would be deemed not of sufficient importance to demand independent investigation by reviewing court.

8. Criminal law ⇨730(5)

In homicide prosecution, the expression of an opinion on a matter of law by prosecuting attorney in closing argument to jury was not error where, upon accused's objection and at accused's request, trial court instructed jury to disregard the view expressed, and stated that law governing case would be given by court in its charge to jury, and subsequently court did correctly instruct jury as to law, which was not in accord with view expressed by prosecuting attorney.

9. Criminal law ⇨1186(4)

Where facts of case overwhelmingly established guilt of accused under law as given to jury by court and as accused conceded it to be, conviction for murder in the second degree could not be said to have resulted in a miscarriage of justice because of alleged prejudicial remarks of prosecuting attorney in opening and closing arguments to jury, wherein prosecuting attorney stated allegedly incorrect view of law.

◆

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Alfred Buenaflore and Marino Pias were convicted of murder in the second degree, and Marino Pias appeals.

Affirmed.

Whitthorne & Magana, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The defendants, Alfred Buenaflore and Marino Pias, engaged in a gun battle with each other about 7 o'clock in the evening in a public poolroom and restaurant on Post street in San Francisco known as the Royal Cafe. Neither was injured, but one of the bullets struck and killed German Damsing, the proprietor of the cafe. Following the killing Buenaflore and Pias fled from the scene of the shooting and disappeared; but they were captured about three and a half years later, and having been indicted jointly for the murder of Damsing they were tried together, found guilty by a jury of murder of the second degree, and sentenced to imprisonment in the state prison. From the judgments of conviction and the order denying their motions for a new trial they appealed. At the trial they were defended by separate counsel, and subsequent to the filing of the record in this court the appeal taken by Buenaflore was dismissed at his request. The appeal taken by Pias was submitted, on his part, on a nine-page opening brief, without oral argument; and the first point made in his behalf is that as to him the evidence is insufficient as a matter of law to sustain a conviction of murder. There is no merit in the point.

The testimony as to the circumstances leading up to and attending the shooting is conflicting. Resolving all such conflicts in favor of the jury's verdict, the principal facts established against Pias may be summarized as follows: A few hours prior to the fatal shooting Pias and Buenaflore, both of whom were Filipinos, became involved in a bitter quarrel over a white girl, which started in the Royal Cafe and ended in a fist fight in the street nearby. According to the girl's testimony Pias had been molesting her for some time by attempting to force his attentions upon her, and on this particular evening he accosted her on the street, grabbed her violently by the arm, and shook her, and in order to escape further violence she sought refuge in the Royal Cafe, taking a seat at the lunch counter. Pias followed her into the cafe and commanded her "to eat", saying it would be her "last meal". She stated that she tried to reason with him, but all he did was to pace the floor nearby. About this time Buenaflore entered the cafe. The girl had known him for a long while but had not seen him for several months, and she appealed to him to escort her out of the cafe. Pias forbade him from doing so, but they left together and Pias followed them. Upon reaching the street Pias again grabbed the girl by the arm, whereupon Buenaflore grappled with Pias, and the men began fighting. During the melee Pias released his hold on the girl, and observing that the men were reaching for their pockets she ran away from the scene of the fighting. The men were finally separated by friends, and a little later on Buenaflore returned to the cafe. A boy named Salas employed therein saw Buenaflore as he entered, and noticed he was armed with a pistol. The boy immediately informed Damsing of the fact, and then went out on the street to summon a policeman. On the way out and while passing through a hallway leading from the cafe entrance to the street the boy met Pias and a companion named Vera going toward the cafe entrance, and he observed that Pias was armed with a pistol. As soon as Salas left the cafe Damsing went over to Buenaflore and requested him to leave, and after some persuasion he consented to do so; whereupon they started toward the doorway, walking side by side—Damsing's hand resting on Buenaflore. As they neared the middle of the room in that position Pias and Vera entered the doorway and instantly Pias and Buenaflore began shooting at each other. At least four shots were fired, and at the first shot Damsing fell to the floor, mortally wounded. Following the shooting Pias and Vera escaped through the front entrance, and Buenaflore fled through the back. The police arrived shortly afterwards and found Damsing's body lying on the floor. They also found on the floor four discharged pistol cartridges, one being a .25 caliber and the others .32 caliber. The autopsy disclosed that Damsing had been shot from the front, with a .25 caliber bullet which entered his left front shoulder; and there were no powder marks where it entered. The bullet then ranged to the right, through his chest, penetrated both lungs, and lodged in the right armpit, causing death within a few minutes. It appears from Pias' testimony that he and Vera were driven to the cafe in an automobile by friends who waited outside, and that following the shooting their friends drove them away in said automobile. It also appears from his testimony that he and Vera knew before entering the cafe that Buenaflore was carrying a pistol; that they anticipated meeting him in the cafe, and that there would be some shooting. The explanation offered by Pias for having visited the cafe at all was that he wanted to wash the blood off his face and hands, but the facts and circumstances of the case are amply sufficient to support the conclusion that he went there for the purpose of shooting Buenaflore, and that in attempting to carry out his unlawful design he inadvertently shot and killed Damsing.

[1, 2] As declared by the decisions hereinafter cited, if one wilfully, premeditatedly and of his malice aforethought commits or attempts to commit an assault upon a certain person with the intention of killing him, but in the execution of his design unintentionally kills another instead, it is nevertheless murder. The intent in such case is transferred by law from his intended victim to the person killed. In other words, the crime is exactly what it would have been if the person against whom the intent to kill was directed had been in fact killed. People v. Suesser, 142 Cal. 354, 365, 75 P. 1093; People v. Wells, 145 Cal. 138, 78 P. 470; People v. Trebilcox, 149 Cal. 307, 86 P. 684; People v. Rothrock, 21 Cal.App.2d 116, 68 P.2d 364. Therefore, under the facts and the law, the jury was fully justified in finding Pias guilty of murder.

Appellant concedes the law to be as above stated, but he contends that the evidence fails to establish that he fired the bullet that killed Damsing; that to the contrary it shows that it was fired by Buenaflore. This contention is based entirely on appellant's own uncorroborated story of the shooting, particularly with reference to the position of the parties at the time it took place; also his claim that the pistol he used was a .32 caliber; but certain impeachment evidence justified the rejection of his entire story. In particular his testimony relating to the actual shooting and the position of the parties at the time it started was wholly contrary to the facts as they were established by a witness named Morta, who was seated at the lunch counter and saw the entire affray from the time Buenaflore entered the cafe, and other than the defendants was the only witness to testify as to the circumstances attending the shooting. Moreover, certain physical facts were established by the prosecution which of themselves disprove any claim that the fatal shot was fired by Buenaflore. In this regard it appears alike from the testimony of appellant and Morta that Damsing, when shot, was less than arm's length from Buenaflore, and the evidence shows without conflict that if within such short range Buenaflore had fired the fatal bullet it necessarily would have left powder marks at the wound of entrance. Secondly, accepting as true the testimony given by Morta that Damsing when shot was walking alongside of and with his hand resting on Buenaflore, the evidence shows that the location of the entrance wound of the bullet and the direction it took in passing through Damsing's body were such that it was practically impossible for Buenaflore to have fired that bullet; on the other hand, if it be assumed as appellant claimed that Damsing when shot was standing in front of Buenaflore, trying to take his pistol away from him, the evidence shows that there would have been powder marks at the entrance wound of the bullet if it had been fired by Buenaflore. In view of the foregoing facts and circumstances there is no reasonable theory upon which it may be held as appellant contends that he did not fire the bullet that killed Damsing.

[3, 4] On the eighth page of his brief appellant quotes two instructions given by the court, which he assigns as erroneous. No authorities are cited in support of the assignment, and the only comment made respecting the instructions is this: "Since Marino Pias admitted shooting the .32 caliber once, then disregarding the plea of self

defense he became ipso facto guilty under the courts instructions." The rule is that an assignment of error based on the giving of an instruction does not call for consideration on appeal where as here there is an absence of citation of authority, and the appellant fails to point out wherein the instruction is erroneous, or how or in what manner he had been prejudiced thereby. People v. Glab, 15 Cal.App.2d 120, 59 P.2d 195; People v. Marron, 140 Cal.App. 432, 35 P.2d 610; People v. Clark, 183 Cal. 677, 192 P. 521. However, we have examined the two instructions appellant quotes and find nothing improper therein. They contain merely a restatement in concise form of the legal doctrine declared in People v. Suesser, supra, and the other cases cited therewith. The apparent reason the law of self-defense was not touched upon therein was that it was fully expounded in another portion of the court's charge to the jury.

[5-9] On the final page of his brief under the heading "Prejudicial Misconduct of the District Attorney" appellant quotes two excerpts from the prosecutor's argument to the jury, together with an objection which purports to have been made thereto in the trial court. But no argument whatever is presented, nor are any authorities cited to show wherein the quoted remarks constituted error; and it has been held repeatedly that the mere naked assignment of error is quite insufficient to warrant an inquiry into its merits. People v. McLean, 135 Cal. 306, 67 P. 770; People v. Woon Tuck Wo, 120 Cal. 294, 52 P. 833; People v. Ferugia, 95 Cal.App. 711, 273 P. 99. Under the rule just stated said assignment might well be disregarded. However, there are several additional legal reasons for holding that no ground for reversal has been shown. First, an inspection of the record discloses that the first excerpt, containing ten lines, was taken from the prosecutor's opening argument, and that no objection whatever was made in the trial court to any portion of the opening argument; consequently objection thereto cannot be raised for the first time on appeal. People v. Kramer, 117 Cal. 647, 49 P. 842; People v. Sieber, 201 Cal. 341, 257 P. 64; People v. DuBois, 16 Cal.App.2d 81, 60 P.2d 190. Secondly, the record shows that the other excerpt, which consists of an incomplete sentence of thirteen words, was part of a statement made by the prosecutor during his closing argument, wherein he presumed to offer his view on a matter of law, and his statement was challenged by counsel for appellant in the following language: "That is not correct. I interpose an objection and assign it as prejudicial misconduct." But on this appeal no effort has been made by appellant, by way of citation of authority, argument, or otherwise, to substantiate the bare assertion made by him in the trial court that the view expressed by the prosecutor was not correct; nor has he attempted to point out wherein the expression of the prosecutor's view operated to the prejudice of this appellant. Therefore under the rule of the cases above cited this court is not called upon to pursue an inquiry of its own to ascertain and determine the merits of the objection made by appellant in the trial court. As said in effect in People v. McLean, supra, the burden rests on an appellant to point out clearly and concisely not only the matters claimed to be erroneous, but the reasons why they are so; and upon his failure so to do, it will be deemed that such matters are not of sufficient importance to demand independent investigation. Third, the record shows that immediately after appellant's objection was interposed and at his request the trial court instructed the jury in substance to disregard the view expressed by the prosecutor, adding that the law governing the case would be given by the court in its charge to the jury; and subsequently the court did correctly instruct the jury in conformity with the legal doctrine declared in People v. Suesser, supra, and the other cases cited therewith, which is not in accord with the view expressed by the prosecutor. Fourth, since the facts of the case overwhelmingly establish the guilt of this appellant under the law as given to the jury by the court and as appellant concedes it to be, it cannot in any event, be said that the verdict against him has resulted in a miscarriage of justice.

Whether in the state of the record here presented the conviction of Buenaflore also could have been upheld is a matter with which we are not here concerned. As mentioned in the beginning, he abandoned his appeal.

The judgment of conviction as to the appellant Pias and the order denying his motion for new trial are affirmed.

We concur: PETERS, P. J.; WARD, J.

BEKINS et al. v. RAUB, County Treasurer, et al.

Civ. 6483.

District Court of Appeal, Third District, California.

Sept. 19, 1940.

Rehearing Denied Oct. 19, 1940.

Hearing Denied Nov. 18, 1940.

1. Mandamus 🔑7, 10

A writ of mandate is not always a writ of right, and when it is applied for there must be a clear case to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. Code Civ.Proc. § 1085.

2. Constitutional law 🔑70(3)
Mandamus 🔑97

That statutory amendment providing that bonds of reclamation districts matured or to mature within 90 days from date of payment of installments may be applied in payment of such installments imposed hardship upon holders of bonds and interest coupons was a matter for legislative consideration, and could not be remedied by granting petition for writ of mandate to compel county treasurer as trustee of district to make call for funds not provided for by statute. Pol.Code, § 3480, as amended by St. 1923, p. 598; Code Civ.Proc. § 1085.

3. Mandamus 🔑97

A writ of mandate would not lie to compel county treasurer as trustee of reclamation district to make a call for an assessment installment and to include therein a call for funds sufficient to pay all outstanding and maturing bond obligations not barred by limitations, since statutory duty of the treasurer does not require that he include in call a sum equal to that part of the former call discharged by payment of bonds. Pol.Code, § 3480, as amended by St.1923, p. 598; Code Civ.Proc. § 1085.

◆

Proceeding for writ of mandate by Reed J. Bekins and another, as trustees appointed by the will of Martin Bekins, deceased, against Gerald F. Raub, Treasurer of the County of Sutter, as trustee of Reclamation District No. 1500, and as trustee of the Bond Fund of Reclamation District No. 1500, and others.

Writ denied.

W. Coburn Cook, of Turlock, for petitioners.

Huston, Huston & Huston, of Woodland, for respondent Reclamation Dist. No. 1500.

Loyd E. Hewitt, of Yuba City, for respondent Raub.

Mr. Justice TUTTLE delivered the opinion of the court.

Petition for writ of mandate, commanding and directing the treasurer of the county of Sutter, as trustee of Reclamation District No. 1500, to make his call for the payment of an assessment sufficient to pay all outstanding and maturing bonds of said district which are not barred by the statute of limitations. A general and special demurrer was interposed to the petition, and an answer was also filed.

It is contended by respondents that the petition does not state sufficient facts to justify this court in issuing the writ. We are of the opinion that this point is well taken.

The petition alleges substantially, that petitioners are the owners and holders of bonds and interest coupons issued by said reclamation district, some of which matured January 1, 1936, and some January 1, 1938, together with certain interest coupons maturing January 1, 1935, January 1, 1936, and subsequently. Petitioners also allege that they are the owners of $36,500 second issue bonds not yet due; that by reason of an opinion rendered by this court in the case of Copeland v. Raub, 36 Cal. App.2d 441, 97 P.2d 859, which upheld the right of a landowner to have his bonds and coupons credited at their face value on a call in satisfaction of unpaid assessments against his land, several assessments called and commencing on the date April 1, 1939, were paid by bonds and coupons to such an extent that there was insufficient cash left in the county treasury to meet the matured bonds and coupons belonging to petitioners; that petitioners had coupons maturing July 1, 1939, and January 1, 1940, which they had presented for payment, but which the treasurer refused to pay, and which are not payable by reason of the want of funds due to acceptance of said matured bonds and coupons in payment of assessment calls Nos. 39 and 40; that thereafter, respondent Raub issued call No. 41; that by reason of the acceptance by respondent Raub of bonds and coupons in payment of said calls, there is a deficiency arising with respect to the payment of maturing bonds and coupons in the sum of approximately $70,000.

Petitioners pray that this court issue a writ of mandate directing the treasurer of Sutter county, as trustee of Reclamation District No. 1500, to make his call (No. 42), for the payment of an assessment instalment upon the lands of said district, on October 1, 1940, and that he include therein the call for funds sufficient to pay all outstanding and matured bond obligations of Reclamation District No. 1500 which are not barred by the statute of limitations, *as well as to pay the deficiency maturities of January 1, 1940.*

Section 3480 of the Political Code reads as follows: "Estimate of assessment installment to pay interest and principal. At least ninety days before any interest date of the bonds, including refunding bonds, the county treasurer of the main county shall estimate the amount of money necessary to pay interest and principal maturing on such interest date after crediting thereon the funds in the treasury applicable to the payment thereof, and the expenses of the county treasurer hereinafter provided and shall add thereto fifteen per cent of such aggregate sum to cover possible delinquencies, and said county treasurer shall thereupon cause to be published two times, to wit: once a week for two weeks in some newspaper of general circulation published in each county in which any of the district may be situate a notice substantially in the following form: * * *."

The foregoing section of the Political Code is the measure of the duty imposed upon respondent Raub with respect to this matter. *It is admitted by petitioners that the Treasurer has fulfilled all the requirements of the law.*

[1] The contention of respondents is that the petition fails to show that there was any duty or obligation imposed by law upon the treasurer to justify relief by way of a writ of mandamus. It is elementary that a "writ of mandate is not always a writ of right, and when it is applied for there must be a clear case to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station". Ross v. O'Brien, 1 Cal.App.2d 496, 36 P.2d 1108. Section 1085 of the Code of Civil Procedure, relating to a writ of mandamus, provides as follows: "It may be issued by any court, except a municipal, justice's or police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person."

It is not disputed that the county treasurer has made every call authorized and required by statute. Petitioners are not asking this court to direct the respondent to make a call prescribed by statute, but to make a call *above* and *beyond* the provisions of the statute by adding to his next call a sum equal to that part of the former call discharged by bonds.

Petitioners contend that equitable principles apply where relief by way of mandate is sought, and that this court should, in the exercise of its equity jurisdiction, compel respondent treasurer to do an act which is not required of him by law. While it is true that there are cases of this character where the courts have gone a long way in the exercise of their equitable jurisdiction, none has been called to our attention where such a writ was granted, when it was admitted that there was no legal duty, express or implied, imposed on the respondent in respect to the act sought to be enforced. The case relied upon by petitioners (Provident Land Corp. v. Zumwalt, 12 Cal.2d 365, 85 P.2d 116) did not involve equitable relief which might be granted under mandamus. The action was one to set aside the purchase of its own bonds by an irrigation district.

[2] It is no doubt true that section 3480 of the Political Code, as amended in 1923, St.1923, p. 598, and which section was upheld by this court in the Copeland case, works a hardship upon petitioners and others in a like situation. This, however, was a matter for legislative consideration when the statute was enacted, and it must be presumed that the legislature could have foreseen that if a considerable number of matured bonds and coupons were accepted in payment of a call, there would be insufficient cash left with which to discharge the obligations which such calls would be presumed to meet. We feel, however, that we are bound to follow the statute, and that we are powerless to compel the county treasurer to issue a call not provided for by law. The proper remedy for petitioners

is not an appeal to the courts, but an appeal to the legislature. Furthermore, it might be pointed out that even if we granted the relief sought in the prayer of the petition, petitioners would be in no better position. The call ordered by the court could still be met by payment through the medium of bonds and coupons. The only method which would meet the problem would be an order that the assessment be paid in cash. But this would be in direct conflict with section 3480 of the Political Code, as amended in 1923, which gives to the landowner the right to pay any assessment with bonds and coupons of the district in lieu of cash.

[3] It is our opinion that the petition fails to state sufficient grounds to justify this court in issuing the writ of mandate, and the demurrer to the petition is therefore sustained and the writ denied.

We concur: PULLEN, P. J.; THOMPSON, J.

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40 Cal.App.2d 707

RAUSCH v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 12691.

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1940.

1. Prohibition 🔑10(1)

The superior court had jurisdiction to determine whether case pending before it was within the jurisdiction of the municipal or of the superior court, and its determination of the question, whether right or wrong, was not without nor in excess of its jurisdiction; hence if its ruling on the question was erroneous the error was merely one to be corrected upon appeal, and writ of prohibition would not lie to prohibit superior court from trying the action. Code Civ.Proc. § 1102.

2. Prohibition 🔑10(1)

A writ of prohibition will not issue where the lower tribunal is not proceeding without or in excess of its jurisdiction. Code Civ.Proc. § 1102.

Original application by Edward R. Rausch against the Superior Court of the State of California in and for the County of Los Angeles, and the Honorable Thomas C. Gould, Judge Presiding, and the Honorable Judges thereof, for a writ of prohibition to restrain respondents from proceeding with the trial of an action pending before the Superior Court. On respondents' demurrer to the petition.

Demurrer sustained and application for writ of prohibition denied.

Walter H. Young, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas DeCoster, Deputy Co. Counsel, both of Los Angeles, for respondents.

McCOMB, Justice.

This is an original application for a writ of prohibition to restrain respondent superior court from proceeding with the trial of an action now pending before said respondent, entitled Royal Building Corporation, a corporation, v. Edward R. Rausch, No. 451001. Respondents have filed a demurrer to the petition.

The essential facts are:

In 1939 Royal Building Corporation filed an action in the municipal court of the city of Los Angeles naming the petitioner herein as defendant. The prayer of the complaint read as follows: "Wherefore, plaintiff prays judgment against the defendant for $1745.00, together with $350.00 or such other sum as the Court finds to be reasonable, as and for its attorney's fees herein, for its costs and disbursements herein incurred, and for general relief."

February 27, 1940, petitioner filed an answer to the complaint in the municipal court. Thereafter the case was tried in the municipal court. Subsequently plaintiff made a motion to have the case transferred to the superior court on the ground that, since the prayer of the complaint was in excess of $2,000, the municipal court did not have jurisdiction of the action. This motion was granted. Petitioner herein has made a motion in the superior court for an order remanding the cause to the municipal court for the reason that plaintiff, having submitted instructions at the trial, which took place in the municipal court, stating that the amount of plaintiff's demand was $2,000, has remitted any claim for a sum in excess of this amount and therefore that the municipal court has jurisdiction of the case.

[1] This is the sole question necessary to be determined:

Will a writ of prohibition issue to prohibit a superior court from trying an action pending before it on the ground that it is in excess of said court's jurisdiction after said superior court has refused on motion to remand the action to the municipal court?

This question must be answered in the negative, for the reason that the superior court has jurisdiction to determine whether the case pending before it is one within the cognizance of the municipal or superior courts and its determination of such question, whether right or wrong, is not without nor in excess of its jurisdiction. Hence, if the superior court's ruling is erroneous, it involves merely an error to be corrected upon appeal. Southern P. R. R. Co. v. Superior Court, 63 Cal. 607, 613.

[2] Under the familiar rule that a writ of prohibition will not issue where the lower tribunal is not proceeding without or in excess of the jurisdiction of such tribunal (sec. 1102, Code Civ.Proc.), petitioner has failed to present a proper case for the issuance of the writ.

The demurrer to the petition is sustained and the application for a writ of prohibition is denied.

We concur: MOORE, P. J.; WOOD, J.

40 Cal.App.2d 725

PEOPLE v. BUTTERFIELD.

Cr. 1736.

District Court of Appeal, Third District, California.

Sept. 20, 1940.

1. Criminal law 🔑741(1), 742(1)

In criminal prosecution, weight and sufficiency of evidence and credibility of witnesses were for jury. Pen.Code, § 1439.

2. Homicide 🔑232

In prosecution for second-degree murder, evidence warranted jury in assuming that defendant deliberately struck deceased with a rock or club on side of deceased's head with such force as to kill deceased, and for no better reason than that deceased had previously cursed and struck defendant for stumbling against him.

3. Homicide 🔑13, 23(1)

When an unlawful assault is made with a deadly weapon upon another, resulting in death, and assault is not provoked or perpetrated in necessary self-defense or in heat of passion, malice may be presumed, and under such circumstances the killing may constitute "murder of the second degree" when it is not perpetrated by means of poison, lying in wait, torture, or any other kind of willful, deliberate, or premeditated killing.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder of the Second Degree".

4. Homicide 🔑271

In prosecution for second-degree murder, whether deceased was struck by defendant in the heat of passion was for jury.

5. Criminal law 🔑553

In criminal prosecution, jury was authorized to reject any portion of defendant's testimony which it did not believe.

6. Homicide 🔑254

Evidence that defendant, while walking with deceased, stepped on stone and stumbled against deceased, who cursed defendant and struck defendant with his fist, and that defendant thereafter picked up a stone or club and struck deceased on head and dragged deceased's body from roadway into a thicket to conceal it from view, and that defendant failed to inform anyone of the homicide and withdrew his money from a bank and left home, warranted conviction for "murder of the second degree".

7. Witnesses 🔑246(2)

A trial judge should participate in examination of witnesses in a criminal case in so fair and impartial a manner as to avoid conveying to jury an impression that he thinks defendant is guilty of offense with which charged and that he desires jury to return verdict of conviction.

8. Criminal law 🔑782(3), 785(1)

In a criminal case, trial court is bound to instruct that jury is exclusive judge of all questions of fact and of credibility of witnesses. Pen.Code, § 1439.

9. Witnesses ⟹282¾

In a criminal case, trial judge may, on cross-examination of defendant, call defendant's attention to apparent conflicting statements which defendant has made so as to give defendant an opportunity to explain or reconcile them, if possible. Pen.Code, § 1439.

10. Witnesses ⟹246(2)

In a criminal case, it is the trial judge's privilege and duty to ask questions of any witness in a fair and discreet way to elicit facts which are material to a just determination of case.

11. Criminal law ⟹1170½(5½)

Defendant's contention that trial judge, in prosecution for second-degree murder, was guilty of prejudicial misconduct in indicating to jury by his personal cross-examination of defendant that he believed defendant was guilty and that defendant's testimony was willfully false, could not be sustained, where record showed that trial judge, in good faith, and in a fair manner, had inquired of defendant if he had not previously made statements in conflict with defendant's testimony and in each instance judge quoted former statements of defendant which appeared to be in conflict with defendant's testimony. Pen.Code, § 1439.

◆

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Fred Butterfield was convicted of murder of the second degree, and he appeals.

Affirmed.

Elliott, Veeder, Sullivan & Dunham and Harrison M. Dunham, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of conviction of murder of the second degree which was rendered against him pursuant to the verdict of a jury.

The cause was previously heard by this court on a petition for a writ of coram nobis (People v. Butterfield, Cal.App., 99 P.2d 310), which was granted on the ground that the defendant was wrongfully induced to plead guilty to the charge of murder by his cellmate named England, and thus prevented from having a trial by jury. The defendant was subsequently permitted to withdraw his plea of guilty and he thereupon entered a plea of not guilty. He was formally tried with a jury which rendered a verdict against him of murder of the second degree. Judgment was duly rendered and he was sentenced to imprisonment in San Quentin state prison for the term prescribed by law. From that judgment he has appealed.

It is contended the verdict and judgment are not supported by the evidence and that the trial judge was guilty of prejudicial conduct in propounding certain questions to the defendant in the course of his examination as a witness at the trial.

Briefly, the facts upon which the defendant was convicted are as follows: He was living with his parents on a farm in Lake county which is situated three miles from Kelseyville. He was employed elsewhere as a farm hand. Several witnesses testified to his previous good character for peace and quiet. He was, however, addicted to the inordinate use of liquor under the influence of which he was sometimes quarrelsome. He was once convicted of the theft of an automobile under section 503 of the Vehicle Code. He was impeached at the trial by evidence of that conviction. The deceased was an itinerant fruit picker in poor health who lived with a partner in a temporary camp near Kelseyville. The evening before the homicide the defendant met Abraham Lee, for the first time, in Kelseyville. They spent the night together, on good terms, drinking beer in various saloons. After midnight they started together for their respective homes. The deceased was carrying a loaf of bread and a jug of wine. Neither of them was armed with a weapon. They followed a roadway paralleling the creek a short distance therefrom. The defendant stepped on a stone and stumbled against the deceased, who cursed and struck him with his fist, inflicting no injury. The defendant had no fear of the deceased, but he picked up a stone or a club and struck his companion on the head above his left ear. He fell to the ground and remained there unconscious. The defendant examined him and dragged his body from the roadway where he left it and then started toward home. After traveling a couple of hundred feet, he returned and dragged the body further into the bushes adjacent to the stream, where he covered it with brush. He then proceeded to his home, taking from a bureau drawer $28, which he had placed there. He drew a check in favor of his mother on an account in a Kelseyville bank, and handed it to her, telling her to forward the cash to him at Santa Rosa. He immediately left home, going to San Francisco by way of Santa Rosa, and thence to Bellingham, Washington, where he spent two or three weeks and then returned to his home. He was promptly apprehended and charged with the murder of Abraham Lee. He first denied participation in the homicide, but later acknowledged the killing of Lee under the circumstances above related. His story contained inconsistencies. He assumed to have a very hazy recollection of the immediate circumstances of the killing.

It was ten days after the homicide that the officers discovered the body which was completely covered with driftwood and brush. They found his pants pockets pulled out as though someone had searched them for money or valuables. A post mortem examination of the body disclosed the fact that the skull was not fractured, but there was evidence of a bruise and hemorrhage over the left ear which a physician said were caused by a severe blow with a blunt instrument. There is no doubt that blow caused the death of Mr. Lee.

After the arrest of the defendant, he was placed in the same cell with another prisoner by the name of England, who persuaded him to plead guilty to the charge of murder. Upon petition for a writ of coram nobis the defendant was permitted to withdraw his former plea of guilty, and he thereupon entered a plea of not guilty. He was formally tried by a jury and found to be guilty of murder of the second degree.

[1, 2] The verdict and judgment are supported by the evidence. The facts of this case as they appeared in the proceeding for a writ of coram nobis were reviewed with the sole object of determining whether the petitioner had been wrongfully deprived of a trial by jury, and not to determine his guilt or innocence of the charge of murder which was preferred against him. Upon this trial it was the province of the jury to determine the weight and sufficiency of the evidence to support the verdict, and the credibility of witnesses. At the trial of this case serious discrepancies in the statements of the defendant appear, together with numerous circumstances in his conduct occurring after the commission of the homicide which the jury was warranted in assuming indicated his guilt of the crime of murder of the second degree. Although it seems improbable, as stated in our opinion in the coram nobis proceeding, that the defendant would deliberately kill, with the purpose of robbery, an impecunious itinerant fruit picker with whom he had spent the evening on good terms, the evidence in this case warranted the jury in assuming that he did deliberately strike the deceased "with a rock or club" on the left side of his head with such force as to kill him, for no better reason than that the deceased had previously cursed and struck the defendant for stumbling against him.

[3] When an unlawful assault is made with a deadly weapon upon the person of another, resulting in death and the assault is not provoked or perpetrated in necessary self-defense, or in the heat of passion, malice may be presumed. Under such circumstances, the killing may constitute murder of the second degree when it is not prepetrated by means of poison, lying in wait, torture or any other kind of wilful, deliberate or premeditated killing. People v. Howard, 211 Cal. 322, 329, 295 P. 333, 71 A.L.R. 1385; People v. Hubbard, 64 Cal.App. 27, 37, 220 P. 315; People v. Semone, 140 Cal.App. 318, 323, 35 P.2d 379; 13 Cal.Jur. 603, sec. 18.

In the Howard case, supra, under circumstances quite similar to the present one in most essential respects, the Supreme Court directed the trial court to reduce a verdict of murder of the first degree to second degree murder and thereupon affirmed the judgment of conviction. In that case, the defendant, after having first denied participation in the homicide, acknowledged that he struck the blow that resulted in the death of his victim, but asserted that he did so only to repel an assault upon himself by the deceased who was the aggressor in a quarrel which occurred between them. The court said in regard to the effect of that undisputed evidence [211 Cal. 322, 295 P. 336, 71 A.L.R. 1385]: "If, as urged by the people, the jury in weighing and considering the evidence might properly reject as untrue that portion of the confession wherein defendant charged the decedent with having been the aggressor in a quarrel which led up to the homicide, there remains no evidence from which it might reasonably be deduced that the killing was the result of a willful, deliberate, and premeditated intent to kill. We do not question the propriety of the jury's action in rejecting any portion of the defendant's evidence or confession which to it was unworthy of belief. * * if it be assumed that the jury accepted defendant's confession in toto, the offense would still be that of second-degree murder, for defendant did not satisfactorily establish such provocation as would excuse the homicide or reduce it to manslaughter."

[4-6] The above-quoted language of the Howard case is peculiarly applicable to the present situation. When this defendant was first apprehended he denied he knew anything about the death of Mr. Lee. Later he acknowledged that as they walked together along a road on their way home after spending the night in drinking beer, he stepped on a rock and stumbled against his associate; that Lee thereupon cursed and struck him without inflicting any injury. The defendant admitted that he was not afraid of the deceased. He said that he had no occasion to fear him. Yet he later admitted that he thereupon struck the deceased who fell to the ground as a result of his blow and that he did not arise. He admitted that he dragged the body from the roadway and concealed it beneath a pile of brush. Both the sheriff and the probation officer testified that defendant told them that when the deceased cursed him he "picked up a hard substance" or a "rock or club" and hit him with it. Accepting the defendant's story as true, the conduct of the deceased under the circumstances related did not justify the defendant in striking him on the head with a deadly weapon. The question as to whether he was struck in the heat of passion was for the jury to determine. As stated in the Howard, case, supra, the jury was authorized to reject any portion of the defendant's testimony which they did not believe. His guilt is supported by evidence of an unjustifiable assault with a deadly weapon and by the fact that the defendant dragged the body of his victim from the roadway into a thicket and concealed it from view by covering it with brush and driftwood; by his failure to inform anyone of the homicide; by drawing his money from the bank and fleeing to Bellingham, Washington, together with certain inconsistencies in his story of the affair. It is true that he subsequently returned to his home but these incriminating circumstances indicate guilty knowledge on his part. We have no doubt the judgment and verdict of murder of the second degree are amply supported by the evidence. While we are inclined to believe the homicide was the result of a drunken quarrel and may amount to no higher offense than that of manslaughter, we realize it was the sole province of the jury to determine the weight and sufficiency of the evidence and the credibility of the witnesses. There are facts sufficient to support the finding of murder of the second degree, which we are not warranted in disturbing.

[7-11] The trial judge is charged with prejudicial misconduct in indicating to the jury by his personal cross-examination of the defendant that he believed him to be guilty of murder and that his testimony was wilfully false. We have carefully read the record in that regard and are of the opinion the challenged questions were not prejudicial. It is true that a trial judge should participate in the examination of witnesses in a criminal case in so fair and impartial a manner as to avoid conveying to the jury an impression that he thinks the defendant is guilty of the offense with which he is charged and that he desires them to return a verdict of his conviction. The court is required to instruct the jury that it is the exclusive judge of all questions of fact and of the credibility of the witnesses. Sec. 1439, Pen.Code. That instruction was given to the jury in this case. The section last mentioned authorizes the court to "comment on the failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him". That section also authorizes the court to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case". A trial judge certainly is authorized on cross-examination of a defendant to call his attention to apparent conflicting statements which he has made so as to give him an opportunity to explain or reconcile them if possible. We are of the opinion it is not only the privilege but the duty of a trial judge to ask questions of any witness in a fair and discreet way to elicit facts which are material to a just determination of the case. It has been held the judge is not a mere

umpire for the determination of legal questions which are involved in the trial of a case. Of course a judge should not examine a defendant on trial for a crime in such a manner as to give the jury an impression that he thinks the accused is guilty of the charge and should be convicted. It is apparent such conduct would nullify the right of trial by jury. Upon examination of the record in the present case we find no evidence of such conduct on the part of the trial judge. It appears that in good faith the judge upon two or three occasions, in a fair and discreet manner, inquired of the defendant if he had not previously made statements in conflict with the testimony which he gave at the trial. In each instance the court quoted former statements of the defendant which do appear to be in conflict with his testimony at the trial. At least these apparent conflicts of evidence did require explanation or reconciliation. We find no prejudicial misconduct of the trial judge in his cross-examination of the defendant.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

FITZPATRICK v. UNDERWOOD.

Civ. 12592. *

District Court of Appeal, Second District, Division 2, California.

Sept. 19, 1940.

Hearing Granted Nov. 18, 1940.

1. Brokers 🔑53, 54

A real estate broker earns his commission when he finds a purchaser ready, able, and willing to enter into a valid contract for purchase of realty upon terms satisfactory to owner, and, if broker is means of bringing purchaser and owner together and sale results in consequence, commission is earned although broker takes no further part in negotiations and is not present at consummation of sale.

2. Brokers 🔑49(1)

Where broker is employed to sell realty, it is not necessary that owner have knowledge that purchaser was one found by broker in order to entitle broker to commission.

3. Brokers 🔑57(2)

Where owner modified terms at which broker was authorized to sell realty and agreed with purchaser to accept a smaller sum, modification of terms did not afford a ground for refusal to pay broker his commission, and acceptance of terms finally proposed by buyer obligated owner to compensate broker for services rendered.

4. Brokers 🔑56(3)

Where broker informed eventual purchaser that certain realty was for sale and exhibited property to him, and terms of sale were subsequently discussed by broker, owner, and purchaser in broker's office, and purchaser thereafter informed broker that owner proposed that she personally sell her property directly to purchaser with stated purpose of avoiding payment of broker's commission and sale was concluded without further services of broker within a month after meeting in the broker's office, broker was entitled to commission.

5. Trial 🔑398

Findings of probative facts invalidate findings of ultimate facts when the latter are based upon the former and are entirely overcome thereby, and findings of probative facts dispose of all allegations involved in pleadings and constitute all facts in the case.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action for commission by W. T. Fitzpatrick, doing business as the W. T. Fitzpatrick Company, against Susan B. Underwood. From a judgment for the defendant, the plaintiff appeals.

Reversed, with directions.

Courtney A. Teel, of Los Angeles, for appellant.

Stephen Monteleone, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff, a licensed real estate broker, commenced this action to recover a commission alleged to have been earned in the sale of real property owned by defendant. From a judgment in defendant's favor plaintiff is prosecuting the present appeal, contending that on the findings of the trial court he is entitled to judgment. The appeal is on the judgment roll alone.

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* Subsequent opinion 112 P.2d 3.

Defendant was the owner of an apartment building in the city of Los Angeles known as Underwood Manor. On February 19, 1938, defendant gave to plaintiff a written exclusive authorization to sell Underwood Manor for the sum of $55,000, "for cash and terms satisfactory to me". Defendant agreed to pay a commission of 5 per cent of the selling price. The authorization ran for six months and at the end of six months the agreement was extended indefinitely with the provision that the agency was not to be exclusive.

The trial court made the following specific findings:

"VII. On December 19, 1938, plaintiff in the course of his operations as a real estate broker exhibited to one Isador Shafer a number of his apartment house properties, including the aforesaid Underwood Manor; that the first information the said Isador Shafer had that said Underwood Manor was at that time for sale was when he was taken to said property by plaintiff on December 19, 1938; that on December 19, 1938, plaintiff and said Isador Shafer viewed said property from the street only. That on December 20, 1938, one Otho Reed Hill, now deceased, a salesman in the employ of plaintiff, took said Isador Shafer through Underwood Manor and exhibited same to him; that plaintiff did not inform defendant that said Underwood Manor had been exhibited to said Isador Shafer by said plaintiff or by said Otho Reed Hill and that defendant had no knowledge thereof until a date subsequent to the 7th day of February, 1939, and after she had sold said Underwood Manor to said Isador Shafer. That defendant left Los Angeles on or about December 1, 1938, for a visit in the east, returning to Los Angeles about December 21, 1938; that plaintiff did not know of the defendant's return to Los Angeles until on or about January 4, 1939, when she came to plaintiff's office with said Isador Shafer, whom she had casually met at 7th and Witmer Streets; that on the said 4th day of January, 1939, at plaintiff's office the purchase of said Underwood Manor by defendant Isador Shafer was discussed between plaintiff, defendant and said Isaor Shafer, but that the parties left plaintiff's office without having come to any agreement as to either price or terms; that defendant, her son, and said Isador Shafer had gone to the office of plaintiff for the purpose of procuring a document in plaintiff's possession belonging to defendant relative to property of defendant other than said Underwood Manor and that said defendant at that time and place received said document from said plaintiff and receipted to him therefor.

"VIII. That said defendant had known said Isador Shafer for approximately twenty years and, prior to the 19th day of December, 1938, said Isador Shafer had been the guest of defendant at said Underwood Manor on several occasions and knew, prior to said 19th day of December, 1938, that defendant was the owner thereof, and, prior to the 19th day of February, 1938, said Isador Shafer had stated to defendant that if he should ever become financially able, he desired to purchase said Underwood Manor.

"IX. That following said 4th day of January, 1939, and for a period of approximately one month, defendant and said Isador Shafer carried on discussions in reference to the sale of Underwood Manor, and, on or about the 7th day of February, 1939, through defendant's own independent efforts and without any assistance from said plaintiff, defendant arrived at satisfactory terms of sale and went into escrow with said Isador Shafer for the sale of said Underwood Manor at a price of $51,000.00 for the real property, plus $2,000.00 for defendant's equity in the furniture and furnishings within said Underwood Manor, and that said Underwood Manor was thereupon sold for the above consideration.

"X. That shortly subsequent to the said January 4, 1939, and to wit: within one or two days thereafter, plaintiff discussed the proposed sale with Isador Shafer over the telephone, and was advised by the said Isador Shafer that defendant had proposed to said Shafer that she, personally, sell her property direct to said Isador Shafer with the stated purpose of avoiding the payment of a broker's commission, so that both buyer and seller might benefit by this item of saving. That plaintiff was then and there informed by said Isador Shafer that defendant and said Isador Shafer intended to conclude said negotiations without plaintiff's further services. That plaintiff then and there advised said

Isador Shafer to continue his negotiations with the owner and that if they got together on terms satisfactory each to the other and concluded a deal resulting in the sale of said property by defendant to said Isador Shafer that plaintiff would try to protect himself in the matter of his commission. That plaintiff thereafter stood by and made no further efforts to effect or conclude any sale of said Underwood Manor, and performed no further services; that said negotiations continued between defendant and said Isador Shafer throughout the month of January."

The court also found that plaintiff did not produce a purchaser for defendant's property ready or willing or able to make the purchase for the sum of $53,000 or for any sum; that it is not true that plaintiff "has performed all things upon his part to have been performed pursuant to the terms" of their agreement; that defendant had no knowledge prior to the institution of the present action that plaintiff intended to claim a commission in connection with the sale; and that no services were rendered by plaintiff which were the procuring or inducing causes of the purchase of the property by Shafer.

[1-3] A real estate broker earns his commission when he finds a purchaser ready, able and willing to enter into a valid contract for the purchase of real estate upon terms satisfactory to the owner. If the broker communicates with the purchaser and is the means of bringing him and the owner together and the sale results in consequence, the commission is earned although the broker takes no further part in the negotiations and is not present at the consummation of the sale. Hill v. McCoy, 1 Cal.App. 159, 81 P. 1015. It is not necessary that the owner have knowledge that the purchaser was one found by the broker. Justy v. Erro, 16 Cal.App. 519, 117 P. 575. The fact that defendant modified the terms at which plaintiff was authorized to sell and agreed with the purchaser to accept a smaller sum "affords no ground for refusal to pay him his commission". Twogood v. Monnette, 191 Cal. 103, 215 P. 542; 4 R.C.L., sec. 52, p. 313. Having accepted the sum of $51,000 for the property, other than the furniture, defendant may not now assert that the terms were not satisfactory to her. Her acceptance of the terms finally proposed by the buyer legally obligated her to compensate the broker for the services rendered.

[4] From the specific facts found by the court it is apparent that plaintiff rendered such services as entitled him to compensation. Plaintiff was the first to inform Shafer that the Underwood Manor was for sale. The property was exhibited to Shafer while defendant was absent from the city on a trip to Chicago. Upon her return the purchase of the property was discussed between plaintiff, defendant and the purchaser but no agreement was then made as to price or terms. Thereafter plaintiff was informed by Shafer that defendant had proposed that she personally sell her property directly to Shafer "with the stated purpose of avoiding the payment of a broker's commission", Shafer also told plaintiff that he and defendant intended to conclude negotiations without plaintiff's further services, but plaintiff informed Shafer that he would protect himself in the matter of his commission. The sale was actually consummated within a little more than a month from the date of the meeting in plaintiff's office. Nothing appears in the court's findings to counteract the effect of any of the findings above mentioned. The finding that prior to the date of plaintiff's contract Shafer had remarked to defendant that if he ever became financially able, he desired to purchase Underwood Manor, does not weaken any other finding, for it is specifically found that a long time after this remark was made plaintiff gave the "first information" to Shafer that Underwood Manor was for sale and the property was then exhibited to him by plaintiff. Although a finding that defendant was informed that plaintiff had found the purchaser was not necessary (Justy v. Erro, supra), it seems incredible that defendant should not have been informed on the subject in view of the court's finding that the purchase had been discussed by plaintiff, defendant and Shafer in plaintiff's office.

[5] Defendant stresses the findings of the trial court to the effect that plaintiff did not produce a purchaser ready, willing or able to purchase the property for cash or terms satisfactory to defendant; that defendant did not actually sell the property to a purchaser produced by plaintiff; and that plaintiff did not perform all things upon his part "to have been per-

formed pursuant to the terms" of the agreement. It will be noted that the specific probative findings cover the essential activities of these parties and present a complete picture of the transaction. The findings relied upon by defendant, although coming under the general classification of ultimate findings, are necessarily based upon the specific probative findings made by the court. They constitute the court's conclusions based upon the facts actually found and as such must be regarded as erroneous conclusions of law. Findings of probative facts invalidate findings of ultimate facts when the latter are based upon the former and are entirely overcome thereby and the findings of probative facts dispose of all the allegations involved in the pleadings and constitute all the facts in the case. Forsythe v. Los Angeles R. R. Co., 149 Cal. 569, 87 P. 24; White v. Rosenstein, 134 Cal. App. 576, 25 P.2d 884. Such is the situation presented by the record in this case.

The judgment is reversed and the trial court is directed to enter a judgment in favor of plaintiff in the sum of $2,550 together with interest thereon at the rate of 7 per cent per annum from February 7, 1939.

We concur: MOORE, P. J.; McCOMB, J.

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40 Cal.App.2d 687

Ex parte BLACHE.

Cr. 2136.

District Court of Appeal, First District,
Division 2, California.

Sept. 19, 1940.

1. Contempt 🔑13
Jury 🔑21(1)
Perjury 🔑31

One charged with crime of perjury is entitled to a jury trial and may demand proof that statement made by him was false, and that it was a "material matter", and, unless statement is inherently false or is such that the court would have judicial knowledge of its falsity, it will not serve as basis for a commitment on ground of its falsity alone. Pen.Code, § 118.

2. Contempt 🔑13
Habeas corpus 🔑22(2)

In proceeding to have husband punished for contempt for failure to pay attorney fees ordered in first wife's separate maintenance action, refusal of second wife, who was not a party in contempt proceedings but appeared as witness, to disclose where she kept money which she withdrew from a joint bank account kept with her husband, did not constitute "perjury", and writ of habeas corpus would issue to secure her release from a commitment for contempt based on perjury, where second wife's testimony was not false on face of record, and testimony sought to be elicited was not material to the issues. Pen.Code, § 118; Code Civ.Proc. § 2065.

3. Witnesses 🔑21, 296, 297

A witness was not required to answer questions which would incriminate or degrade her, or questions which were trivial and not relevant. Code Civ.Proc. § 2065.

SPENCE, J., dissenting.

Original proceeding in the matter of the petition of Jeanne Blache for a writ of habeas corpus.

Petitioner discharged.

Edward J. Lynch, Livingston & Livingston, and Max H. Margolis, all of San Francisco, for petitioner.

Raymond D. Williamson, of San Francisco, for respondent Sheriff.

NOURSE, Presiding Justice.

The petitioner seeks her release under habeas corpus from a commitment for contempt. Petitioner's difficulties arise out of the complications of her marriage in 1919 to Maurice Blache and the claims of one Anna Blache that at the time of this marriage Maurice was her husband by virtue of a ceremony performed in 1912.

The petition alleges that Maurice Blache was born in France and had been in the United States since 1911. When the United States entered the war in 1917 he volunteered in a California regiment and was thereafter honorably discharged. He married petitioner in San Jose, California, in 1919, and they thereafter lived together as husband and wife. At the time of this marriage Maurice had no property, or income, or employment; the petitioner at that time was the owner of one apartment house in San Francisco, this being her separate property, which, about a year after the marriage, she sold. She invested the proceeds of this sale in a business known as "Blache Film Laboratories" which she owned and operated as her separate property for several years at a considerable profit. During all this period Maurice was employed as a camera man with Pathe Films Corporation at a salary of twenty-five dollars a week. Sometime after entering this business the petitioner was in poor health, and, upon advice of her banker, she opened a joint bank account with Maurice in which she deposited proceeds of her business venture. This arrangement she alleges was "for the sole purpose of avoiding the expense and delay of probate proceedings or litigation in the event of her death; that petitioner at said time informed her husband, Maurice J. Blache, of the advice of said banker and that she was making said deposits in their joint names, and the said parties did then and there agree that there was to be no change in the title of said money as separate property of petitioner, and the said Maurice J. Blache agreed that at any time upon request, he would sign any order or release necessary to authorize withdrawal of the money or transfer thereof to the name of the petitioner". The petitioner further alleges: "That a few days prior to the said 26th day of May, 1939, said Maurice J. Blache informed petitioner that two attorneys from Los Angeles had come to San Francisco and were demanding that he pay over to them immediately the sum of $37,500 under threats of prosecution for bigamy and depriving the said Maurice J. Blache and his wife of all money and property owned by them, or either of them, unless such payment was made forthwith; that said Maurice J. Blache for the first time informed your petitioner that he had gone through a marriage ceremony with said Anna J. Blache in Ohio in 1912; that thereafter in 1913 said Anna J. Blache had deserted him and that he had brought an action for divorce in Los Angeles in 1915; that the default of said Anna J. Blache had been entered in said action and the case was tried and submitted, but he had since ascertained that for some reason an interlocutory decree had not been entered; that said Maurice J. Blache had not seen Anna J. Blache since she deserted him some 25 years before, but that she had known at least 8 or 9 years that Maurice J. Blache and petitioner had intermarried; that said Maurice J. Blache also informed your petitioner at said time that he was greatly in fear that the most extreme measures would be used against him by the said attorneys from Los Angeles to force him to raise money to meet their demands and told your petitioner that she should not be involved in such proceedings, but should protect her own interests; that said Maurice J. Blache thereupon executed an order authorizing petitioner to withdraw said funds from said Anglo-California National Bank; that said Maurice J. Blache never had any right, title or interest in said money, or any part thereof, and never claimed any interest therein and does not now claim any interest therein."

Following these threats an action was commenced by Anna J. Blache on June 6, 1939, for separate maintenance against Maurice, and petitioner was joined as a defendant on allegations that she and Maurice held community property. At a preliminary hearing the superior court awarded Anna $100 a month as alimony pendente lite, $350 as counsel fees, and $210 on account of costs. On October 16, 1939, the same court made an additional award on account of counsel fees of $3,150. This latter sum was not paid and Maurice was ordered to show cause why he should not be punished for contempt. At this hearing the petitioner herein appeared and was sworn as a witness for the plaintiff Anna Blache. In the course of this hearing it was disclosed that in May, 1939, there was on deposit in the joint bank account of petitioner and Maurice the sum of $15,000. This deposit represents the sum covered by the transfer from Maurice to petitioner heretofore mentioned. With this transfer the petitioner withdrew the entire sum from the bank on May 26, 1939, which was ten days before Anna commenced her action for maintenance. At about the same time Maurice conveyed to petitioner all real property standing in the joint names of petitioner and Maurice.

These contempt proceedings rest upon the petitioner's refusal to disclose the sum of $15,000 which she had withdrawn from the bank. In support of the commitment the respondent contends that the inquiry was material to the proceedings brought to compel Maurice to pay the award on account of counsel fees. The petitioner contends that the questions were not material. The record compels an agreement with petitioner.

This record is voluminous, showing day after day of arguments of counsel, charges and recriminations, interspersed with repeated conjectures and suspicions. It is difficult to determine what is the legal evidence upon which the order of commitment is defended. We will not attempt to segregate all of the few grains of wheat from the great mass of chaff. It is sufficient to state that the witness steadfastly refused to give opposing counsel any information regarding the present location of the money involved, that she reiterated that the entire sum was her separate property, the proceeds of her separate property, that Maurice had no interest in any part of it, that she withdrew the sum from the bank at the time alleged, that she had then held it in her own possession, and that Maurice had no interest in, access to, or control over it. It should also be stated that, except for maintaining this position, her answers were not frank and in some cases appeared to be both untruthful and evasive; and herein seems to lie the reason for her commitment.

The commitment rests partially upon the opinion of the trial court that, in refusing to disclose the place where the money was kept, the petitioner committed perjury. In deference to the judgment of the trial court in this regard we are forced to conclude, as hereinbefore stated, that the order for commitment followed the trial court's belief that the witness was committing perjury, and it is left to determine whether such belief will support the order of commitment.

[1, 2] Perjury is itself a criminal offense denounced by section 118 of the Penal Code as applying to one who, under oath, "states as true any material matter which he knows to be false". But one charged with the crime of perjury is entitled to a trial by jury and may demand proof that the statement was false and that it was a "material matter". In this proceeding for contempt, which is also a criminal proceeding, the witness may demand proof of the falsity of the statement and may not be held on the mere suspicion of the trial court that the statement was false. Unless the statement of the witness is inherently false or is such that the court would have judicial knowledge of its falsity, it will not serve as the basis for a commitment on the ground of its falsity alone. People v. Hille, 192 Ill. App. 139; 17 C.J.S., Contempt, § 24, p. 31. There is nothing in the testimony of the petitioner which would make it appear false on the face of the record, and there is nothing which would support a conclusion that the trial court could take judicial knowledge that the testimony was false. The hearing ended in April, 1940, and it is fairly conceivable that the particular fund, withdrawn in May, 1939, had been spent, commingled with other funds of the witness, or given away. There was no more than a suspicion that the witness was holding it intact at some safe hiding place.

But a more serious consideration is that the entire line of questions upon which petitioner was committed was not material to the issues of the pending proceeding. It should be recalled that such proceeding was instituted by counsel for Anna to recover counsel fees of over three thousand dollars. When the original award of alimony pendente lite and counsel fees had been made Maurice made payments under the order. Then, when counsel for Anna discovered that the petitioner owned real estate worth approximately two hundred and fifty thousand dollars and the award of counsel fees was increased by three thousand dollars, Maurice stopped payments and contempt proceedings against him were instituted. From the fact that he was able to make these small payments it might have been inferred that he had obtained these sums from the petitioner and that he could obtain more from the same source. But that is not the subject of the inquiry on this proceeding. On the theory that petitioner and Maurice were community owners, all the real properties owned by this petitioner were tied up by attachment or injunctive process. The title to these properties was being litigated in another proceeding in another court. The title to the fifteen thousand dollars involved here was being litigated in another proceeding. In the hearing out of which this contempt proceeding evolved, Maurice had testified that he had no interest in the money, did not know where it was located, and did not have access to it or control over it. The petitioner had testified to the same effect, except as to knowledge of its location which she refused to divulge. She explained her position as to Maurice's inability to reach the money very clearly when she asked the court: "Do you think I would give any money to a man—money that belongs to me—could I give it to another man so maybe another woman would get it?" No part of the testimony of these witnesses has been contradicted in any particular. No evidence of any character was offered to show that the money, or any part of it, was in existence at the time of the commitment. It had been drawn from the bank nearly a year previous to the hearing and the presumption would be that it was used in the ordinary manner in the business of the petitioner, and in living expenses. This presumption would be strengthened by the inference that it was the only money she had for these purposes because all other property of the witness was tied up under legal process. In this proceeding no presumptions can run against the petitioner.

[3] During the course of the inquiry the trial court repeatedly requested counsel for Anna Blache to state in what respect they deemed the inquiry pertinent to the contempt proceedings against Maurice. Their answer was that if they could find where the money was located they might be able to ascertain from the custodian whether Maurice had any interest in it. It does not appear that the trial court was impressed by this explanation, and neither are we, but it seems clear from our examination of the record that the court was convinced that the witness was not telling the truth and should be punished for that reason. The question of the immateriality of the inquiry is not a debatable one. The location of the particular fund was immaterial to the contempt proceeding against Maurice. The issue in that proceeding was whether Maurice had funds sufficient to pay Anna under the alimony award. Petitioner was a party in the divorce action, but not in the contempt proceeding. As a witness in that proceeding she was not required to answer questions which would incriminate or degrade her. She was not required to answer trivial and nonrelevant questions. The petitioner had testified that she had withdrawn the money from the bank and had had it in her possession. She claimed title and legal ownership and exclusive right of possession. She was entitled to the presumption that her possession was lawful and based upon ownership. She asked to have this claim adjudicated in a lawful manner and in a proper forum. The only evidence before the court supported her claim of title, ownership, and right of possession. Because of the repeated admonitions of the court that the inquiry appeared to be directed to the purpose of discovering the fund so that counsel might seize it by legal process, the petitioner was fully justified in defending herself against such event. There was no evidence upon which the court could found more than a suspicion that she was falsifying in her testimony in relation to this inquiry. There was no evidence upon which the court could base a finding that the questions put to the witness were material to the issue then before the court, to-wit, whether Maurice was able to pay the alimony award. The right of a witness to refuse to answer a question which is not "pertinent to the matter in issue" may not be denied. Sec. 2065, Code Civ. Proc.; Kimball v. Superior Court, 38 Cal. App. 761, 762, 177 P. 488; Rogers v. Superior Court, 145 Cal. 88, 94, 78 P. 344.

The petitioner is discharged.

I concur: STURTEVANT, J.

SPENCE, Justice (dissenting).

I dissent.

The main issue before the trial court was whether or not Maurice Blache had the ability to comply with the trial court's order. In support of the contention that he had such ability, it was shown that large real estate holdings of the value of approximately $250,000 and a bank account in a sum in excess of $15,000 had stood for some time in the joint names of said Maurice Blache and petitioner and that said Maurice Blache had purported to transfer to petitioner any interest which he had in said real property and in said bank account at a time when negotiations were pending for a settlement between said Maurice Blache and his wife, Anna Blache. It was claimed that said Maurice Blache still had an interest in said property and in the money which had been withdrawn from bank account and that he still had control over and access to the same. Questions were therefore directed to petitioner to ascertain what she had done with the money which she had withdrawn from said bank account and where the money was located thereafter and at the time of the hearing. In my opinion, the questions relating to the disposition made of the money after it had been withdrawn from the bank were material. The plaintiff was not bound by the mere conclusion of the witness that said Maurice Blache had no interest therein and it was appropriate for the trial court to allow plaintiff the widest latitude in the examination of the witness in order to ascertain all the facts which might throw light upon the issue which the trial court was called upon to determine.

In reply to pertinent questions relating to the disposition and location of the money, petitioner gave purported answers on each of the several days of the hearing. The trial court was most patient with the witness and continued the hearing from time to time with the advice that she must answer the questions addressed to her on this subject. The nature of the answers given by petitioner to these questions is illustrated by the following which were given at various times: (1) "Why should I tell you?" (2) "I will not tell where I have it. That is my money." (3) "It is in my possession. I would not say where. Why should I say where?" (4) "Well, it is buried under a tree in the country." (5) "I cannot point it from here." (6) "The tree is in the country." (7) "Well, it is in my place in the country." (8) "Well, I don't remember when I buried it because I have to be very careful. It may be a day or two days after I drew it out, I don't remember." (9) "I don't remember saying that I buried the money under a tree. I was too excited that day. I don't remember whether I buried it or not. I might have, I cannot be sure." (10) "I don't remember drawing any money from that bank account." (11) "I am not sure what you mean by a bank account. I would not be sure of anything." (12) "I don't know what I did with the money now. I know I have it somewhere but I don't remember where now." (13) "I won't have anybody asking me those kind of questions."

The foregoing answers are but a few of the contradictory and defiant answers given by the witness upon the numerous hearings. Her first answers were to the effect that the money was in her possession but she absolutely refused to disclose the place where it was located. She was directed to answer and then testified that she had buried the money under a tree in the country. Thereafter she claimed she did not remember so testifying and took refuge in the claim that she did not remember what she had done with the money. During the final hearings, her counsel interposed numerous objections and challenged the right of the trial court to compel her to answer the questions. The trial court overruled the objections and directed the witness to answer whereupon her counsel stated, "I think the witness has several times indicated her purpose not to answer that question". The only reasonable conclusion which can be reached upon a reading of the record is that the statements of the witness to the effect that she did not know or did not remember were mere attempts to evade answering the questions and constituted a refusal to answer said questions.

The trial court made full and complete findings in its order for the warrant of commitment to issue. It was there found, among other things, that the questions were material; that the witness had the ability to answer the same; that the only answers given in response thereto were sham, evasive, false and vague answers; and that the refusal of the witness to answer said questions constituted a wilful and deliberate refusal to answer as a witness. I believe that all of these findings are amply sustained by the evidence and that the trial court was entirely justified in holding petitioner in contempt under the circumstances. A witness may not avoid a charge of contempt by stating, "I do not know" or "I do not remember" when it is apparent that the witness has the ability to answer but refuses to do so. In re Stein, D.C., 7 F.2d 169; Schleier v. United States, 2 Cir., 72 F.2d 414; O'Connell v. United States, 2 Cir., 40 F.2d 201; People ex rel. Petrucci v. Hanley, 121 Misc. 624, 202 N.Y.S. 87; In re Schulman et al., D. C., 167 F. 237; In re Schulman et al., 2 Cir., 177 F. 191; Becker v. Gerlich, 72 Misc. 157, 129 N.Y.S. 614; Haimsohn v. United States, 6 Cir., 2 F.2d 441.

I find no merit in any of the points raised by petitioner in this proceeding and, in my opinion, the writ should be discharged and the petitioner should be remanded to custody.

40 Cal.App.2d 696

CHURCH et al. v. CHURCH et al.

Civ. 11926.

District Court of Appeal, Second District, Division 1, California.

Sept. 19, 1940.

1. Trusts ⟜262

In action by minors against directors and trustees of a corporation, which was allegedly voluntarily wound up and dissolved, and minors' father for alleged conversion of stock certificates which had been issued in the father's name, as trustee for minors, and thereafter sold by the father to corporation, evidence supported finding that there had been no conversion of the stock.

2. Trusts ⟜41

Where a father of minor children took out shares of stock in a family corporation in his name as trustee for children, it could be assumed that a valid trust was created.

3. Trusts ⟜189

Where father of minor children took out shares of stock in a family corporation in his name as trustee for children, and the father had never executed any document in writing or declaration of trust restricting his power, as trustee, to transfer shares, and evidence warranted finding that, aside from trustee's certificates, there was no such agreement entered into concerning shares, and it did not appear that any restriction on power of sale was contained in certificates, it could not be said as matter of law that the father did not have the right, as trustee, to transfer shares whenever, in exercise of his discretion, it appeared to him proper or necessary to do so.

4. Trusts ⟜189

A trustee can properly sell trust property if such sale is necessary or appropriate to enable trustee to carry out purposes of trust, unless sale is forbidden in specific words by terms of trust or it appears from terms of trust that property was to be retained in specie in trust.

5. Trusts ⟜202

Where father of plaintiffs, who were minors, had taken out shares of stock in family corporation in his name as trustee for plaintiffs, and the father subsequently sold the stock to corporation, and it could not be said as matter of law that he did not have a right, as trustee, to transfer shares whenever, in exercise of his discretion, it appeared proper or necessary to do so, and defendants, who were directors and trustees of corporation, which was allegedly voluntarily wound up and dissolved, entered into transaction concerning sale of stock in good faith, defendants were not liable to plaintiffs, irrespective of what plaintiffs' father might have done with proceeds received from sale of stock. Civ.Code, § 2244.

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Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Henry Arthur Church and others, all minors, by William L. Stevens, their guardian ad litem, against Clyde M. Church, also known as C. M. Church, Ralph O. Church, also known as R. O. Church, H. A. Church, Jr., also known as Harry Church, all the foregoing in their respective individual capacities, the South Pasadena Finance Company, C. M. Church, Isabelle M. Church, D. L. Brainerd, sued fictitiously, Lois C. Lientz, and E. T. Grua, all the five foregoing persons as directors and trustees of the South Pasadena Finance Company, allegedly voluntarily wound up and dissolved, and Elizabeth M. McNitt, as trustee of the South Pasadena Finance Company, allegedly voluntarily wound up and dissolved, and others, for an alleged conversion of certain stock certificates. From an adverse judgment, plaintiffs appeal.

Affirmed.

A. V. Falcone, of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for respondents.

DORAN, Justice.

This is an appeal by plaintiffs from a final judgment.

The action was brought by appellants as minors, suing by their guardian ad litem, for an alleged conversion by respondents of certain stock certificates issued in the name of Harry A. Church, as trustee for said respective appellants. The said Harry A. Church is the respondent H. A. Church, Jr., (hereinafter referred to as Harry Church), and is the father of appellants.

The complaint sets forth four separate causes of action, one for each of said appellants, alleging that prior to and on or about February 20, 1928, each of said appellants was the owner of preferred shares of the capital stock of respondent corporation South Pasadena Finance Company, of the then value of $5,600 and that on or about said date the respondents converted said shares to their own use and benefit.

All of the named defendants and respondents, except Harry Church, and in addition D. L. Brainerd, sued by a fictitious name, appeared and joined in answering appellants' complaint. It does not appear that Harry Church interposed any answer or that any default was taken against him.

Respondents by their answer deny ownership of said stock by appellants and the conversion thereof by respondents, and set up affirmative defenses of the bar of limitations; also an additional separate defense of estoppel.

The trial court found for the respondents on practically all material issues raised by the pleadings including the separate defenses of respondents.

As will hereinafter appear, the basis for the alleged conversion on which appellants' causes of action are founded is the sale by Harry Church back to respondent South Pasadena Finance Company of shares of its stock issued in his name as trustee for appellants, his minor children, and held by him.

The following appears from facts stipulated and evidence adduced at the trial:

There were two corporations of the name South Pasadena Finance Company, one virtually a successor of the other. The first was organized in April, 1924, and was dissolved in April, 1927, and the second was incorporated on March 18, 1926. The shares of stock in question here were those of the second corporation.

The first corporation was organized by H. A. Church, Sr., the father of Clyde, Ralph and Harry Church, and the grandfather of appellants; R. O. Church (Ralph Church); H. A. Church, Jr., (Harry Church); W. W. Cottle and C. M. Church (Clyde Church). The second corporation was organized by C. M. Church (Clyde Church), R. O. Church (Ralph Church), H. A. Church (Harry Church). The said corporations appear to have been family affairs, formed and organized principally to take care of and generally administer certain personal property, such as notes, mortgages, etc., given his children during his lifetime by the said H. A. Church, Sr. The first corporation was organized pursuant to the expressed wish of said H. A. Church, Sr.; and his four children, Clyde, Ralph and Harry Church and Mrs. Cottle, transferred to said corporation the property that each had received from their father as above mentioned and took in exchange therefor the stock of said corporation. Some of the said shares that each thus received were issued in their respective names as trustees for their respective children, the grandchildren of H. A. Church, Sr. This was true of some of the shares so issued to Harry Church. The evidence is conflicting as to why such trustee shares were issued.

It appears that the second company was organized in order to conform to a change in California law regarding stock of no par value. The assets of the first corporation were transferred to the second company, the stock of that company was turned in and surrendered in exchange for an equal number of shares of the second company of the same proportionate value. No cash or additional consideration appears to have been paid for the shares in the second corporation.

Harry Church was president and a director of the second corporation from its formation until at least October 15, 1928. The directors of the corporation as shown by the minutes of February 7, 1928, and by the minutes of March 20, 1928, were H. A. Church (Harry Church); C. M. Church (Clyde Church); W. W. Cottle; R. O. Church (Ralph Church), and W. J. Filley, and the officers as shown on both of those dates were H. A. Church, president, C. M. Church, secretary, R. O. Church and W. J. Filley, vice-presidents, Lois C. Lientz, assistant secretary, and W. W. Cottle was treasurer.

Steps to wind up and dissolve the second corporation were taken in 1935.

[1] The details incident to the disposition of the stock in question were revealed at length during the trial. It would serve no purpose to recount them here. It is sufficient to note that the trial court found that there had been no conversion of the stock in question and this finding, which is well supported by the evidence, is decisive as to all of the issues here presented.

[2, 3] It may be assumed that a valid trust was created by Harry Church when he took out shares of the family corporation in his name as trustee for his children. (See Restatement of the Law of Trusts, Sec. 17, p. 64, and Cahlan v. Bank of Las-

sen County, 11 Cal.App. 533, 540, 105 P. 765, which latter is cited by appellants). However, it cannot be said as a matter of law that Harry Church did not have the right as trustee to transfer the shares in question whenever, in the exercise of his discretion, it appeared to him proper or necessary so to do. He had never executed any document in writing or declaration of trust restricting his power in this respect, and there is sufficient evidence in the record to warrant a finding that, aside from the trustee's certificates themselves, there was no such agreement, oral or written, made or entered into with respect to the said shares.

[4] A trustee can properly sell trust property if such sale is necessary or appropriate to enable the trustee to carry out the purposes of the trust, unless such sale is forbidden in specific words by the terms of the trust or it appears from the terms of the trust that property was to be retained in specie in trust. Restatement of the Law of Trusts, sec. 190(b), p. 502, citing [among others]: Giselman v. Starr, 106 Cal. 651, 40 P. 8; Crystal Pier Co. v. Schneider, 40 Cal.App. 379, 180 P. 948.

It does not appear from the record that any such restriction on the power of sale was contained in the stock certificates themselves. There apparently was the usual blank form for transfer printed upon the back of the certificate. In this connection, it may be noted that where a note given to a trustee was made payable to him as trustee, "or order", and a mortgage was also expressly made up to him as trustee, "his assigns and successors", it has been held that the trustee has, by necessary implication, the power to sell or assign the note and mortgage. Giselman v. Starr, supra, 106 Cal. page 656, 40 P. page 8. In that case the instruments themselves were treated as defining the powers of the trustee.

There was nothing inherent in the transaction entered into by Harry Church with the corporation which would prevent him from including therein the trustee's shares. He received adequate consideration for all the shares so transferred. If Harry Church deemed it to his interest to withdraw from the family corporation and to take out of it his property invested therein, it would be safe to assume that he likewise deemed it to the interest of his family, appellants included. When he saw fit to withdraw his investment in the company it was only natural for him to withdraw at the same time any investment made therein for other members of his family.

Obviously, if Harry Church as trustee had the right to transfer or sell the said trustee's certificates, such a sale or transfer made in good faith would not constitute a tortious conversion.

[5] What Harry Church may have done with the proceeds received from the above transaction after the same was consummated is not legally the concern of these respondents, it appearing that the transaction was entered into in good faith by them. Section 2244 of the Civil Code expressly provides that one who actually and in good faith transfers any money or other property to a trustee, as such, is not bound to see to the application thereof, and his rights can in no way be prejudiced by a misapplication thereof by the trustee.

It is not necessary to consider the questions raised by the affirmative defenses of respondents.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

40 Cal.App.2d 701

CHURCH et al. v. CHURCH et al.

Civ. 11952–S.

District Court of Appeal, Second District, Division 1, California.

Sept. 19, 1940.

1. Appeal and error 🔑1009(3)

In minors' suit to set aside, on ground of extrinsic fraud in procurement thereof, an unsatisfactory judgment in previous action by minors against their former trustees for an accounting, record did not sustain minors' contention that there was no conflict in the evidence.

2. Attorney and client 🔑86

Generally, a stipulation of an attorney will be presumed to have been authorized by client, as well in order to uphold action of court as for protection of other party to stipulation, but when adverse party, as well as the court, is aware that attorney is acting in direct opposition to his client's instructions or wishes, reason of rule ceases and court should not act upon stipulation, nor can adverse party claim the right to enforce a judgment rendered by reason thereof.

3. Judgment 🔑443(2)

Plaintiffs, who were minors, could not set aside a final unsatisfactory judgment in previous action by plaintiffs against their former trustees for an accounting on ground that judgment was procured by extrinsic fraud in that it was result of a fraudulent settlement wherein plaintiffs' attorneys in previous action, without authority, entered into a stipulation to compromise action, where record did not show that defendants, who were also defendants in previous action, or their attorneys or trial court, were aware of any lack of authority of plaintiffs' attorneys, and there was no showing that a retrial of previous action might result in a different outcome.

4. Judgment 🔑651

Where judgment entered upon stipulation of attorneys, whom plaintiffs claimed were not authorized to settle action, was final and regular upon its face, such judgment was binding upon parties in absence of fraud or insolvency of attorneys.

5. Judgment 🔑461(1)

In minors' suit to set aside, on ground of extrinsic fraud in procurement thereof, an unsatisfactory judgment in previous action by minors against their former trustees for an accounting, minors were bound to affirmatively establish fraud on part of defendants, irrespective of the fact that in previous action minors sued as minors by their guardian ad litem.

6. Judgment 🔑461(5)

In minors' suit to set aside, on ground of extrinsic fraud in procurement thereof, an unsatisfactory judgment in previous action by minors against their former trustees for an accounting, evidence supported findings adverse to minors.

7. Judgment 🔑443(1)

A plaintiff has no cause of action in equity to set aside a judgment for alleged fraud in procurement thereof, irrespective of nature of fraud or deceit, unless detriment has been occasioned thereby.

8. Judgment 🔑443(1)

Before relief may be obtained in equity from a judgment affected by extrinsic fraud, it must appear that the judgment is unjust and that a different judgment would have been entered but for the fraud.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit in equity by Henry Arthur Church and others, all minors, by William L. Stevens, their guardian ad litem, against Clyde M. Church, also known as C. M. Church, Ralph O. Church, also known as R. O. Church, and others to set aside a judgment in a previous action. From a judgment for defendants, plaintiffs appeal. Affirmed.

A. V. Falcone, of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for respondents.

Ben F. Griffith and Malcolm Archbald, both of Los Angeles, in pro. per.

DORAN, Justice.

This is an appeal by plaintiffs from a final judgment in favor of defendants rendered after trial in the superior court in and for the county of Los Angeles in an action in equity brought by plaintiffs to have set aside and vacated a judgment in a previous action in said court, on the ground of extrinsic fraud in the procurement thereof.

Appellants describe their appeal in the preface to their opening brief, as follows: "This is an appeal by plaintiffs from an adverse judgment in a suit in equity to set aside a judgment (in a previous action by plaintiffs against their former trustees for an accounting), entered therein, without a trial, upon stipulation between counsel, without plaintiffs' knowledge consent or authorization, * * *."

This litigation grows out of the same trust relationship which formed the basis for the action by these same minor appellants against the Security-First National Bank of Los Angeles, in which case appellants have also appealed to this court. Church et al. v. Security-First National Bank of Los Angeles et al., Cal.App., 105 P.2d 148. The trust in question is described in detail in the opinion just cited.

In the present action it is alleged that on or about August 4, 1933, all of said appellants, by and through William L. Stevens as their guardian ad litem, through whom as their guardian they also bring the present action, commenced an action in the said superior court wherein appellants were plaintiffs and respondents Clyde M. Church, Ralph O. Church and Hattie May Cottle were defendants, said action being No. 360868 in said court.

In said action No. 360868, which appellants refer to as the "original action", appellants prayed for an accounting by respondents Clyde and Ralph Church and Hattie Cottle, as trustees, from April 17, 1917, to the date of the filing of said original action, to-wit: August 4, 1933; for removal of said respondents as trustees and for appointment of new trustees by the court.

It is further alleged that respondents Griffith and Archbald were employed by Stevens, as said guardian ad litem, to act as attorneys for plaintiff in said action pursuant to an order of said court, first had and obtained, and that said respondents appeared and acted as such in the so-called original action, viz: No. 360868. However, appellants then allege, in paragraph VII of their complaint: "That at no time whatsoever were the defendants Griffith and Archbald, or either of them, or any other person for them, authorized or directed by Stevens, as the guardian ad litem of the plaintiffs in the original action, or by the plaintiffs themselves, or any of them or by anyone else, or at all, to compromise, in any way or at all, the substantial rights of said plaintiffs in the original action, or to compromise in any way or at all, the cause of action set forth in the original action, * * *."

Appellants allege that respondents Jennings, Belcher, Grua and the firm of Jennings & Belcher acted in said original action as attorneys for respondents Clyde Church, Ralph Church and Hattie May Cottle, and that the lack of authority in respondents Griffith and Archbald as attorneys, as set forth in paragraph VII of appellants' complaint above quoted, was known to all the respondents at all times mentioned in said complaint.

It is further alleged in substance that the attorneys for the respective parties entered into a stipulation and settled the action, which settlement it is alleged was fraudulent. The stipulation referred to was expressly approved by the trial court and the form of the judgment was approved by respondent Griffith as one of plaintiffs' counsel and by respondent Belcher acting for defendants' counsel. It is this judgment that appellants in their present action seek to have set aside on the grounds of fraud in its procurement. The judgment was final and no appeal has ever been taken therefrom.

It is alleged also that as a consequence of the acts of respondents, appellants have been deprived of a trial in said original action upon the merits and in effect that the within action in equity is the sole remedy available.

Respondents by their answers admit the said stipulation and judgment thereon but deny the allegations of fraud and conspiracy. All other material allegations of the complaint are denied.

After a trial of the issues the court below found for the respondents and against the appellants on all material questions of fact raised by the pleadings.

Out of twenty-one separate findings of fact appellants assign error to eighteen as being unsupported by the evidence and in direct conflict therewith, and assign all the conclusions of law as erroneous.

[1] It is contended by appellants that there is no conflict in the evidence, a contention that is not borne out by the record. It is also contended that the principal question here involved is the authority of respondents Griffith and Archbald to procure

the termination of the original action by the means employed and that that question is one purely of law; that it is conceded that no express authority was possessed by respondents Griffith and Archbald so to terminate said action, and with that premise conceded and with the further concession that said respondents represented to the court that they possessed such authority, "the conclusion is inevitable that said acts constituted extrinsic fraud as the same is defined by the applicable law".

[2, 3] Such a conclusion would be inevitable only if it could be presumed that said respondents as attorneys acted without authority in the premises. The presumption, however, is otherwise. In Knowlton v. Mackenzie, 110 Cal. 183, at page 188, 42 P. 580, at page 581, it is said: "As a general rule, a stipulation of the attorney will be presumed to have been authorized by the client, as well in order to uphold the action of the court as for the protection of the other party to the stipulation; but when the adverse party, as well as the court, is aware that the attorney is acting in direct opposition to his client's instructions or wishes, the reason of the rule ceases, and the court ought not to act upon the stipulation, nor can the adverse party claim the right to enforce a judgment rendered by reason hereof." Cited in Clemens v. Gregg, 34 Cal.App. 245, 253, 167 P. 294. There is nothing in the record here to show that the respondents who were defendants in the original action, their attorneys or the court, were aware of any lack of authority of appellants' attorneys in the original action.

[4] It should also be borne in mind that the judgment entered upon the stipulation in the said original action is final and regular upon its face. Such a judgment, so entered, is binding upon the parties in the absence of fraud or the insolvency of the attorneys. Holmes v. Rogers, 13 Cal. 191; Sampson v. Ohleyer, 22 Cal. 200, 210; and see Jackson v. Brown, 82 Cal. 275, 23 P. 142, wherein an appeal was taken from a judgment rendered by consent of counsel and from an order denying a motion to vacate the same, it being contended that counsel lacked authority to consent to such a judgment, and the evidence as to authority was conflicting. There, after considering the conflicting evidence, the court said at page 278, of 82 Cal., at page 143 of 23 P.: "Under such a state of facts as is above set forth, we cannot say that the court erred in denying the motion to vacate the judgment. It must then be held that the judgment herein was rendered by consent of Samuels."

[5, 6] It was incumbent upon appellants to affirmatively establish fraud on the part of the respondents. This they have failed to do. The record shows ample evidence to support the findings of the trial court in the matter and the conclusions based thereon are correct.

The fact that appellants sued in the original action as minors by their guardian ad litem does not alter the situation here presented. Newport v. Hatton, 195 Cal. 132, 142, 231 P. 987.

[7, 8] In particular, it should be emphasized that the prayer of appellants' complaint demands a judgment decreeing the judgment in the so-called original action "fraudulent and void" and that said action be set for a "trial upon its merits". In that connection it is important to note that the record in the within action reveals no evidence of fraud, extrinsic or otherwise. Nor is there any showing that a retrial of said original action would even be likely to result in a different outcome. As pointed out by respondents, the action herein being an action in equity, "It is fundamental, of course, that no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action (Gutterman v. Gally, 131 Cal.App. 647, 650, 21 P.2d 1000; citing Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 571, 126 P. 351, 42 L.R.A.,N.S., 125)" moreover, "Before relief may be obtained in equity from a judgment affected by extrinsic fraud it must appear that said judgment is unjust and a different judgment would have been entered but for the fraud practiced. (Karlslyst v. Frazier, 213 Cal. 377, 380, 2 P.2d 362.)" See, also, Davis v. Chalfant, 81 Cal. 627, 22 P. 972; Painter v. Painter Co., 133 Cal. 129, 65 P. 311; Hogan v. Horsfall, 91 Cal.App. 37, 266 P. 1002.

It is not necessary to consider the question of respondents' affirmative defenses.

The appeal is without merit.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

BITTINGER v. NEW YORK LIFE INS. CO.*

Civ. 11992.

District Court of Appeal, Second District, Division 1, California.

Sept. 23, 1940.

Hearing Granted Nov. 19, 1940.

1. Insurance 🔑349(5)

General provision of life policy that any indebtedness to insurer would be deducted in any settlement of the policy or of any benefit thereunder meant that at the time of any settlement of the policy, or any benefit thereunder, indebtedness then existing would be deducted, and did not mean that all indebtedness must remain outstanding until such settlement was made or benefit received, as against contention that unpaid interest on loan should become part of principal indebtedness to be deducted from death benefit and that nonpayment of interest therefore could not lapse policy.

2. Insurance 🔑349(5), 367(1)

Nonpayment of interest on indebtedness which was equal to full cash reserve in life policy caused policy to lapse as of date interest was due, subject to right to reinstatement within one month, and any payment of premium which was also due could only operate as reserve with which to purchase automatic term insurance, hence policy was not in effect upon date of insured's death where automatic term insurance purchasable with dividend for which insured was entitled to credit plus tendered difference between such dividend and amount of premium was insufficient to extend from date policy lapsed to date of insured's death.

3. Insurance 🔑367(1)

Where insured had borrowed full amount of cash reserve in life policy and had defaulted in interest so that policy lapsed, notwithstanding payment of premium due by means of crediting dividend against premium and tendering payment of difference between dividend and premium, insurer did not "waive" automatic term insurance provisions of policy under which the term insurance purchasable with amount of dividend and tendered payment was insufficient to extend to date of insured's death.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Adalyn B. Bittinger against the New York Life Insurance Company, a corporation, upon a life policy. From judgment for defendant, plaintiff appeals.

Affirmed.

Hearing granted; SHENK and EDMONDS, JJ., not participating.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for respondent.

DORAN, Justice.

This is an appeal from a judgment in favor of defendant in an action by plaintiff as beneficiary in a life insurance policy to recover the death benefit provided therein.

There is no dispute as to the facts. The record shows them to be as follows:

On April 1, 1905, respondent corporation issued a policy of insurance on the life of George E. Bittinger, appellant's husband, for the sum of $20,000, the first $10,000 of which was payable in forty equal semi-annual instalments of $250 each, and the second $10,000 of which was payable in cash six months after the fortieth payment.

The provision of the policy regarding cash loans reads as follows: "The insured may obtain Cash Loans on the sole security of this Policy, on written request, at any time after it has been in force two full years, if premiums are duly paid to the anniversary of the insurance next succeeding the date when the loan may be obtained. * * * If any indebtedness on this Policy remains unpaid at the death of the Insured, and the amount of such indebtedness is not repaid in cash before the first instalment becomes payable under this Policy, the amount insured by this Policy shall not be paid in instalments, as specified on the first page, but shall be paid in one sum, namely $13,000.00, from which shall be deducted the amount of the indebtedness due on this Policy."

Under the heading "This Policy is Automatically Non-Forfeitable", the said policy contains the following:

"First:—If any premium is not paid on or before the date when due, and *if there is no indebtedness* to the Company,—The insurance, for the amount stated at the head of Column 3 of the Table on the second page, payable in instalments in the manner stated on the first page, will automatically continue from such due date as Term Insurance as follows, and no longer, namely: for 37 days if premiums have been paid for 3 months; for 45 days if for 6 months; for 53 days if for 9 months; for 60 days if for one year and less than two years; and for the period specified in Column 3 of said Table, if premiums have been paid for two or more years" (italics included); and

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* Subsequent opinion 112 P.2d 621.

"Second:—If any premium or interest is not paid on or before the date when due, and *if there is an indebtedness* to the Company,—Insurance for the net amount that would have been payable in one sum as a death claim on said due date, namely: $13,000, less the amount of the indebtedness, will automatically continue from said due date as Term Insurance for such time as any excess of three-fourths of the reserve under this Policy over such indebtedness will purchase at the age of the Insured on said due date, according to the Company's present published table of Single Premiums for Term Insurance, and no longer. In Lieu of such Automatic Term Insurance, on the Insured's written request within six months from said due date but not otherwise, this Policy will be endorsed for such amount of Paid-up Insurance, payable in one sum, as said excess will purchase at the age of the Insured on said due date, according to the Company's present published table of Single Premiums." (Italics included.)

Then follows this clause: "The Automatic Term Insurance and the Paid-up Insurance, as specified above, shall be payable under the same conditions as this Policy, but shall be without participation in profits, cash loans or further payment of premiums."

A paragraph under the head "Reinstatement" reads: "If any premium or interest is not paid on the date when due, the Company will restore this Policy as of the date of such non-payment, on payment by the Insured of such premium or interest within one month thereafter, with interest. The Company will also restore this Policy as of the date of such non-payment, at any time after one month and within the Accumulation Period, under the following conditions:" (Then follow the conditions, which are not pertinent to the question here to be considered.)

Among the "general provisions" of the policy are the following: "(5) If this Policy is continued beyond the Accumulation Period, with payment of premiums, Profits will be apportioned at the end of every five years thereafter during the continuance of the Policy. (6) Any indebtedness to the Company will be deducted in any settlement of this Policy or of any benefit thereunder."

On April 1, 1933, there was a loan outstanding against said policy in the sum of $6,630, which was the full amount of the cash loan value at that time. There was also declared due on said date a cash dividend on said policy in the sum of $189.77, in favor of the insured. There was due from the insured on said date a semi-annual premium of $202.15 and interest on said loan in the sum of $331.50. The insured elected to apply the abovementioned dividend to the payment of the said premium, and in addition delivered to respondent insurance company his check for $12.38 to make up the difference between said premium and the amount of the dividend. The insured later and about May 31, 1933, attempted to pay the full amount of the said interest with his check, but this check was not honored because of insufficient funds. Respondent insurance company, by letter dated June 27, 1933, notified the insured of this fact and also that by reason thereof his policy had been lapsed.

On May 1, 1933, respondent's agent had issued a receipt for the premium of $202.15, and thereafter respondent issued an official premium receipt for the same. The said official receipt showed on its face the amount of the premium of $202.15, the amount of the loan interest of $331.50, the total thereof of $533.65 and a notation of the dividend of $189.77. There is nothing on the face thereof to show that it is not a receipt for the total amount shown.

Under date of May 8, 1933, respondent company wrote to the insured stating that the records of the company showed that the premium of $202.15 was paid, but that there was also due the interest in sum of $331.50, and requesting the insured to let the company know when it could expect a remittance covering the interest. Under date of August 8, 1933, respondent company sent to insured its check in the sum of $12.38, enclosed with a letter as follows: "On June 28th, we refunded to you an N.G. check given in payment of the loan interest due April 1st, 1933, on the above numbered policy. To-date this interest has not been paid, and in view of this the Company has authorized us to refund the premium, which was also due on April 1st.

We therefore, attach hereto our check No. 184255, drawn to your order for $12.38, to cover said refund, and regret to advise that your policy now stands lapsed on the books of the Company with this premium. We trust, however, that at your earliest convenience, you will take up the matter of reinstatement. We ask that you kindly make prompt use of our check." The said check was never cashed. Nor was the interest due April 1, 1933, ever paid, and no further payments of any kind appear to have been made under the policy or upon the loan. The insured died October 21, 1933, at the age of 65 years. Appellant's claim as beneficiary for benefits under the policy was denied by respondent company on the ground that the said policy of insurance was not in force and effect on the date of the insured's death.

In addition to the facts noted above the trial court found, upon undisputed evidence, that the said policy of insurance was automatically continued from April 1, 1933, as term insurance for the sum of $6,370 for a period of 189 days, purchased by $189.77, the amount of the said dividend, which the company had applied as reserve; that according to the company's published table of single premiums for term insurance in effect April 1, 1933, $1 reserve would carry $1,000 of insurance as automatic term insurance at age 65 for a period of 6.3371 days; that in figuring the period of said automatic term insurance the company had allowed the insured the full reserve value of the policy less the indebtedness.

The deposition of the company's actuary, read in evidence, showed that the policy had been carried as term insurance to October 7, 1933, and that if on the date the said policy lapsed the amount of the reserve value thereof had been increased by $12.38 the term insurance would have expired October 20, 1933.

Accordingly, the trial court concluded that the said policy of life insurance was of no force or effect on October 21, 1933, the date of the insured's death.

Appellant contends that the premium on the policy was paid to October 1, 1933; that the reserve on the policy carried it beyond October 21, 1933, the date of death of the insured; and that the "forfeiture provision" of the policy did not become final until 30 days after October 1, 1933. Appellant argues in support of her contentions that the premium paid by the insured April 1, 1933, by means of the dividend and his check for the difference, was never refunded, and that the insurance company had no authority or right to refund it; that the term "Indebtedness" used in the policy includes interest on loan as well as principal and the interest default should be disposed of by deducting the amount from the death benefit instead of using the default to lapse the policy; that there was a reserve of at least $125 on the policy on October 1, 1933; and that in any event the policy was still effective October 21, 1933, because the policy provisions under the heading "Reinstatement", above set forth, constituted a grace period for the payment of premiums, irrespective of the automatic term insurance provision.

The provisions of the policy, read together, indicate clearly, and without any ambiguity, that the policy was intended to lapse into term insurance immediately upon default in the payment of any premium, and, when there was an indebtedness to the company outstanding, such a lapse also occurred immediately upon default in the payment of any interest as well, but if the amount due was paid within one month after the due date, with interest, the policy would be restored to full force and effect as of the due date.

It is therefore evident that under the terms of the policy, nonpayment of the interest due April 1, 1933, caused the policy to lapse into term insurance as of that date, and immediately thereafter, subject to the right of the insured to have the policy restored to full force and effect if the defaulted interest, with interest thereon, were paid within one month after the due date, April 1, 1933.

[1] Appellant argues, however, that the provisions of the policy respecting the loan and the effect of the loan are ambiguous, and, reading the policy as a whole and resolving the ambiguity in favor of the beneficiary, the word "indebtedness" must be held to include interest as well as principal of the loan and that the nonpayment of the interest is disposed of by adding the interest to the principal and deducting the full amount of the "indebtedness" from the death benefit due and payable. But the policy expressly provides for another method of handling unpaid interest, namely, automatic term insurance upon default. As respondent points out, "appellant has failed to differentiate between what obligations of the insured make up the in-

debtedness on the policy and the effect upon the status of the policy resulting from the non-payment of said indebtedness", and that when the policy provided that "Any indebtedness to the Company will be deducted in any settlement of this Policy or of any benefit thereunder," it merely meant that at the time of any settlement of the policy, or any benefit thereunder, the indebtedness then existing would be deducted. It did not mean that all indebtedness must remain outstanding until such settlement was made or benefit received. See Burton v. Columbian, etc., Ins. Co., 20 Cal.App. 21, 127 P. 1037 (cited by respondent).

As is also pointed out by respondent, the provisions of the loan agreement, under which insured's indebtedness was incurred, are not inconsistent with the provisions of the policy above referred to.

[2] Since it appears that on April 1, 1933, there was outstanding against the policy an indebtedness equal to the full amount of the reserve at that time, there would have been no reserve left with which to purchase term insurance had it not been for the dividend declared as of that date. The policy would then have become forfeited on April 1, 1933, subject, however, to the right of the insured to have the same restored upon payment within thirty days of the amount due, with interest.

Under the policy as written, the insured having defaulted in an interest payment on April 1, 1933, any payment of premium on that date could not have served to keep the policy in full force or effect but could have only been applied to purchasing additional term insurance. In this respect, the uncontroverted evidence indicates that had respondent company credited insured with the payment of $12.38 made upon the premium as aforesaid, it would only have served to extend the term insurance to October 20, 1933, which, while close indeed, would still fall short of covering the insured on October 21, 1933, the date of his death.

[3] Under the facts as above noted it cannot be said that respondent company waived the provisions of the policy regarding automatic term insurance. Any forbearance on the part of respondent company was clearly conditioned upon payment by insured of the interest due.

Appellant's arguments as to the amount of reserve under the policy on October 1, 1933, and as to the said policy not having been forfeited until thirty days after October 1, 1933, are all based on the assumption that the policy could not have lapsed into term insurance on April 1, 1933, which, as is seen above, was the case under the provisions of the policy.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

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40 Cal.App.2d 673

MARR et al. v. POSTAL UNION LIFE INS. CO. et al.

Civ. 12031.

District Court of Appeal, Second District, Division 1, California.

Sept. 18, 1940.

Hearing Denied Nov. 9, 1940.

1. Frauds, statute of 🔑139(5)

In action against alleged undisclosed principal to recover on a note executed by alleged agent, parol evidence was admissible to prove the agency, as against objection that the statute of frauds rendered it inadmissible, where holders of note had completely performed on their part contract for sale of realty for which they had received the note. Civ.Code, § 1624, subd. 4, and §§ 2307, 2309, 2310; Code Civ.Proc. § 1973, subds. 4, 5.

2. Principal and agent 🔑145(2)

The contract of an agent who deals in his own name without disclosing that of his principal is the contract of the principal.

3. Principal and agent 🔑146(3)

Where innocent third persons are led into dealing with an apparent principal, they will be protected as against an undisclosed principal who is the actual purchaser, where the undisclosed principal has permitted the agent to hold himself out as the principal with full power to contract, the rights of such third persons depending not on actual authority, but on the conduct of the real principal which he is precluded from disputing.

4. Frauds, statute of ⚷139(1)

Where there has been full performance on the part of one seeking to enforce a contract, the doctrine of "estoppel" arises, and where it does arise, no writing is required, since courts will not permit a litigant to use the statute of frauds as an instrument with which to perpetrate fraud or oppression. Civ.Code, § 1624, subd. 4, and §§ 2307, 2309, 2310; Code Civ.Proc. § 1973, subds. 4, 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

5. Frauds, statute of ⚷139(1)

Where a contract made by one who is alleged to be the agent of another is required to be in writing, but there was no written authorization for the alleged agent to execute such contract, the alleged undisclosed principal may be "estopped" from setting up the lack of written authorization of his agent as a defense to the action of a third party to the contract, where the third party has fully performed on his part. Civ.Code, § 1624, subd. 4, and §§ 2307, 2309, 2310; Code Civ.Proc. § 1973, subds. 4, 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

6. Principal and agent ⚷145(4)

The fact that owners of realty when they entered into contract of sale to alleged corporate agent of alleged undisclosed principal obtained a financial statement of the affairs of the alleged corporate agent to determine value of collateral offered by the alleged corporate agent to secure payment of the alleged corporate agent's note, which collateral consisted of stock in the alleged corporate agent, did not constitute an "election" on the part of the owners of the realty to hold the alleged agent rather than the alleged undisclosed principal.

See Words and Phrases, Permanent Edition, for all other definitions of "Election".

7. Brokers ⚷91

Conduct of brokers who negotiated sale of realty to alleged agent was not binding on the vendors, so as to prevent them from holding alleged undisclosed principal liable.

8. Principal and agent ⚷189(4)

In action against alleged undisclosed corporate principal to recover on a note executed by alleged agent, evidence in support of plaintiff's claim, that alleged agent was the alter ego of the alleged undisclosed principal, did not constitute a fatal variance between the allegations of the complaint and such proof, where by its answer the alleged undisclosed principal denied that execution and delivery of the note was its act, performed by or through the instrumentality of its alleged agent, since any omission in the complaint was sufficiently cured by the express denial contained in the answer. Code Civ.Proc. §§ 469, 470.

9. Pleading ⚷388

Where defendant was not actually misled to its prejudice in presenting its defense, variance, if any, between allegations of plaintiff's complaint and plaintiff's proof could not be considered as a material variance. Code Civ.Proc. §§ 469, 470.

10. Corporations ⚷1

Before courts will disregard the corporate entity of one corporation and treat it as the alter ego of another, even though the other may own all the stock of the former, it must further appear that there is such a unity of interest and ownership that the individuality of the one corporation and the owner or owners of its stock has ceased, and further, that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice.

11. Corporations ⚷1

Before courts will disregard the corporate entity of one corporation and treat it as the alter ego of another, bad faith in one form or another must be shown.

12. Corporations ⚷1

Though the fact, standing alone, that a corporation remains inchoate without stockholders or stock, is not of itself determinative of an alter ego relationship on its part, nevertheless it does indicate that such corporation may exist merely to serve the interests of another, a corporation or an individual.

13. Corporations ⚷1

The fact that a corporation has no real or independent business of itself is of some importance in determining whether it is used simply as a conduit through which to conduct the business of another.

14. Corporations ⚿1

The fact that corporations employed the same attorney was a fact entitled to consideration in determining the question of alter ego.

15. Corporations ⚿1

The use of common offices by two corporations indicates, or at least supports, a conclusion that one of the corporations is the alter ego of the other corporation.

16. Corporations ⚿1

In action against insurance company to recover on a note executed by another company as part payment for realty, on ground that the other company acted as agent or as the alter ego of the insurance company, evidence justified conclusion by jury that the other company was merely the alter ego of the insurance company so as to authorize recovery as against the insurance company.

17. Principal and agent ⚿173(2)

In action against insurance company to recover on a note executed by another company as part payment for realty, on ground that the other company acted as agent or as the alter ego of the insurance company, complaints filed by insurance company against the other company and others in another action, in connection with the acquisition of the realty in question, were competent and material for purpose of proving ratification by insurance company of acts done by the other company in the other company's dealings with the plaintiff.

18. Appeal and error ⚿1170(9)

Where the District Court of Appeal was not warranted in saying that a different verdict would probably have occurred had alleged errors in instructions not occurred, it could not reverse the judgment. Code Civ. Proc. § 475; Const. art. 6, § 4½.

19. Appeal and error ⚿824

Where contention was raised for the first time at oral argument and subsequent to the filing of all briefs, in which it was not referred to at all, the District Court of Appeal could not give consideration thereto.

20. Insurance ⚿36

Where insurance company was an undisclosed principal with respect to the purchase of realty, it would not be permitted to escape liability on ground that the contract it caused to be made through its agent was illegal and unlawful under the Insurance Code. St.1935, p. 559, § 1150.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Minnie M. Marr and others, as trustees, against the Postal Union Life Insurance Company, and the Postal Underwriters, Inc., to recover on a note. From an adverse judgment, the Postal Union Life Insurance Company appeals.

Affirmed.

Euler & Subith, Louis J. Euler, Fred E. Subith, and G. M. Gannon, all of Los Angeles, and Charles Callahan, of Hollywood, for appellant.

Foster C. Phelps and Theodore W. Russell, both of Los Angeles, for respondents.

WHITE, Justice.

This action was instituted by plaintiffs as trustees and as members of a bondholders' protective committee against defendants, Postal Union Life Insurance Company and Postal Underwriters, Inc. The litigation is predicated upon a non-negotiable promissory note in the amount of $17,000, which note was received by plaintiffs as part of the consideration for the transfer by them of certain real estate known as the Royal Palms Hotel in the city of Los Angeles. The property in question was conveyed to defendant Postal Underwriters, Inc., and the note here sued upon was secured by 1,700 shares of the capital stock of defendant Postal Union Life Insurance Company.

The complaint presented two causes of action, by the first of which it was alleged that defendant Postal Union Life Insurance Company (hereinafter referred to as the insurance company) was an undisclosed principal in the transaction, and that in the execution of the note defendant Postal Underwriters Inc. (hereinafter referred to as the Underwriters) was, by virtue of precedent authorization, acting as an agent for the insurance company. The second cause of action charged that such agency was established by a subsequent ratification of the act of the alleged agent, the Underwriters. By its answer defendant insurance company denied any agency in connection with the transaction and further denied "that the execution and/or delivery of the said contract was the act of this defendant made and/or done through and/or by the said Postal Underwriters, Inc.". Defendant Underwriters admitted the execution of the note, but denied liability for the full amount thereof, alleging negligence and bad faith in the proceedings attendant upon the foreclosure of the collateral security.

Briefly epitomizing the factual situation, it appears that prior to March 14, 1935, plaintiffs were the owners of that certain real property known as the Royal Palms Hotel. Defendant insurance company is a California corporation engaged in the life insurance business. Defendant Underwriters is also a California corporation, doing a small amount of brokerage business in the insurance field, but in the main devoting its activities to the holding of legal title to properties which were encumbered in favor of the insurance company. About March 1, 1935, one Starke and one Ringgold, real estate brokers, approached T. J. Olsen, controller of the insurance company and also vice-president of the Underwriters, and B. D. Malone, treasurer and general manager of the insurance company, with a view to promoting a sale of the Royal Palms Hotel property. Some days later Starke and Ringgold discussed the possibility of a sale of the property with plaintiffs, the then owners thereof. As a result of negotiations an agreement of sale was entered into between plaintiffs and defendant Underwriters on March 14, 1935, wherein plaintiffs agreed to sell the hotel property for the sum of $19,100, payable $2,100 in cash and the balance by a promissory note executed by the Underwriters for $17,000, said note to be secured by 1,700 shares of stock of the insurance company. An escrow was thereafter opened, in which were deposited a deed from plaintiffs, a personal check of the aforesaid B. D. Malone in the sum of $4,100, and 1,700 shares of the capital stock of the insurance company, to be used as security, and the non-negotiable promissory note, the latter of which forms the basis of this action. On or about April 1, 1935, the deed was delivered to the Underwriters and plaintiffs received $2,100 in cash, the note, and the 1,700 shares of stock. The balance of $2,000 remaining of the $4,100 aforesaid was paid by the purchasers as a brokerage commission. Three payments were made on the note in the total sum of $1,765. Following default in payment, the pledged stock was sold at an alleged public pledge sale, upon which occasion it was purchased by the plaintiffs, who were the pledgees, for the sum of $10. It further appears that in June, 1936, an action was filed by the insurance company against the Underwriters and others to recover the Royal Palms Hotel property which had been deeded by the plaintiffs to the Underwriters on the theory that the Underwriters had acted in the transaction above outlined as the agent of the insurance company. It was plaintiffs' contention that the allegations in the complaint in the last-named action constituted the first notice they had of the alleged relationship of principal and agent existing between the defendants in the instant action. Thereafter the present lawsuit was filed by the plaintiffs herein.

Following trial before a jury a verdict was returned for plaintiffs in the sum of $11,235 plus $1,123.50 attorney's fees, the same being the amount claimed by plaintiffs in their complaint less the sum of $5,000 which the jury found was the fair value of and should have been realized from the collateral at the alleged public sale aforesaid. From the judgment entered pursuant to such verdict defendant insurance company alone prosecutes this appeal.

Appellant first contends that this being an action based upon an agreement for the sale of real estate, wherein it is sought to hold an alleged undisclosed principal, parol evidence is not admissible to prove the agency. Civ.Code, sec. 1624, subd. 4, and secs. 2307, 2309 and 2310; Code Civ.Proc., sec. 1973, subds. 4 and 5. The following special interrogatories were submitted to the jury:

"Was there any authority in writing or any note or memorandum thereof in writing and signed by the Insurance Company, given by the Insurance Company to the Underwriters to enter into the contract sued upon in this case?

"Was there any ratification in writing or note or memorandum thereof in writing and signed by the Insurance Company ratifying the acts of the Underwriters in entering into the contract sued upon in this case?"

[1-5] The jury answered both questions in the negative. It follows from the foregoing, argues appellant, that since the jury found specially that there was no written evidence of the agency the verdict was based on parol evidence, or on the alleged alter ego relationship to which reference will hereinafter be made. However, appellant's claim that the statute of frauds is applicable in the instant case cannot be

sustained. Where, as here, the contract sued upon had been completely performed by respondents, the aforesaid code sections cited by appellant have no application, and the appellant insurance company will not be permitted to avail itself of the statute of frauds to avoid liability on the contract. The reason for this rule is obvious in cases where, as here, respondents believed, and under the facts of the case had a right to believe, they were dealing with the actual purchaser. No citation of authority is required for the statement that it is the law that the contract of an agent who deals in his own name without disclosing that of his principal is the contract of the principal. Schnier v. Percival, 83 Cal.App. 470, 256 P. 1109. And where innocent third parties are led into dealing with an apparent principal they will be protected as against an undisclosed principal who is the actual purchaser when the latter has permitted the agent to hold himself out as the principal with full power to contract. The rights of such innocent parties in such a situation do not depend upon the actual authority of the party with whom they directly deal, but arise from the conduct of the real principal by which he is precluded from disputing, as against them, the existence of authority which he has allowed to be vested in the party with whom they are dealing. Duerr v. Sloan, 40 Cal. App. 653, 181 P. 407; Colquhoun v. Pack, 32 Cal.App. 97, 161 P. 1168; Geary St., etc., R. R. Co. v. Rolph, 189 Cal. 59, 207 P. 539. In other words, the authority of the agent under the facts here present rests upon the theory of estoppel. Where, as in the instant case, there has been full performance upon the part of the party seeking to enforce the contract, the doctrine of estoppel arises, and when it does arise no writing is required because the courts will not permit a litigant to use the statute of frauds as an instrument with which to perpetrate fraud or oppression. Respondents believed, as they had a right to believe, at the time the transaction was consummated, that they were dealing with the Underwriters as principal. Consequently respondents could not be expected to inquire as to the existence of written authority to the agent when they had no knowledge that the Underwriters was anything but the principal. For the protection of innocent parties it is ordained that where a contract made by one who is alleged to be the agent of another is required to be in writing and there was no written authorization for the alleged agent to execute such contract, the alleged undisclosed principal may be estopped from setting up the lack of written authorization of his agent as a defense to the action of a third party to the contract when the latter has fully performed upon his part. Corporation of America v. Harris, 5 Cal.App. 2d 452, 43 P.2d 307; Laack v. Dimmick, 95 Cal.App. 456, 273 P. 50. Therefore the trial court committed no error in admitting parol evidence in determining the question of agency and instructing the jury as to the effect of such evidence.

[6, 7] We do not find in the record any substantial evidence to support appellant's contention that respondents elected to hold the Underwriters as agent rather than the insurance company as principal. The interest of respondents in obtaining a financial statement of the affairs of the insurance company was but natural when the collateral offered by the Underwriters to secure payment of their note consisted of stock in the insurance company. Nor was the conduct of the brokers who negotiated the sale of the property binding on respondents.

[8, 9] We come now to a consideration of appellant's contention that the court erred in admitting evidence over its objection when such evidence was offered in support of respondents' claim that in the transaction under investigation the Underwriters was the alter ego of appellant insurance company. In this connection it is first urged that such proof constituted a fatal variance between the allegations of the complaint and such proof. We think not. By its answer appellant insurance company denied that the execution and delivery of the note was its act, performed by or through the instrumentality of its codefendant, Underwriters. By such denial appellant challenged proof that it was in any way connected with the execution and delivery of the note by the Underwriters. The genesis of the action as set up by the complaint was that appellant executed the promissory note by authorizing the Underwriters as its agent so to do, or that such act on the part of the Underwriters was later ratified by the insurance company. Any omission in the complaint with reference to alter ego was sufficiently cured by the aforesaid express denial as contained in the answer. Sebring v. Harris, 20 Cal.App. 56, 128 P. 7; Perkins v. Blauth, 163 Cal. 782, 127 P. 50; Bledsoe v. Stuckey, 47 Cal.

App. 95, 96, 190 P. 217; Vance v. Anderson, 113 Cal. 532, 45 P. 816. That appellant was not, as claimed, taken by surprise through the introduction of the issue of alter ego into the trial is strongly indicated by the opening statement of appellant's counsel to the jury, wherein he said: "* * B. D. Malone organized the Underwriters for the purpose of holding this real estate and for the purpose of transacting his other business; and instead of being the alter ego of a life insurance company, which it could not be under the law, it was the alter ego of B. D. Malone. * * * I am here representing the Postal Union Life Insurance Company, and we are entirely distinct and separate in this case, and the two corporations have no connection whatever, and the proof will show you that, and the proof will show you that they never did have any connection except that B. D. Malone, true, at one time controlled the Postal Underwriters, and also owned the controlling stock in the Postal Union Life Insurance Company. * * *" The foregoing immediately suggests that appellant's counsel was not surprised or misled by presentation of the alter ego theory at the trial, but on the contrary was fully prepared to meet such issue and defend against it. Not having actually misled appellant to its prejudice in presenting its defense, the variance, if any, between the allegations of the complaint and the proof cannot be considered as a material variance. Code Civ.Proc. secs. 469, 470.

[10, 11] We are now confronted with the question raised by appellant as to whether the evidence submitted on the issue of the Underwriters' being the alter ego of the insurance company was sufficient to justify the action of the trial court in submitting that question to the jury, and further, whether such evidence was sufficient to support an affirmative verdict based thereon. What we shall have to say in that regard will also serve to determine the sufficiency of the evidence to sustain the existence of an agency between the two corporations. Before the courts will disregard the corporate entity of one corporation and treat it as the alter ego of another, even though the latter may own all the stock of the former, it must further appear that there is such a unity of interest and ownership that the individuality of the one corporation and the owner or owners of its stock has ceased, and further, that the observance of the fiction of separate existence would under the circumstances sanction a fraud or promote injustice. In other words, bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence. Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.2d 709; Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641; Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780; Sunset Farms, Inc. v. Superior Court, 9 Cal.App.2d 389, 50 P.2d 106.

[12, 13] With these principles in mind, let us examine the evidence as to interlocking relations existing between the corporations whose status as independent entities is here in question. No stock of the Underwriters was ever issued. M. L. Malone, wife of B. D. Malone, was its president, and the latter owned or controlled approximately 20,000 of the total 25,000 outstanding shares of stock in the insurance company. The jury was not required to believe the testimony of W. R. Malone to the effect that he was holding 13,000 shares of B. D. Malone's insurance company stock as collateral security with power of voting the same, because the conduct of B. D. Malone in the management of the affairs of the insurance company at all times justified a conclusion contrary to the testimony of W. R. Malone. The evidence further warrants the conclusion that B. D. Malone controlled the insurance company, while his wife was president of the Underwriters. While the fact standing alone that a corporation remains inchoate without stockholders or stock is not of itself determinative of an alter ego relationship upon its part, nevertheless it does indicate that such corporation may exist merely to serve the interests of another—a corporation or an individual. Shorb v. Beaudry, 56 Cal. 446, 450; Clark v. Millsap, 197 Cal. 765, 779, 242 P. 918. In his opening statement counsel for appellant declared: "* * * B. D. Malone came in and bought the stock of the Postal Union Life Insurance Company from this other group, and in order to hold the title to this real property he organized this Postal Underwriters. Now, that was his company * * *." The reason for this, said appellant's counsel, was "because a life insurance company can't hold real property under the law". Ins. Code, sec. 1150, St.1935, p. 559. During the presentation of its defense herein appellant attempted to show that the Underwriters was an active insurance broker in its own right, and that the brokerage business was one of the principal purposes of its exist-

ence, but such effort was feeble, indeed. The proof indicated that its brokerage business was extremely meager. In fact, the commissions earned therefrom never exceeded $57.30 in any one month, and they varied in amount from that figure to as low as $7.29 per month. Further, the evidence showed that the assets of the Underwriters consisted almost exclusively of equities in some 107 parcels of real property, practically all of which real properties were incumbered in favor of the insurance company. The fact that a corporation has no real or independent business of itself, of course, is of some importance in determining whether it is used simply as a conduit through which to conduct the business of another. Eldridge v. Mowry, 24 Cal.App. 183, 185, 140 P. 978; Clark v. Millsap, supra.

[14, 15] It is further in evidence that while T. J. Olsen was vice-president and a director of the Underwriters and in active charge of its affairs, he received no compensation from the Underwriters for these services until about May, 1935, which was subsequent to the transaction now before us. From December, 1934, to June, 1935, Olsen was paid a salary of $200 per month by the insurance company of which he was controller, while his duties consisted of looking after the interests of the insurance company in the properties acquired by the Underwriters. Lois Mercer was a secretary employed by the insurance company, yet she performed stenographic services for the Underwriters as needed, and when her work for the latter corporation increased she moved to quarters occupied by it adjacent to the insurance company's executive offices. Her salary was paid exclusively by the insurance company, and the Underwriters paid her nothing during the period here under consideration. In fact, no officer of the Underwriters, except Olsen after the date above specified, was ever paid a salary by the Underwriters. Thus we find a situation where all active workers promoting the interests of the Underwriters did so actually as the paid employees of the insurance company. Prior to and at about the time of the transaction here involved, the books of account of the Underwriters consisted only of a cash book showing receipts and disbursements. It is also noteworthy that the two corporations during the first six months of 1935 employed the same attorney, a fact entitled to consideration in determining the question of alter ego. Kelly v. Ning Yung Ben. Soc., 2 Cal.App. 460, 463, 84 P. 321; Mirabito v. San Francisco Dairy Co., 8 Cal.App.2d 54, 59, 47 P.2d 530. The insurance company owned the building in which both corporations officed, the business office of the Underwriters being adjacent to the executive offices of the insurance company, and the Underwriters paid no office rent. The furniture and equipment in the office of the Underwriters' secretary was owned by the insurance company, while a common PBX board was used in handling the telephone service for both corporations, for which service the Underwriters paid nothing. Such use of common offices by two corporations is regarded as indicating, or at least supporting, a conclusion that one is the alter ego of the other. Eldridge v. Mowry, supra; Mirabito v. San Francisco Dairy, supra; Higgins v. Cal. Petroleum, etc., Co., 122 Cal. 373, 55 P. 155; Abney v. Belmont Country Club, 100 Cal.App. 12, 279 P. 829; Sunset Farms, Inc. v. Superior Court, supra.

[16] Appellants contend that there appears in the record evidence of sufficient substantiality, if believed, to warrant the conclusion that in the instant transaction the Underwriters, as agent for its undisclosed principal the insurance company, was to obtain title to the Royal Palms property in consideration of the payment to respondents of $4,100 and further obligating itself on a promissory note for an additional $17,000; thereupon the Underwriters were to or did in fact execute a $90,000 obligation in favor of the insurance company, with the Royal Palms Hotel as security. In exchange therefor the insurance company was to deliver to the Underwriters about $38,000 in trust deeds upon a number of small properties, which trust deeds were held by the insurance company. That the Underwriters would sell these small trust deeds for approximately $30,000, which would leave the Underwriters a profit of $7,000 or $8,000 above the $21,100 paid by it to respondents for the Royal Palms property. That as a result of these transactions the insurance company, having received a $90,000 trust deed in exchange for $38,000 in small trust deeds, would show a book profit of approximately $52,000. Upon reflection, however, such an arrangement does violence to reason and sorely taxes credulity when analysis reveals that under the aforesaid plan

the Underwriters would have paid out $21,100 for the property, then obligated itself to pay $90,000 more, or a total obligation of $111,100, all to obtain $38,000 in trust deeds. In other words, it is difficult to believe that the Underwriters magnanimously agreed with the insurance company to engage in a deal by which the Underwriters would suffer a loss of $73,100. We feel therefore that the jury was justified in concluding that these two corporations were not dealing with each other at arm's length, but on the contrary, it was never intended that these reciprocal obligations should be paid by one to the other, but were merely obligations undertaken by the corporations themselves to themselves as one organization for the purpose of building up the apparent or book financial condition of the insurance company, in which scheme the Underwriters was merely the alter ego of the insurance company.

[17] As further evidence of the relationship existing between the two corporations, there was offered at the trial an original and two amended complaints filed by appellant insurance company against the Underwriters and others in connection with the acquisition of the Royal Palms property by the Underwriters. In the original complaint appellant alleged directly and unequivocally that the Underwriters held title to the Royal Palms property for the insurance company; that the insurance company arranged to have $4,100 advanced to the Underwriters to consummate the transaction with respondents; that the Underwriters agreed to execute a $90,000 trust deed in favor of appellant insurance company upon the Royal Palms property; that the transaction was authorized by resolution of the board of directors of the insurance company; that the taxes on the property were paid on behalf of the insurance company by its president. Then follow allegations as to the manner in which the $90,000 trust deed and the equitable title to the hotel property were lost by the insurance company. This litigation was finally compromised. True, the last-mentioned evidence and exhibits were excluded by the trial court, but such exclusion was erroneous. The evidence was competent and material. It should have been admitted. It went far toward proving a ratification by the insurance company of the acts done by its agent in the latter's dealings with respondents.

The foregoing recital of the evidence convinces us that there were here present all the necessary elements to constitute an alter ego relationship between the two corporations, namely, (1) control of one by the other; (2) that one was but the mere conduit of the business of the other; (3) that recognition of the separate existence of the Underwriters would sanction a fraud and permit oppression and injustice. We entertain no doubt that the evidence clearly shows that the Underwriters had no real genuine interest in the Royal Palms property; that all it possessed was the naked legal title, held by it for the insurance company. Shea v. Leonis, 14 Cal.2d 666, 96 P.2d 332; Clark v. Millsap, supra; Higgins v. Cal. Petroleum, etc., Co., supra, 122 Cal. 376, 55 P. 155; Lost Burros Gold Mining Co. v. Inyo County Bank, 83 Cal.App. 679, 257 P. 209. The jury was the judge of the value and effect of evidence challenging the verity of the testimony here narrated.

[18] Appellant next complains of the giving of certain instructions and the refusal to give others. It would unduly prolong this already lengthy opinion to set forth the challenged instructions given and the proffered instructions rejected. Suffice it to say that a reading of all instructions given satisfies us that the jury was adequately, correctly and fairly instructed upon all issues tendered by the pleadings or raised by the evidence. And we might add that under the facts of this case as revealed by the evidence, even though it should be conceded that the giving or refusing of certain instructions was erroneous, nevertheless section 4½ of article VI of the Constitution and section 475 of the Code of Civil Procedure restrains us from reversing the judgment, because we would not be warranted in saying that a different verdict would probably have been rendered had such errors not occurred.

[19, 20] Upon the oral argument of this cause appellant contended that the contract between respondents and it through the Underwriters was illegal and void for the reason that the same contravened the provisions of section 1150 of the Insurance Code. Because it was raised for the first time at the oral argument and subsequent to the filing of all briefs, in the latter of which it was not referred to at all, we cannot give consideration thereto. However, we might say that the inhibitions of section 1150 of the Insurance Code may have fur-

nished the motive for appellant's doing what the jury found it did, viz., utilizing the Underwriters as a business conduit to hold title to real property, which under the law the insurance company was prohibited from doing. Being an undisclosed principal so far as its transactions with respondents were concerned, the insurance company should not now be permitted to escape liability on the ground that the contract it caused to be made through its alter ego with respondents was illegal and unlawful so far as the obligations of the insurance company thereunder were concerned.

The judgment should be affirmed, and it is so ordered.

We concur: YORK, P. J.; DORAN, J.

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40 Cal.App.2d Supp. 835

PEOPLE v. McNUTT.

No. Cr. A 1707.

Appellate Department, Superior Court, Los Angeles County, California.

Sept. 16, 1940.

1. Automobiles 🔑316

The statute defining offense of reckless driving as driving in willful or wanton disregard for the safety of persons or property is directed at a manner of driving, which necessarily includes a series of overt acts capable of observation and narration by witnesses, and, therefore, is not invalid as penalizing a mere state of mind, since reference to a state of mind is merely for a description of the prohibited acts. Vehicle Code, § 505, St.1939, p. 2107.

2. Constitutional law 🔑48

A construction of reckless driving statute which was reasonable and would make statute valid would be adopted rather than a construction which might make the statute invalid. Vehicle Code, § 505, St.1939, p. 2107.

3. Automobiles 🔑330

Under statute defining reckless driving as driving in willful or wanton disregard for the safety of persons or property, “wantonness” includes the elements of consciousness of one's conduct, intent to do or omit the act in question, realization of the probable injury to another, and reckless disregard of consequences. Vehicle Code, § 505, St.1939, p. 2107.

See Words and Phrases, Permanent Edition, for all other definitions of “Wantonness”.

4. Automobiles 🔑330

Under statute defining reckless driving as the driving in willful or wanton disregard for the safety of persons or property, a driver's conduct which exhibits reckless indifference to probable consequences with knowledge of facts and circumstances likely to result in injury becomes “wanton negligence”. Vehicle Code, § 505, St.1939, p. 2107.

See Words and Phrases, Permanent Edition, for all other definitions of “Wanton Negligence”.

5. Automobiles 🔑330

Under statute defining reckless driving as the driving in “willful” or wanton disregard for the safety of persons or property, the word “willful” means “intentional”, and the intention referred to relates to the disregard of safety and not merely to the act done in disregard of safety. Vehicle Code, § 505, St.1939, p. 2107.

See Words and Phrases, Permanent Edition, for all other definitions of “Intentional” and “Willful”.

6. Automobiles 🔑181(1), 330

There is no substantial difference between “willful misconduct” as used in automobile guest statute and “reckless driving” prohibited by statute defining the offense as driving in willful or wanton disregard for the safety of persons or property, and the two terms mean the same thing so far as they are concerned with the state of mind of the driver whose conduct is in question. Vehicle Code, §§ 403, 505, St.1935, p. 154; St. 1939, p. 2107.

“Willful misconduct” is defined as conscious reckless disregard or as wanton and reckless disregard of probable injury, or as necessarily involving deliberate, intentional, or wanton conduct in doing or omitting to perform acts with knowledge that serious injury is a probable, as distinguished from a possible, result.

See Words and Phrases, Permanent Edition, for all other definitions of “Reckless Driving” and “Willful Misconduct”.

7. Automobiles ⚷181(1), 330

Mere negligence, even though gross, is not "willful misconduct" under automobile guest statute or "reckless driving" under statute defining "reckless driving" as the driving in willful or wanton disregard for the safety of persons or property. Vehicle Code, §§ 403, 505, St.1935, p. 154; St.1939, p. 2107.

8. Automobiles ⚷330

Where motorist who, while driving between 30 and 35 miles per hour, collided with another automobile which was standing near curb when motorist first saw it but which backed into motorist's path, was guilty, at most, of merely failing to keep a proper lookout ahead, such failure might be found to constitute "negligence" but did not amount to "reckless driving" prohibited by penal statute defining "reckless driving" as the driving in willful or wanton disregard for the safety of persons or property. Vehicle Code, § 505, St.1939, p. 2107.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

Appeal from Police Court of City of Pasadena; Kenneth C. Newell, Judge.

Arlous J. McNutt was convicted for reckless driving, and he appeals.

Reversed, and new trial ordered.

Robert Wanamaker, of Pasadena, for appellant.

J. W. Joslyn, of Pasadena, for respondent.

SHAW, Presiding Judge.

Defendant was charged with the offense of reckless driving and convicted thereof. He appeals from the judgment, contending that the evidence is insufficient to show his guilt of that offense. With this contention we agree.

[1, 2] Reckless driving is made a misdemeanor by section 505 of the Vehicle Code, St.1935, p. 175, which, as amended in 1939, St.1939, p. 2107, defines that offense as follows, reading only the words outside the brackets: "Any person who drives any vehicle upon a highway in [such a manner as to indicate either a] wilful or [a] wanton disregard for the safety of persons or property is guilty of reckless driving." The amendment of 1939 consisted merely in eliminating from the section the words in brackets, which had theretofore been, but are not now, a part of it. Objection had been made to the certainty of the section, as it stood before the amendment, on account of its use of the word "indicate". While this objection was considered and held untenable, in People v. Smith, 1939, 36 Cal.App.2d Supp. 748, 750, 751, 92 P.2d 1039, and People v. Steel, 1939, 35 Cal.App.2d Supp. 748, 92 P.2d 815, it seems probable that the purpose of the amendment was merely to obviate this objection.

Objection was also made to the section as it stood before the 1939 amendment on the ground that it penalized a mere state of mind. This objection also we considered and held to be without foundation, in People v. Smith, supra. It arises again upon the present form of the statute, which penalizes one who "drives * * * in wilful or wanton disregard for the safety of persons or property." The objection is still untenable. It is still true that, as stated in People v. Smith, supra, 1939, 36 Cal.App.2d Supp. page 751, 92 P.2d page 1041: "The prohibition and punishment laid down by the statute are directed at a manner of driving, which necessarily includes a series of overt acts, capable of observation and narration by witnesses. The reference to a state of mind is merely for a description of the prohibited acts." While the intent of the section in this respect is not as clearly stated as before the amendment, such a construction of it is still reasonable and will be adopted rather than another which might make the provision invalid. The statute, so construed, is valid for the reasons stated in People v. Smith, supra.

[3-5] In this case we are required, as we were not in People v. Smith, supra, to construe the part of the statute descriptive of the forbidden driving. Its words are, "in wilful or wanton disregard for the safety of persons or property." The term "wantonness" is thus defined: "Wantonness includes the elements of consciousness of one's conduct, intent to do or omit the act in question, realization of the probable injury to another, and reckless disregard of consequences." Albers v. Shell Oil Co., 1930, 104 Cal.App. 733, 750, 286 P. 752, 759, quoting from 45 Corpus Juris 674. "Where the conduct of defendant exhibits reckless indifference to probable consequences, with knowledge of facts and circumstances likely to result in injury, it becomes wanton negligence." Kramm v.

Stockton, etc., Co., 1906, 3 Cal.App. 606, 618, 86 P. 738, 903, 904. The word "wilful" in this connection means "intentional". 68 Corpus Juris 268; People v. Faber, 1938, 29 Cal.App.2d Supp. 751, 755, 77 P. 2d 921; Green v. Stewart, 1930, 106 Cal. App. 518, 528, 289 P. 940; Norton v. Puter, 1934, 138 Cal.App. 253, 258, 32 P.2d 172; compare Penal Code, section 7, subd. 1. The intention here referred to relates to the disregard of safety, etc., not merely to the act done in disregard thereof. See Howard v. Howard, 1933, 132 Cal.App. 124, 129, 22 P.2d 279, and Meek v. Fowler, 1935, 3 Cal.2d 420, 425, 45 P.2d 194, discussing "wilful misconduct".

[6] Consideration of these definitions at once suggests the strong resemblance between the "reckless driving" here in question and the "wilful misconduct" which, under the guest statute (now section 403 of the Vehicle Code, St.1935, p. 154), renders a driver liable for injuries to his guest. Indeed, many of the judicial definitions of "wilful misconduct"—none is found in the code—use the words "reckless" and "wanton". See Meek v. Fowler, 1935, 3 Cal.2d 420, 426, 45 P.2d 194; Parsons v. Fuller, 1937, 8 Cal.2d 463, 468, 66 P.2d 430; Porter v. Hofman, 1938, 12 Cal. 2d 445, 448, 85 P.2d 447; Norton v. Puter, 1934, 138 Cal.App. 253, 258, 259, 32 P.2d 172; Rhoads v. Studley, 1936, 15 Cal.App. 2d 726, 728, 59 P.2d 1082, 1083. In Porter v. Hofman, supra, 12 Cal.2d at page 449, 85 P.2d at page 449, wilful misconduct under the guest statute was characterized as "conscious reckless disregard of their [the guests'] safety", which is substantially the same as the statutory definition of reckless driving; and in Rhoads v. Studley, supra, it was referred to as, "wanton and reckless disregard of probable injury to the guest", which does not materially differ from that definition. In Meek v. Fowler, supra, 3 Cal.2d page 426, 45 P.2d page 197, the court quoted and approved this language defining "willful misconduct": "Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result." (Emphasis by the court.) In Parsons v. Fuller, supra, 1937, 8 Cal.2d page 468, 66 P.2d page 432, the court, in defining "willful misconduct", quoted and approved the following statement as correct: "Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, *or wanton* conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, *that danger is likely to result therefrom.*" (Emphasis by the court.) This was also quoted and approved in Porter v. Hofman, supra, 1938, 12 Cal.2d 445, 447, 85 P.2d 447. In Norton v. Puter, supra, 1934, 138 Cal.App. 253, 258, 259, 32 P.2d 172, 174, the court used, in defining the term "wilful misconduct", these words from a Massachusetts decision, In re Burns, 218 Mass. 8, 105 N.E. 601, Ann. Cas.1916A, 787: "the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." This use of the quotation was followed with approval in Parsons v. Fuller, supra, 1937, 8 Cal.2d page 468, 66 P.2d 430, and Porter v. Hofman, supra, 1938, 12 Cal.2d 445, 448, 85 P. 2d 447. On consideration of all these authorities, we find no substantial difference between wilful misconduct and reckless driving, and conclude that they are in truth the same thing, so far as they are concerned with the state of mind of the driver whose conduct is in question, so that the decisions construing the term "wilful misconduct" may be applied to the statutory provision prohibiting "reckless driving".

[7] These decisions have thoroughly settled the rule that mere negligence, even though gross, is not wilful misconduct. Kastel v. Stieber, 1932, 215 Cal. 37, 47, 8 P.2d 474; Meek v. Fowler, supra, 1935, 3 Cal.2d 420, 426, 45 P.2d 194; Parsons v. Fuller, supra, 1937, 8 Cal.2d 463, 468, 66 P.2d 430; McCann v. Hoffman, 1937, 9 Cal.2d 279, 281, 70 P.2d 909; Weber v. Pinyan, 1937, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407; Porter v. Hofman, supra, 1938, 12 Cal.2d 445, 448, 85 P.2d 447. Such negligence also falls short of constituting reckless driving.

[8] The evidence here, viewed in the light most favorable to the judgment, shows nothing more than negligence. The defendant was driving his Ford car southerly on Hill Avenue, in Pasadena, and collided with a Buick car driven by the witness Larson, which had been going in the same direction but had stopped because of its driver's discovery of a cross street for

which he was looking, and had then backed up to enable the driver to turn east into that street, which extended easterly but not westerly from Hill Avenue. According to Larson's testimony he had stopped for about 12 seconds after his backing and was signaling for a left turn, when the impact occurred. It was stipulated that the west half of the roadway of Hill Avenue was 24 feet wide; and the evidence shows without dispute that before the Larson car backed, it was near the curb, the defendant's car was near the center line and there was ample room for defendant's car to pass the Larson car without hitting it. Defendant testified that he first saw the Larson car when it was standing near the curb and he then was driving between 30 and 35 miles per hour and had ample room to pass; that when he was about 40 feet north of the intersection he noticed the car again; that "the next he knew" it had backed directly into his path, and that he "tried to stop but did not have time or room." There is no evidence tending to show that before defendant tried to stop he saw the Larson car in his path or knew that Larson intended to back, was backing or had backed, nor is there anything to show that the speed at which defendant was driving was illegal.

The most that can be made of these facts is that defendant perhaps failed to keep a proper lookout ahead of him and for that reason failed to see the Larson car back and stop ahead of him. Such failure on his part could be found to constitute negligence, but it does not amount to reckless driving, under the circumstances and the rules above stated. See Stacey v. Hayes, 1939, 31 Cal.App.2d 422, 427, 429, 88 P.2d 165; Parrett v. Carothers, 1936, 11 Cal.App.2d 222, 227, 53 P.2d 1023; both decided under the guest statute and declaring failure to keep a proper lookout not to be misconduct.

The judgment is reversed and a new trial is ordered to be held in the Superior Court of Los Angeles County.

We concur: BISHOP, J.; SCHAUER, J.

16 Cal.2d 238

ROBINSON v. GEORGE et al.

L. A. 17477.

Supreme Court of California.

Sept. 25, 1940.

1. Trial ⚷142

A trial court can grant a nonsuit only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff, if such a verdict were given.

2. Master and servant ⚷330(1, 3)

The fact that one is performing labor for another is prima facie evidence of employment, and such person is presumed to be a servant in absence of evidence to contrary.

3. Master and servant ⚷332(1)

Where arrangements between an employer and employee are entirely oral, a determination as to relationship of employer and employee is within province of jury.

4. Master and servant ⚷332(3)

If terms of contract of employment are precise and explicit and evidence is reasonably susceptible of but a single inference, question of whether one is a servant or an independent contractor becomes a question of law for trial court.

5. Automobiles ⚷245(32)

In action against newspaper company and newspaper carrier, whose duties as route carrier terminated before 6 p. m. but who was subject to call at his home by company's district manager until 7:30 p. m., for injuries received when carrier's automobile struck plaintiff while carrier was on way home from making last delivery at about 8 p. m., whether carrier, at time of accident, was an independent contractor or a servant of company, was for jury.

6. Automobiles ⚷242(6)

In action against newspaper company and newspaper carrier, whose duties as route carrier terminated before 6 p. m. but who was subject to call at his home by company's district manager until 7:30 p. m., for injuries received when carrier's automobile struck plaintiff while carrier was on way home from making last delivery at about 8 p. m., plaintiff's showing that carrier was rendering services for company was sufficient to give rise to presumption that a "master and servant relationship" existed between carrier and company.

See Words and Phrases, Permanent Edition, for all other definitions of "Master and Servant Relationship".

7. Master and servant ⚷318(1)

In determining status of an "employee", as distinguished from an "independent contractor", it is the existence of right of control and not the use or lack of use of such right that is important.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

8. Automobiles ⚷244(26)

In action against newspaper company and newspaper carrier, whose duties as route carrier terminated before 6 p. m., but who was subject to call at his home by company's district manager until 7:30 p. m., for injuries received when carrier's automobile struck plaintiff while carrier was on way home from making last delivery at about 8 p. m., plaintiff's evidence showing that carrier was rendering services for company would have been sufficient to support finding of an "employer-employee relationship" between carrier and company at time of accident where no evidence was introduced by company to rebut presumption which arose from plaintiff's evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer-Employee Relationship"

9. Automobiles ⚷242(6)

In action against newspaper company and newspaper carrier for injuries received when carrier's automobile struck plaintiff where company claimed that carrier was an independent contractor, after plaintiff established a prima facie case against company, burden shifted to company which could then prove, if possible, that carrier was an independent contractor.

10. Automobiles ⚷197(7)

Where plaintiff was struck by a newspaper carrier's automobile while carrier was on way home after making last delivery, and carrier had no definite area of employment and had not contracted with newspaper company to do a "job" of delivering papers, but remained on call and made deliveries as ordered by company's district manager, the "going and coming rule" did not apply to relieve company from liability for plaintiff's injuries notwithstanding that carrier received orders from manager by telephone at carrier's home, since case was within the "special errand rule" which is an exception to the "going and coming rule".

See Words and Phrases, Permanent Edition, for all other definitions of "Going and Coming Rule" and "Special Errand Rule".

11. Master and servant ⚷302(1, 6)

The "going and coming rule", which declares that employees while going to or returning from their places of employment are not within the scope of their employment, is applied in those instances where a person is employed to perform services at or in a particular plant or upon particular premises, and where accident or injury occurs while he is going to, or coming from, that place of employment, or where employee has left place of employment on an errand personal to himself.

12. Master and servant ⚷302(1)

Cases where employment itself is one in which an employee is required to travel from place to place at employer's will are an exception to the "going and coming rule", and risks of such travel are directly incident to employment.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Harry T. Robinson against Melvin W. George and the Citizen-News Company, and others, to recover damages for injuries suffered by plaintiff when struck by an automobile driven by defendant Melvin W. George. From a judgment of nonsuit as to defendant Citizen-News Company, plaintiff appeals.

Judgment reversed.

For prior opinion, see 98 P.2d 519.

Charles A. Son and Clarence G. Weisbrod, both of Los Angeles, for appellant.

Lyndol L. Young and Joseph H. Edgar, both of Los Angeles, for respondent Citizen-News Co.

Paul Palmer, of Hollywood, and Charles Peckham, of Los Angeles, for defendants Melvin W. George, William F. George, and Grace George.

CARTER, Justice.

Plaintiff herein appeals from a judgment of nonsuit rendered in favor of the defendant Citizen-News Company in an action for personal injuries.

In the complaint it was alleged that plaintiff sustained certain personal injuries as the result of the negligent operation of an automobile by defendant Melvin W. George. It was also alleged that defendant George was an agent and employee of the defendant Citizen-News Company, a corporation, and, that the accident occurred while he was engaged in performing his duties and within the scope of his employment. This allegation was denied by the defendant corporation in its answer. At the close of plaintiff's case, and before defendants had introduced any evidence, a motion was made for nonsuit on behalf of the defendant corporation on the ground "that the nature of his (George's) engagement with the defendant (corporation) was that of an independent contractor, and if he could be considered an agent he certainly had completed his duties prior to the happening of the accident and was then on his own business going home and not acting for his employer". Said motion for nonsuit was granted. Plaintiff appeals from the judgment entered thereon, contending that said action of the trial court constitutes reversible error.

It appears from the testimony taken at the trial that defendant George was regularly employed by the defendant corporation as a news-carrier to deliver papers during the afternoon hours. His duties as such route-carrier terminated before 6 p. m. George and the corporation had an arrangement whereby after his daily duties as route-carrier were finished, George would be subject to telephone calls at his home by the district manager for the defendant corporation, who would notify him of any complaints made by subscribers that they had not received delivery of their papers. Thereupon George would deliver copies of the newspaper to the addresses from which complaints had come in. In so doing he furnished his own automobile which he used for both his daytime and evening deliveries. His compensation for delivering these "complaints" was referred to as a "commission", and consisted of fifteen cents or twenty-five cents for each delivery according to the zones in which the deliveries were made. It was paid in a lump sum at the end of every month.

Sometimes George telephoned from his home to the district manager to secure his deliveries. The district manager remained on duty until 7:30 p. m. only, and the period during which George was thus subject to call was between the hours of 6 and 7:30 p. m. on each day.

The accident in question occurred on West Adams street near Washington boulevard in the city of Los Angeles, at about 8 o'clock p. m. in the evening of April 13, 1937. At that time George had finished all of his deliveries and was on his way to his home from the point of his last delivery which was approximately five blocks from the scene of the accident.

The questions presented by this case are: One, whether defendant George was at the time of this accident a servant of the defendant corporation; and, two, if so, whether he was at the same time acting within the scope of his employment.

[1] In reviewing a judgment of nonsuit, it must always be borne in mind that a court can grant a nonsuit only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given. Gish v. Los Angeles Railway Corporation, 13 Cal.2d 570, 90 P.2d 792; Newson v. Hawley, 205 Cal. 188, 270 P. 364; Cain v. Marquez, 31 Cal.App.2d 430, 88 P.2d 200; Vermont, etc., Co. v. Declez, etc., Co., 135 Cal. 579, 67 P. 1057, 56 L.R.A. 728, 87 Am.St. Rep. 143.

It is in the light of these rules that we shall consider plaintiff's case.

The defendant corporation contends that the plaintiff presented no evidence whatsoever establishing an agency relationship between itself and the defendant George; but that, instead, said evidence proved that the status of defendant George was that of an independent contractor.

[2] The rule, as stated by plaintiff, is that the fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary. Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570; 13 Cal.Jur. 1041, and cases cited.

Defendant, however, cites the case of Hammel v. Keehn, 18 Cal.App.2d 387, 63 P.2d 1165, to the effect that the inference that one found performing service for another is his servant may be destroyed by other evidence so that a nonsuit is warranted. Defendant contends that the evidence produced by plaintiff, herein, dispelled the disputable presumption which he sought to invoke in his favor.

In the case of Hammel v. Keehn, supra, the factors which dispelled the presumption of a master and servant relationship were that the services of calling for and delivering automobiles was rendered by a partnership which not only used its own equipment but rendered the same service for another auto agency. Each request for service was determined to be a new contract. The evidence to which defendant refers in the instant case as dispelling such presumption is, that George allegedly was not performing work for the defendant but was on his way home at the time of the accident, a point which we will discuss hereafter in this opinion, and also that whatever services he had been engaged in prior to his going on his way home were performed under a contract, the terms of which are not in dispute.

[3, 4] As for the latter portion of defendant's statement, where the arrangements between an employer and employee are entirely oral as in this case, a determination as to the relationship of these parties is within the province of the jury. Fechtner v. Costa, 16 Cal.App.2d 691, 61 P.2d 473. Of course, it is true, as the defendant corporation asserts, that if the terms of the contract are precise and explicit and the evidence is reasonably susceptible of but a single inference, the question of whether one is a servant or an independent contractor becomes one of law for the court. Chapman v. Edwards, 133 Cal.App. 72, 24 P.2d 211; Fechtner v. Costa, supra.

[5, 6] We are unable to agree with the contention of the defendant corporation that since there is no conflict in the evidence as to the terms of the contract between itself and defendant George, the only conclusion which can be reached from the evidence is that defendant George was an independent contractor. Substantially, the only evidence concerning the character of defendant George's relationship with the defendant corporation was that which de-

scribed the nature of George's duties and the manner of their performance together with the method of paying compensation therefor. Plaintiff's showing that defendant George was rendering services for the defendant company was sufficient to give rise to the presumption that the relation of master and servant existed between them. The fact that defendant George was being compensated for said services indicated that they were not being rendered gratis.

The defendant corporation cites many cases which set forth the various tests which have been applied in determining whether a relationship is that of master and servant or independent contractor. Preo v. Roed, 99 Cal.App. 372, 278 P. 928; Hammel v. Keehn, supra; Coleng v. Ramsdell, 19 Cal.App.2d 376, 65 P.2d 365; Batt v. San Diego Sun Publishing Co., Ltd., 21 Cal.App.2d 429, 69 P.2d 216. Applying these tests to the instant case, defendant contends that no master and servant relationship existed between itself and George, because it was interested only in the result of his work—that is the delivery of newspapers to those subscribers who complained that they had not received their copies; that it was not concerned in and had no interest in the means by which any of such deliveries were made; that it did not retain the right to control or direct the mode and manner in which the work was done; that there was no provision that defendant George was personally to make the deliveries; or that either defendant George or the defendant corporation could not have terminated their relationship at any time without breaking a contract.

[7] It must be pointed out that neither does it appear from the evidence that any of these contentions are true. The testimony in the record with regard to George's duties does not show that the defendant corporation exercised any particular control over the details thereof, but, as plaintiff maintains, in determining the status of an employee as distinguished from an independent contractor, it is the existence of the right of control and not the use or lack of use of it that is important. Phillips v. Larrabee, 32 Cal.App.2d 720, 90 P.2d 820; and it does not appear herein that the defendant corporation did not possess such right.

[8] Since practically the only evidence as to the nature of the relationship of the parties is the presumption arising out of the fact that defendant George was rendering services to the defendant corporation, the jury could have found that he was doing it in the capacity of a servant; and, since no evidence was introduced by the defendant corporation to rebut this presumption, we are of the opinion that the evidence would have been sufficient to support a finding of an employer-employee relationship. Fechtner v. Costa, supra; Huddy v. Chronicle Publishing Co., Cal. Sup., 103 P.2d 421.

[9] Of course, after plaintiff establishes a prima facie case, the burden shifts to the defendant corporation which then may prove, if it can, that defendant George was an independent contractor. Phillips v. Larrabee, supra; Hillen v. Industrial Accident Commission, supra; Hartford Accident & Ind. Co. v. Industrial Accident Commission, 93 Cal.App. 313, 269 P. 733.

The defendant company takes the position that, even if defendant George could be termed its servant, no legal relationship existed between them at the time of the accident, for the reason that defendant George was then engaged in a purely personal act—that of returning to his home.

[10, 11] In support of this position, the defendant corporation cites many cases decided in accordance with "the going and coming rule" which declares that employees while going to or returning from their places of employment are not within the scope of their employment, for the reason that they are not at that time rendering a service growing out of or incidental thereto. 27 Cal.Jur. 380; Mauchle v. Panama-Pacific Int. Exp. Co., 37 Cal.App. 715, 174 P. 400; Nussbaum v. Traung Label, etc., Co., 46 Cal.App. 561, 189 P. 728; California C. I. Exchange v. Industrial Accident Commission, 190 Cal. 433, 213 P. 257; Dellepiani v. Industrial Accident Commission, 211 Cal. 430, 295 P. 826. The rule in the above cases is not applicable here for the reason that the instant case comes within an exception to the "going and coming" rule known as the "special errand" rule. The rule generally known as the "going and coming" rule is applied in those instances where a person is employed to perform services at or in a particular plant or upon particular premises and where an accident or injury occurs while he is going to or coming from that place of employment, or where the employee has left the place of employment on an errand personal to him-

self. Makins v. Industrial Accident Commission, 198 Cal. 698, 247 P. 202, 49 A. L.R. 411. In the Makins case, supra, it was held that a news-carrier who performed his duties within an area of definite boundaries, and was injured therein, was injured at his place of employment and was entitled to be compensated therefor.

In the instant case the defendant George had no definite area of employment, unless the entire city could be termed such, for each delivery which he made might be in an entirely different zone or direction. Furthermore, to paraphrase the language used in Hillen v. Industrial Accident Commission, supra, 199 Cal. at page 581, 250 P. 570, it does not appear that defendant George contracted to do a "job" of delivering papers, but to remain on call and make each delivery as he was ordered. There is no evidence that he was required to or would be allowed to make all the deliveries in a certain area, or a certain portion of the whole number of deliveries regardless of area.

It is our view that each time he was directed by the district manager to make deliveries to certain given addresses he was sent on a special errand by the defendant corporation and came within the provision of the special errand rule which is stated in 1 Campbell on Workmen's Compensation, section 182, page 171, as follows: "When the employee is sent on a special errand, either as part of his regular duties or, at the express order of his employer, the former is under the Act and injuries sustained in the course thereof are compensable from the time of his beginning the assignment to its completion; that is both going and coming or until he deviated therefrom for personal reasons." It was neither alleged nor proved herein that defendant George deviated in any manner from his line of duty.

[12] In this state it has been held that cases where the employment itself is one in which an employee is required to travel from place to place at the will of the employer are an exception to the "going and coming" rule and the risks of such travel are directly incident to the employment itself. London, etc., Co. v. Industrial Accident Commission, 35 Cal.App. 681, 170 P. 1074.

A case which we regard as being particularly applicable to the present set of facts is that of State C. I. Fund v. Industrial Accident Commission, 89 Cal.App. 197, 264 P. 514. In that case a salesman was requested to return to the store at night, in the evening after his usual business hours, and to remain on the premises while an electrician repaired a broken switch. The employee returned to the store at about 7 o'clock, remained there until 10 and when the electrician had completed his work, then departed for his home. While transferring from one car to another on his way home he fell, was injured, and as a result of said injury, died. The court in 89 Cal.App. on page 200 therein, 264 P. on page 515, said that: "Obviously, the service decedent was performing on the night he was injured did not have its inception at the store upon his arrival there, nor did it end there immediately upon leaving. It began the instant he left his home on the errand to go to the store for the purpose of allowing the electrical work to be done; and if, as has been held, the 'going and coming' rule does not apply to an employee who has sustained an injury in performing a business errand for his employer while going home (Sun Indemnity Co. v. Industrial Accident Commission, 76 Cal.App. 165, 243 P. 892), it would not be reasonable to hold that the rule should apply where the employee is injured while returning to his home from the performance of a business errand. As indicated, it was in effect held in Sun Indemnity Co. v. Industrial Accident Commission, supra, that the 'going and coming' rule should not be held to apply where the employee was injured while primarily engaged in a business errand for his employer, notwithstanding that he was at the time returning home after having finished his day's work; and substantially the same principle was involved in Western Pacific R. R. Co. v. Industrial Accident Commission, 193 Cal. 413, 224 P. 754, except in the latter case the accident to the employee happened after leaving his home."

According to the arrangement between them the defendant corporation telephoned its order to defendant George at his home, or he telephoned from there to receive his orders. In the eyes of both, it might be said that for all intents and purposes George's home was his place of business. It was the place to which the defendant's district manager transmitted its orders, it was the point from which defendant George made the deliveries thus ordered. It was the point to which he might return to remain or to receive other orders. Certainly if he had been required to remain at the office of his employer to receive the names of the missed subscribers, it should not have been disputed that he was on a special errand and that his employment continued until said "special errand" was completed and he had returned to his point of departure. The mere fact that the parties agreed upon a different point at which to receive orders and from which they were to be executed can scarcely be said to alter the situation.

We are of the opinion that sufficient evidence was presented by the plaintiff to support a verdict had one been rendered in his favor. The judgment of nonsuit is therefore reversed.

We concur: GIBSON, C. J.; EDMONDS, J.; SHENK, J.; HOUSER, J.; YORK, Justice pro tem.; SPENCE, Justice pro tem.

MOORE et al. v. PURSE SEINE NET et al.*

L. A. 16192.

Supreme Court of California.

Sept. 21, 1940.

Rehearing Granted Oct. 21, 1940.

1. Admiralty 🔑1
States 🔑4

A state may not constitutionally adopt and enforce laws which materially interfere with harmony and uniformity of the maritime law in its international and interstate relations, or which contravene a paramount act of Congress. U.S.C.A.Const. art. 3, § 2.

2. Admiralty 🔑1

Since admiralty jurisdiction is vested exclusively in the courts of the United States, no state court may conduct proceedings according to the course of admiralty or administer admiralty remedies, and its proceedings are limited to those cognizable at common law. U.S.C.A. art. 3, § 2.

3. Admiralty 🔑4

Jurisdiction in admiralty depends on maritime subject matter and not upon source or character of the substantive law which is being administered, and, if the property proceeded against is a thing maritime and the place of seizure is on navigable waters, the cause is clearly within maritime jurisdiction, and it is immaterial whether the substantive law which authorizes the seizure is a law of the United States or of a state. U.S.C.A.Const. art. 3, § 2.

4. Admiralty 🔑6

Where net on fishing vessel in navigable waters is necessary to the ship's enterprise and indispensable for accomplishments of objects of particular voyage, it is a part of the vessel, although it is not required for navigation, for purpose of determining whether state courts have jurisdiction to adjudge net forfeited because of its use in violation of state law. St.1933, p. 394.

5. Admiralty 🔑6

The criterion for determining whether any vessel or its appurtenances are subject to admiralty jurisdiction is business or employment for which it is intended, or may be used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion, and if business or employment of vessels appertains to travel, or trade and commerce on public navigable water, it is sufficient and admiralty jurisdiction attaches. U.S.C.A. art. 3, § 2.

6. Admiralty 🔑4

The transportation back to land of fish caught in navigable waters was an activity in aid of trade and commerce and within admiralty jurisdiction. U.S.C.A.Const. art. 3, § 2.

7. Admiralty 🔑6

A net carried by a fishing vessel in navigable waters was a part of the "appurtenances" of the vessel or part of her "tackle, apparel, and furniture" and was in legal contemplation a part of the vessel itself, and a subject of admiralty jurisdiction. U.S.C.A.Const. art. 3, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Appurtenances" and "Tackle, Apparel, and Furniture".

8. Admiralty 🔑2

Under provision of Judicial Code saving to suitors in admiralty the right of a common-law remedy where the common law is competent to give it, it is not a remedy in the common-law courts which is saved, but a common-law remedy, and a proceeding in rem as used in the admiralty courts is not a remedy afforded by the common law, but is a proceeding under the civil law, and when used in the common-law courts it is given by statute. Jud.Code, § 256, 28 U.S.C.A. § 371.

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* Subsequent opinion 118 P.2d 1.

9. Admiralty ⚿23

The state courts lacked jurisdiction of proceeding to have adjudged forfeited a net which was allegedly used on a fishing vessel in navigable waters in violation of state statute, since such a proceeding was in rem against a thing maritime seized in navigable waters and federal court had exclusive jurisdiction. St.1933, p. 394; U.S.C.A.Const. art. 3, § 2.

10. Admiralty ⚿1

The right to proceed in rem is distinctive remedy of the admiralty and hence administered exclusively by the United States courts in admiralty, and no state can confer jurisdiction upon its courts to proceed in rem, nor can Congress give such power to a state, since it would be contrary to the constitutional grant of such power to the federal government. U.S.C.A.Const. art. 3, § 2.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by E. C. Moore, I. Zellerbach, and A. T. Jergens, as the Fish and Game Commission of the State of California, against Purse Seine Net, approximately 325 fathoms long, 32 fathoms deep, approximate size of mesh five to eight inches, and others, to have adjudged forfeited the net. From a judgment adjudging the net forfeited, defendants appeal.

Reversed, with directions.

For prior opinion, see 98 P.2d 766.

Alfred T. Cluff and Sawyer & Cluff, all of Los Angeles, and Arch E. Ekdale, of San Pedro, for appellants.

Earl Warren and U. S. Webb, Attys. Gen., and Paul D. McCormick, Deputy Atty. Gen., for respondents.

EDMONDS, Justice.

In a statutory proceeding, a large purse seine net was adjudged forfeited to the Fish and Game Commission of the State of California because of a use which the court found was unlawful. The appellants were the owners of the net at the time it was seized.

The facts are undisputed, and the only question for decision is whether the court had jurisdiction to entertain the proceeding. The appellants do not challenge the state's power to regulate fishing in its territorial waters, to close certain waters to fishing with nets, and to provide by law for the forfeiture of nets used in violation of its regulations. But they contend that as the present proceeding is one in rem against a thing maritime seized in navigable waters, the federal courts have exclusive jurisdiction.

When seized the net was being used by the purse seine fishing boat "Reliance", on which it belonged in fishing operations. It is conceded that the boat was then within waters in which the taking of fish by net was unlawful.

The Fish and Game Commission filed its petition in the superior court reciting these facts and asking for a judgment declaring the net to be a public nuisance, forfeiting it, and ordering its destruction or sale. Upon the filing of this petition, the court ordered public notice of the time and place of its hearing to be given. On the day fixed, the appellants appeared and filed their claim as owners of the net. The judgment of forfeiture followed.

The principal contention of the appellants is that as the thing seized was part and parcel of a ship, the superior court has exercised admiralty jurisdiction in a proceeding in rem brought to accomplish a maritime forfeiture of a maritime object in accordance with the conventional procedure of courts of admiralty. This, they say, constitutes an invasion of the exclusive province of the United States courts upon whom admiralty jurisdiction is conferred by the Constitution of the United States and the acts of congress. In support of the judgment, the respondent insists that as the state may validly legislate to protect fish and game, its courts may enforce the penalties of a statute enacted for that purpose.

[1] In any maritime case there are two fields in which conflict may occur between the laws and judicial proceedings of a state and those of the United States. The first is in the field of substantive law. A state may not constitutionally adopt and enforce laws which materially interfere with the harmony and uniformity of the maritime law in its international and interstate relations, or which contravene a paramount act of congress. This is not a conflict of jurisdiction and the question concerns only substantive law.

[2] But conflict may occur in another field. As admiralty jurisdiction is vested exclusively in the courts of the United States, no state court may conduct pro-

ceedings according to the course of admiralty or administer admiralty remedies. Its proceedings are limited to those cognizable at common law.

[3] In this case the appellants do not claim that there is any conflict between the substantive provisions of the California Fish and Game Code, St.1933, p. 394, under which the proceeding was brought, and maritime law. But lack of conflict in this regard is not determinative of the case, for jurisdiction in admiralty depends upon maritime subject-matter and not upon the source or character of the substantive law which is being administered. If the property proceeded against is a thing maritime and the place of seizure is on navigable waters, the cause is clearly within the maritime jurisdiction, and it is immaterial whether the substantive law which authorizes the forfeiture is a law of the United States or of a state.

[4] Admittedly the net in this case was seized upon navigable waters. The vessel from which it was taken was engaged in fishing, and the net was a part of her equipment. If it was necessary to the ship's enterprise and indispensable for the accomplishments of the objects of the particular voyage, it was, in legal contemplation, a part of the vessel, although it was not required for navigation. Turner v. United States, 2 Cir., 27 F.2d 134; The Buffalo, D.C., 148 F. 331; The Edwin Post, D.C., 11 F. 602; The Witch Queen, 30 Fed. Cas. page 396, No. 17,916.

[5] The true criterion by which to determine whether any vessel or its appurtenances is subject to admiralty is the business or employment for which it is intended, or may be used, or in which it is actually engaged, rather than its size, form, capacity or means of propulsion. "If the business or employment of vessels appertain to travel, or trade and commerce on public navigable water, it is sufficient, and the jurisdiction attaches." The General Cass, 10 Fed.Cas. pages 169, 170, No. 5,307; The E. M. McChesney, 8 Fed.Cas. page 668, No. 4,463; The Alabama, C.C., 22 F. 449; The City of Pittsburgh, D.C., 45 F. 699; The Public Bath No. 13, D.C., 61 F. 692; Benedict, "On Admiralty", 5th ed. vol. 1, p. 2.

[6, 7] A fishing vessel leaves the mainland with her hatches empty and navigates to a place where the fish are abundant. She is then maneuvered so that the net encircles a school of fish. The fish are drawn aboard and transported back to land. This transportation is as essential a part of the fishing business as is the pursing and hauling in of the net and is certainly an activity in aid of trade and commerce. It is an essential step in getting the fish to market. Hence, at the time the net here in controversy was seized, it was a part of the appurtenances of the "Reliance", or, to use the phraseology of the American admiralty, a part of her "tackle, apparel and furniture". In legal contemplation it was a part of the vessel itself, just as were her engines, her stores and her navigation equipment, and a subject of admiralty jurisdiction.

However, a further question must be answered. Is this proceeding one which may be prosecuted in a state court?

[8] Although by the Constitution of the United States, the jurisdiction of admiralty causes is vested in the federal courts (arts. III, sec. 2), by statute there is saved to suitors "the right of a common-law remedy where the common law is competent to give it". 28 U.S.C.A. § 371. But a decree in rem is not a remedy which the common law is competent to give; it is authorized only by the civil law. The Constitution "only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding in rem, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute." The Moses Taylor, 4 Wall. 411, 71 U.S. 411, 431, 18 L.Ed. 397.

[9] This rule was followed and applied in California as early as 1871. Crawford v. The Bark Caroline Reed, 42 Cal. 469. Later in Fischer v. Carey, 173 Cal. 185, 159 P. 577, L.R.A.1917A, 1100, jurisdiction of an action for partition of a vessel was disclaimed, although it was one in equity against a personal defendant. The court pointed out that although the action was personal in form, in substance it was a suit in rem, and any decree of the court would act directly upon the vessel by taking it into the custody of the court, through a receiver and ordering a sale. This was held to be an invasion of the exclusive jurisdiction of the courts of admiralty. To the same effect is the case of

The Glide, 167 U.S. 606, 17 S.Ct. 930, 42 L.Ed. 296, where the court decided that although a state may enact a law providing for a lien against a ship, it may only be enforced in a federal court of admiralty. And in a more recent consideration of the rule as it applies to facts substantially identical with those now before the court, the conclusion was reached that a state court has no jurisdiction in a proceeding brought for the forfeiture of a fishing boat for violation of a state law. In that case the facts showed that the boat was seized upon the charge of fishing without a license. The director of fisheries of the state of Washington filed a petition in the superior court of that state praying for the confiscation and forfeiture of her engines, tackle, apparel, furniture, equipment, and seine net. The state court was denied jurisdiction. The Bessie Mac, D.C., 21 F. Supp. 220.

The respondent relies on Smith v. Maryland, 18 How. 71, 15 L.Ed. 269, where, it is true, the court held that a state law did not conflict with the jurisdiction of admiralty. But this case has been overruled by the later decisions which are directly to the contrary. It was pointed out in The Glide case, supra, that the question whether a claim of a maritime nature could be enforced in the state courts by process in rem under a state statute creating a right in the thing itself was not brought to the court directly until the cases of The Moses Taylor, supra, and The Hine v. Trevor, 4 Wall. 555, 71 U.S. 555, 571, 18 L.Ed. 451. In the first, it was determined that a suit against the vessel or thing is a proceeding in rem and is not a remedy afforded by the common law, hence, the admiralty court had exclusive jurisdiction. Later in the same term, the court in The Hine v. Trevor, supra, decided that as the vessel was sued in a state court for a tort arising from a collision, the judgment should be reversed and remanded with directions to dismiss for want of jurisdiction. The remedy pursued, said the court partook of all the essential features of an admiralty proceeding in rem which is in no sense a common-law remedy so as to come within the exemption of the law which "saves to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it".

[10] For these reasons, the judgment must be reversed with directions to the superior court to dismiss the proceeding. As one acknowledged authority upon admiralty law has written, "The right to proceed in rem is the distinctive remedy of the admiralty and hence administered exclusively by the United States courts in admiralty: no state can confer jurisdiction upon its courts to proceed in rem, nor could Congress give such power to a state, since it would be contrary to the constitutional grant of such power to the Federal Government." (Benedict, "On Admiralty", 5th ed., vol. 1, sec. 23.) See, also, Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 20 S.Ct. 824, 44 L.Ed. 921; Crawford v. The Bark Caroline Reed, supra.

It is so ordered.

We concur: GIBSON, C. J.; SHENK, J.; McCOMB, Justice pro tem.

16 Cal.2d 229

SULLIVAN v. UNION OIL CO. OF CALIFORNIA et al. (ABBEY, Intervener).

L. A. 16922.

Supreme Court of California.

Sept. 25, 1940.

1. Master and servant ⚷78

Where employees made contributions to "provident fund" which provided for retirement benefits which were payable to beneficiary if she was legal spouse of member three years prior to the member's age of 60 and remained such legal spouse until death of member, but member neither retired nor reached the age of 60 at time of his death, his former wife was not entitled to fund.

2. Master and servant ⚷78

Where former husband as employee contributed to "provident fund" which provided for payment of death benefits to beneficiary, and former wife entered into property settlement agreement under which each party released other from all obligations, and wife agreed that the provisions were in full satisfaction of her right to community property and full satisfaction of her right to support, former wife on death of husband was not entitled to fund as beneficiary, since her rights in husband's estate were terminated by agreement.

3. Constitutional law ⚷70(3)

Declaration of public policy is properly a legislative function with which reviewing court should not be concerned.

4. Master and servant ⚷78

Where "provident fund" to which husband as employee contributed provided for payment of benefits on his death to his beneficiary and husband and wife were divorced, decree of divorce had no effect upon the asserted right of the former wife as a beneficiary, but such rights were terminated by property settlement agreement which in effect completely divested the wife of any community right in fund.

5. Insurance ⚷199
Wills ⚷5

An insurance policy in legal contemplation is "property" which can be sold, assigned, or bequeathed by the owner, and its pecuniary value to its owner is as great as though owner held promissory note of the insurer for that amount.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action for declaratory relief by Carrie B. Sullivan against Union Oil Company of California, a corporation, and others, wherein E. R. Abbey, administrator of the estate of John W. Sullivan, deceased, intervened. From the judgment, intervenor appeals.

Reversed.

Harry C. Westover and Alfred A. Appling, both of Santa Ana, for appellant.

Emmett E. Doherty and Robert G. Blanchard, both of Los Angeles, for respondent.

HOUSER, Justice.

On this appeal, the questions that are presented for the consideration of this court involve (1) the meaning and application of certain provisions of the rules and regulations of an "Employees' Provident Fund" of the Union Oil Company of California, a corporation, and (2) the effect of a property-settlement agreement upon plaintiff's right as beneficiary of the interest of her former husband in said fund.

Plaintiff and John W. Sullivan (now deceased) were married in 1912. In 1916 the husband was employed by the Union Oil Company of California. In the following year that company inaugurated its so-called "Provident Fund", to which each employee was to contribute a percentage of his wages in return for benefits which thereafter were to become payable to him or to his designated beneficiaries. The husband became a participant in the fund as of November 1, 1917, and designated plaintiff, who was then his wife, as beneficiary. Some nineteen years later, on July 15, 1936, plaintiff instituted a divorce action against her husband and in connection therewith procured from the trial court a temporary order by which the husband was enjoined from the subsequent removal or transfer of money standing to his credit in the said fund. During the pendency of the divorce action, and on July 28, 1936, plaintiff and the husband executed a property-settlement agreement whereby the community and other property of the parties was divided between them. By the terms of said agreement the husband was to pay to plaintiff the sum of $60 a month for the three years next thereafter ensuing, and, with that exception, each was relieved from any future obligation to the other, and expressly waived any right to share in or succeed to the estate of the other. With respect to the "Provident Fund", the agreement provided that the temporary restraining order might be modified to permit the husband to draw $200 therefrom for attorney's fees and expenses in connection with the settlement of the property rights of the parties, and at that time the court issued an order to that effect. On August 7, 1936, an interlocutory decree of divorce by default was entered in favor of plaintiff, and on the same day an order was made for the payment to her of "support money" and alimony; also, a further restraining order was issued by which the husband was enjoined from conveying, encumbering, transferring, or withdrawing any deposit or credit existing in his favor in the "Provident Fund". On August 24, 1937, a final decree of divorce was entered between the parties. No express mention of the property settlement of the parties was made in either the interlocutory or the final decree. However, the final decree provided that "* * * wherein said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein".

John W. Sullivan died on October 30, 1937, at which time he had neither retired from his employment nor had he reached the retirement age of 60 years, but until his death was an active employee of the Union Oil Company and a prospective participant in the "Provident Fund", having to his credit therein the sum of $4,382.83. On March 16, 1938, plaintiff filed an action against the Union Oil Company for declaratory relief, for the purpose of establishing her asserted right as beneficiary to the $4,382.83 in the fund. On May 20, 1938, the administrator of the decedent's estate filed a complaint in intervention wherein it was alleged that the decedent's heirs, and not plaintiff, were entitled to the money in the said fund, for two reasons: First, that under the rules and regulations of the fund, on the date when her final divorce decree was entered plaintiff became ineligible as a beneficiary of the fund; and, secondly, that by virtue of the terms of the property-settlement agreement between the then husband and wife, plaintiff had accepted the provision made for her therein *"in full satisfaction"* of her right to the community property, and thereby waived any interest which she might have had in the fund. Plaintiff demurred to this pleading, and her demurrer was sustained without leave to amend the complaint. Judgment of dismissal of the action was then entered, from which judgment the intervener has appealed to this court.

With regard to the effect of the rules and regulations of the "Provident Fund" on plaintiff's right as the named beneficiary, it may be noted that the certificate which was issued by the officials of the said provident fund contained at least five different provisions which, in appropriate circumstances, related to the proper distribution of the fund to the respective members thereof, or to their named beneficiaries. However, by the terms of each of two only of such governing provisions is it asserted by either of the contending parties herein that the rights of the respective parties to the instant litigation are in anywise affected.

[1] The first of the assertedly applicable provisions is number 36(a), which is found under the general heading of *"Retirement Benefit"*. By that rule it is provided that "The beneficiary must have been the legal spouse of the Member three years prior to the Member's age of 60 * * * *and have remained such legal spouse until the death of the Member;* * * *" (Emphasis added.) Since it is apparent that such provision has application to "Retirement Benefit" only, it follows that in the circumstances of the instant case,—and particularly in view of the fact that the former husband of plaintiff herein had neither retired, nor had reached the age of 60 years at the time of his death,—no support can be found for the contention that under the rules and regulations which governed the distribution of the fund plaintiff was ineligible to become a beneficiary of the money standing to the credit of her former husband in the said fund.

The only other rule which apparently has application to the situation here presented is number 44, which is to be found under the heading *"Death Benefit"* and which provides that: "In the case of death of any Member *before retirement* there shall be ascertained the total amount standing to the credit of his account and such amount shall be paid to beneficiary, * * *."

Had there been no other limitation to the right of plaintiff herein to maintain her claim as a named beneficiary of the fund, it would seem clear that her contention on this appeal should be sustained. However, the property-settlement agreement between plaintiff and her former husband, which preceded the entry of either the interlocutory decree or the final decree of divorce, contains provisions with reference to the disposition of *all* their property rights,—the effect of which would seem to preclude plaintiff from maintaining the claim which she asserted in the trial court and which on appeal from the judgment she seeks to establish. Pertinent among the several provisions of the agreement which was entered into between plaintiff and her then husband are the following:

"That, except as hereinafter specified, each party hereto is hereby released and absolved from any and all obligations and liabilities for the future acts and duties of the other, and that each of said parties hereby releases the other from any and all liabilities, debts, or obligations of any kind or character * * * including all claims of either party upon the other for support and maintenance as wife or husband or otherwise, it being understood that this instrument is intended to settle the rights of the parties hereto *in all respects,* except as hereinafter provided.

"That any and all property acquired by either of the parties hereto from and after the date hereof, shall be the sole and separate property of the one so acquiring same, and each of said parties hereby respectively grants to the other all such future acquisitions of property as the sole and separate property of the one so acquiring the same.

"The said parties hereto each hereby waive any and all right to the estate of the other *left at his or her death* and forever quitclaim any and *all* right to share in the same of the other, * * * and hereby release and waive all right to inherit under any will of the other * * * and said parties hereby waive any and all right to the estate of the other * * * and from the date of this agreement * * * they shall have all the rights of single persons and maintain the same relation of such toward the other.

"The wife does and shall accept the provisions herein made for her *in full satisfaction* of her right to the *community* property of the respective parties hereto and *in full satisfaction* of her right to support and maintenance as herein provided." (Emphasis added.)

From the foregoing, it becomes apparent that it was the expressed intention of the parties at the time when they entered into the property-settlement agreement to make a full and final adjustment between them of *all* their property rights, interests and claims. There was no exception to that understanding. Everything in the nature of property rights was included as a part of the subject-matter of that agreement.

[2] It therefore becomes unquestionable that if the property of the parties which was included within the "Provident Fund" was that of the community of plaintiff and her former husband, any right which the wife may then have had therein was released in favor of the husband. And so much is conceded by respondent in her brief on this appeal, wherein it is said: "It is clear that this agreement (except as specifically provided therein) released the husband from any obligation which he might be under to make or continue to retain his former wife *as beneficiary of the Provident Fund,* and it clearly *waived* all rights the respondent might have in that fund *as community property.* It waived all of her rights to inherit from his [the] estate of the husband, and, in general, *terminated in every way their community.* Indeed, if there were any doubt as to these results, the fact that the agreement was drawn by the wife's attorney might be persuasive upon the court in resolving this doubt *against her.*" (Emphasis added.)

However, respondent contends that the fact that such property was community property, as well as the fact that by the terms of the property-settlement agreement between the parties she had finally and conclusively terminated her rights therein, are not necessarily determinative of her right to have the money in the provident fund distributed to her as the beneficiary named in the certificate of membership of her former husband. In other words, she claims solely by virtue of her position as a designated beneficiary of the fund, and contends that, regardless of what effect the property-settlement agreement may have had upon her rights as a wife, her right as the named beneficiary is separate and distinct in character and in nowise is affected by the agreement which was entered into between the respective parties. As authority for that position respondent cites the case of Jenkins v. Jenkins, 112 Cal.App. 402, 297 P. 56, 58, wherein the action was one instituted by the first wife against the widow of an assured for the purpose of establishing a right to the proceeds of a life insurance policy which had been issued while the assured was married to the first wife, who had been designated in the policy as the beneficiary thereof. The assured and the first wife were thereafter divorced, but by prior agreement between them the latter had released her property rights in his estate. Upon his death and as his heir the widow claimed a right to the proceeds of the insurance policy. However, unlike the situation in the instant case, the property-settlement agreement which was made between the parties therein contained an express provision "that the party of the second part [the first wife] has entered into this contract upon the direct representation, upon which, in signing the contract she has acted, that the party of the first part has made a full and complete disclosure to her of any and all properties which he now, either directly or indirectly owns, as shown by a list of properties hereto attached and made a part hereof, and that the party of the second part shall not be bound by the terms of this contract in so far as any property which is not listed on said attached list". It also was stated in the decision that the list referred to "enumerates much personal property even to the extent of including club memberships and other contracts, but it contains no mention of any insurance policy or policies nor any general language that by indirection might refer to any policies of insurance". The court there reached the following conclusions: "that this contract could have no effect upon the policy here in question or the rights of either plaintiff or the deceased husband therein. Defendant here claims that the contract assigned to the husband all of the rights of the plaintiff in the policy, and that from the date of the contract the policy and the proceeds thereof, actual or anticipated, became the separate property of the husband. The contract negatives any such claim. The contract *specifically designated the property* involved or affected thereby and *excludes the policy.* The effect of the restrictive clause is claimed to have been aborted by the fact that at the time of the execution of the contract both parties knew of the policy of insurance and that there was therefore no need of specifically mentioning it. This argument would be as effective to support the conclusion that mention of the policy was intentionally omitted." (Emphasis added.) The court further concluded that the decree of divorce had no effect upon the right of the first wife to be paid the amount specified in the insurance policy, especially in view of the failure of the assured to name any other beneficiary thereof. In that case, full recognition was given the same assertion as is made by respondent herein to the effect that a distinction exists between community property rights of the parties and the right which had inured to the first wife by reason of her having been named in the insurance policy as the beneficiary thereof. In the instant case, it is conceded by respondent that the property-settlement agreement which was entered into and which had become effective as between respondent and her former husband had the effect of completely divesting her of any *community* right in the fund. However, the underlying reason for the conclusion reached in the cited case may be found in the language used therein, as follows: "A mere statement of the facts is a complete answer to the contention [of the appellant who was the second wife of the assured]. To adopt such a theory would be to hold that policies of life insurance mean nothing and by such a holding the usefulness of life insurance would be at an end and this form of insurance would pass. Such a holding would necessarily mean that every insurance company would be restrained from paying out on any life insurance policy until a decree determining heirship had been entered or some other statutory mode of ascertaining the heirs had been pursued. The designation of beneficiary would mean nothing, and the beneficent objects of life insurance would be thwarted. Life insurance occupies a too important place in our national and economic life to be thus treated."

[3] Upon a reading of the opinion in the cited case it becomes obvious that the ruling made therein was founded not so much upon a declaration of principles of law, but that it rested, first, upon the fact that the insurance policy was not mentioned in the list of properties which was attached to the agreement of the parties,—with the result that with respect to the said policy the former wife was not bound by the terms of the agreement; whereas, in the present case, by the terms of the property-settlement agreement the existence of the fund was recognized by the parties, as is evidenced by the provisions therein made that the husband was to be given permission to withdraw therefrom a certain sum with which to pay attorneys' fees incurred in connection with the settlement of the property rights of the parties. And secondly, but of greater importance, the decision in the Jenkins case was based upon the court's conception of that which would redound to the best interests of the community. In other words, it may be perceived that in making that ruling,—for the express purpose of declaring what should be a good business policy,—there was a departure from the conceived functions of an appellate court. Clearly such a declaration is properly a legislative function with which this court should not be concerned.

[4] In the instant case, it is not seriously contended that in and of itself the decree of divorce had any effect upon the asserted right of plaintiff as a beneficiary. That question heretofore has received the attention of this court, and appears to have been settled against any affirmative claim in that regard. Jenkins v. Jenkins, 112 Cal.

App. 402, 297 P. 56; Courtois v. Grand Lodge A. O. U. W., 135 Cal. 552, 67 P. 970, 87 Am.St.Rep. 137. See, also, note: 52 A.L.R. 389, 390, and cases there cited; 59 A.L.R. 172; Guarantee Fund Life Ins. Ass'n v. Willett, 241 Mich. 132, 216 N.W. 369; Pendleton v. Great Southern Life Ins. Co., 135 Okl. 40, 273 P. 1007. But the dominant and governing feature herein which clearly distinguishes the facts from those in the Jenkins case is that of her own free will, with full knowledge of the existence of the fund and of all pertinent facts, acting under the advice and counsel of her attorney (who drafted the agreement), and for full and valuable consideration therefor, the wife had expressly agreed with her husband to forever settle and divide between them *all* their respective properties including that of the community, to waive any right of succession or inheritance with respect to his remaining property and to release him from any and all obligations to her which theretofore may have had existence for any reason whatsoever.

[5] Neither insurance policies nor rights arising thereunder are either sacred or "untouchable". As far as present consideration is concerned, an insurance policy is but a form of contract. An insurance policy in legal contemplation is property, which can be sold, assigned or bequeathed by the owner thereof. As was said in Blethen v. Pacific Mut. Life Ins. Co., 198 Cal. 91, 98, 243 P. 431, 434, "'Its pecuniary value to its owners was [is] as great as though they held a promissory note of the company for that amount. * * *' In re Dobbel['s Estate], 104 Cal. 432, 38 P. 87, 43 Am.St.Rep. 123." The provisions of an insurance policy and the question of the personal rights derivable therefrom may be the subject of interpretation or construction in a manner not distinguishable from that accorded terms or rights which may be specified in any other written or oral agreement. For example, let it be supposed that prior to the date when plaintiff and her then husband entered into their property-settlement agreement they together had been the owners, in community, of an automobile, which by written agreement entered into between the interested parties had been sold for a stated price, which amount was to be paid to the wife at a designated date; and that thereafter the husband and the wife had executed the property-settlement agreement here under consideration. In essential particulars,—and as far as governing legal principles may be concerned, particularly with respect to the question here involved,—this court is unable to perceive any distinguishing difference between the supposititious case and the one at bar. No substantial reason has been suggested why the express language employed by the parties to the property-settlement agreement should not be given the effect that it "settled" *all* the rights of the respective parties to the agreement, which expressly included those of the community.

The judgment is reversed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; CARTER, J.; SPENCE, Justice pro tem.

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16 Cal.2d 216

PEOPLE v. WERNER et al.

Cr. 4306.

Supreme Court of California.

Sept. 21, 1940.

1. Criminal law 🔑44

An "attempt to commit a crime" is compounded of intent and a direct and ineffectual act done toward its commission.

See Words and Phrases, Permanent Edition, for all other definitions of "Attempt to Commit a Crime"

2. Criminal law 🔑44

The preparation antecedent to an offense and the actual attempt to commit it are materially different, and, to constitute an "attempt to commit a crime", acts of defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances.

3. False pretenses 🔑49(1)

Evidence was insufficient to sustain conviction for attempted grand theft of sum of money from prosecuting witness to whom accused represented that for certain sum of money he could influence dismissal of criminal charges against prosecuting witness, where what purported to be money was, by secret agreement unknown to accused, given to accused's wife on day before money was to have been given to accused and there was no direct ineffectual act on part of accused on day of alleged attempted grand theft, whereby but for extraneous circumstances he would have perpetrated offense of grand theft.

4. Criminal law ⚷20

A lawful act cannot be rendered unlawful merely because actors intended to follow it by an unlawful act.

5. False pretenses ⚷23

Where there was evidence that accused represented to prosecuting witness that for a certain sum of money he could influence dismissal of criminal charges against prosecuting witness, and prosecuting witness, acting in secret agreement with wife of accused for the purpose of concealing such act from the accused, purportedly gave wife money which accused believed was to be delivered on the following day, the wife's act in accepting the money could not be imputed to her husband, since it was not performed in concert with him, and could not be used to establish offense of attempted grand theft as against accused.

6. Conspiracy ⚷41

In order that an act of a codefendant may be imputed to a defendant in a criminal action, particular act of codefendant must be shown to have been done for furtherance or in prosecution of common object and design for which defendants combined together, and, if one of a number of conspirators goes outside common plan and commits a fresh and independent act wholly outside of and foreign to the common design, others are not to be held equally guilty of that act.

7. Criminal law ⚷37

Generally, if the criminal intent originates in the mind of the accused and the criminal offense or attempt thereat is perpetrated, fact that accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him constitutes no defense.

8. False pretenses ⚷12

Where a person knows or suspects that a crime affecting him is about to be committed, he may without being deemed to have consented thereto remain passive and make no effort to prevent its commission, to the end that the criminal may be apprehended, but he may not actively participate to the extent of personally delivering his property or what purports to be his property to offender and upon prosecution for theft or attempted theft thereof urge that it was taken without his consent, an element essential to conviction therefor.

9. False pretenses ⚷12

Where there was evidence that defendant represented that for certain sum of money he could influence dismissal of criminal charges against prosecuting witness and prosecuting witness in order to secure evidence acting secretly in agreement with wife of accused, delivered an envelope purporting to contain money to wife, on day before the money was actually to be delivered to accused, accused could not be convicted of attempt to commit grand theft, since the money, or what purported to be the money, was voluntarily delivered to wife of accused without compulsion of any sort and uninfluenced by any fraudulent representation.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Erwin P. Werner and Helen M. Werner were convicted of attempted grand theft, and Erwin P. Werner appeals.

Reversed with directions.

For prior opinion, see 101 P.2d 513.

Morris Lavine, of Los Angeles, for appellant.

Mark L. Herron and Harry F. Sewell, both of Los Angeles, for defendant Helen M. Werner.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

CARTER, Justice.

In an indictment returned by the grand jury of Los Angeles county the defendant and his wife were charged with having solicited one William McNeil, the principal prosecution witness, to offer and join in the offer of a $2,500 bribe to a named deputy district attorney with intent to corrupt the latter with respect to the prosecution of said McNeil on grand theft charges then pending against him. In a second count based on the same transaction defendant and his wife were charged with attempted grand theft of the $2,500 from McNeil. The jury disagreed upon the first trial. Upon the second trial the defendants were convicted on both counts. However, on appeal a reversal was ordered on the ground that the convictions were inconsistent in that the money could have been procured from McNeil either for bribery purposes or because the defendants intended to divert it to their own use but that both intents could not have coexisted. People v. Werner, 29 Cal.App.2d 126, 84 P.2d 168. Upon the third trial defendant and his wife were acquitted on the count charging solicitation of a bribe but convicted of attempted grand theft of $2,500. Motions for new trial were made and denied. Each defendant appealed, though the wife has since dismissed her appeal. There is here pending only the appeal of Erwin P. Werner from the order denying his motion for new trial.

Chronologically, the record discloses substantially the following train of events. In 1933 McNeil, the prosecuting witness, became acquainted with a Mrs. Bovell who in the course of time delivered into his possession for investment purposes some $155,000 in cash and bonds. In 1936 Mrs. Bovell employed the services of one Bergman, an attorney, in an effort to compel McNeil to return her property. McNeil was represented by the appellant Werner who in time had McNeil deliver certain trust deeds, aggregating $16,000, to Mrs. Bovell. In April, 1937, the appellant sued McNeil and his wife for $7,500 for his services in connection with the Bovell settlement. This suit admittedly engendered ill feeling by McNeil toward appellant. In July, 1937, and after investigation by the bunco detail of the Los Angeles police department and the district attorney's office, a criminal complaint was filed against McNeil, charging him with one count of grand theft in connection with the Bovell matter and six other counts of grand theft growing out of McNeil's financial dealings with another woman. At the conclusion of a preliminary hearing held on August 2, 1937, McNeil was bound over to the superior court on the seven counts of grand theft. Shortly thereafter McNeil and the Werners met and held several conferences, during the course of which certain proposals were made, which later formed the basis of this prosecution.

There is testimony to the effect that at or about the time of McNeil's preliminary examination on the grand theft charge, the appellant telephoned to the attorney representing McNeil in the civil action for attorney's fees brought by appellant and informed him that he had unsuccessfully tried to contact McNeil and that he (appellant) could "have that case of the People against McNeil dismissed". Appellant was thereupon referred to another attorney representing McNeil in the criminal prosecution, whom appellant telephoned and informed that "he was in a position to square the beef for Mac". Subsequent to McNeil's preliminary examination, appellant again telephoned to the latter attorney and told him it was "not too late yet to fix the matter" and that if McNeil desired to get in touch with him to write to him general delivery at Merced, where appellant then resided. McNeil's two attorneys informed him of their conversations with appellant. Thereafter and on Tuesday, August 17, 1937, McNeil wired appellant to inform him immediately if he (appellant) could be in Los Angeles on that or the following day. The telegram further stated "Contact me personally at my home. Regard this strictly confidential". While on the stand in this trial McNeil testified that when he sent the telegram to appellant he disliked him heartily because of their prior financial difficulties and that he desired to ascertain why appellant "was still anxious to see me, and I sent the telegram". After receipt of the telegram and on Friday of the same week the appellant visited McNeil at his home. McNeil testified that at that visit the appellant stated that he and Mrs. Werner had some good ideas as to how to handle the criminal action being prosecuted by Mrs. Bovell against McNeil and that Mrs. Werner was well acquainted with the then chief deputy district attorney and that for about $2,500 he could get the latter to "kick this case out of the District Attorney's office" provided also that some settlement be made with Mrs. Bovell, the prosecuting witness. Before appellant left Los Angeles to return to Merced, McNeil drove him to Mrs. Bovell's place of residence and picked him up there approximately two hours later, at which latter time appellant reported that he was working himself into the good graces of Mrs. Bovell and hoped ultimately to have her drop her attorney from the case and enter into a settlement of the McNeil matter with him.

Without detailing all the facts with respect thereto, McNeil's asserted distrust of appellant and his belief that appellant was trying to "shake him down" were conveyed by a friend of McNeil to the deputy district attorney handling the Bovell prosecution then pending against McNeil, with the result that McNeil, pursuant to request called at the office of said deputy district attorney. As a result of this conference, an investigator from the district attorney's office, agreeably to McNeil, installed a dictaphone microphone in the latter's home with a view to listening in on future conversations between McNeil and the Werners. On August 25, 1937, appellant and Mrs. Werner called at McNeil's home. Already secreted in the basement thereof were an investigator and a stenographer from the district attorney's office, stationed there for the purpose of hearing and reporting the conversation of the Werners with McNeil. The latter testified that upon the occasion of this visit and while appellant was in another part of the house shaving, Mrs. Werner stated to him that "anything that was to be handled in the settlement of this matter in the District Attorney's office, she would handle herself; and if she didn't get to handle the money she would not have anything to do with it * * * and that she could have this case dismissed in the District Attorney's office by paying to * * * the Chief Deputy District Attorney, $2,500" and that she knew the chief deputy well. McNeil further testified that after appellant's return to the room appellant stated what he thought should be offered to Mrs. Bovell by way of settlement, suggesting McNeil's home and furnishings, two bungalows, and $10,000. On the following day the Werners again returned to the McNeil home and reported having had dinner with Mrs. Bovell on the preceding evening, at which the subject of settlement was satisfactorily discussed. McNeil testified that at this meeting appellant stated that the $10,000 should be advanced "right now", as he "could not do business on jawbone". However, unknown to appellant, and this definitely appears both from the testimony of McNeil and Mrs. Werner, a secret arrangement had been entered into between the latter two persons whereby it was agreed that Mrs. Werner was to see McNeil alone some time on the following day and that appellant was not to know of this meeting. Mrs. Werner accordingly called alone the following afternoon and McNeil testified it was then agreed between them that when she called that evening with appellant, McNeil was to inform appellant the money would not be available until the following day and that McNeil should secretly "slip" Mrs. Werner the $10,000 in an envelope that evening in the event appellant left the room. McNeil testified further that Mrs. Werner stated that she was to see the chief deputy district attorney the next morning "and give him the $2,500" pursuant to a prior agreement on his part to dismiss the McNeil prosecution upon such payment.

On the evening of the same day (August 27, 1937), the day mentioned in the indictment, the Werners again called on McNeil. During the evening the appellant left the room and went to the bathroom for a few minutes and in his absence Mrs. Werner asked McNeil to give her the money, which he did, whereupon she pinned the envelope purportedly containing the same inside her dress. The testimony of McNeil, the prosecuting witness, and of Mrs. Werner is definite and in agreement to the effect that the envelope purportedly containing the money was delivered by McNeil to Mrs. Werner unknown to the appellant and while he was out of the room and was so delivered pursuant to their prior secret agreement calling for a delivery thereof unknown to the appellant. Examination of the record fails to reveal any testimony to indicate that appellant knew of the prior secret agreement between McNeil and Mrs. Werner or of the secret delivery of the money on the night designated in the indictment. While the reason for keeping appellant in the dark as to the actual delivery of the money is presently immaterial, it appears to have been prompted by a desire to preclude the appellant from coming into its possession and perhaps diverting it elsewhere than as intended.

However, the envelope secretly handed by McNeil to Mrs. Werner did not contain either $10,000 or $2,500, but instead contained two $1 bills and eight pieces of paper cut to the size of one dollar bills. It was not McNeil's money, but had been handed to him by the district attorney's investigator for the purpose. Shortly after Mrs. Werner had secretly received the envelope and pinned it in her dress, and after appellant had returned to the room, the Werners left the McNeil home. As they walked out into the yard, they were arrested by deputies from the district attorney's office, returned to the house and, upon threat of search, Mrs. Werner produced the envelope from her dress. Much of the conversations between McNeil and the Werners was heard and reported by the persons secreted in the house by the district attorney. Their testimony at the trial generally covered the subject. Among others, the chief deputy district attorney was called as a prosecution witness. He denied knowing Mrs. Werner. While the testimony of the Werners in their defense conflicted in many respects with the prosecution evidence, the jury apparently resolved such conflicts against them. However, we are not satisfied that the evidence adduced by the prosecution will support a conviction of the appellant upon a charge of attempted grand theft of $2,500 from the prosecuting witness McNeil.

[1, 2] It is settled that an attempt to commit a crime is compounded of two elements, viz., intent and a direct ineffectual act done toward its commission. It is equally well settled that there is a material difference between the preparation antecedent to an offense and the actual attempt to commit it. The preparation consists of devising or arranging the means or measures necessary for the commission of the offense, while the attempt is the direct movement toward its commission after the preparations are made. In other words, to constitute an attempt the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances. People v. Anderson, 1 Cal.2d 687, 37 P.2d 67; People v. Mann, 113 Cal. 76, 45 P. 182; People v. Lombard, 131 Cal. App. 525, 530, 21 P.2d 955; 14 Amer.Jur. 813–818.

[3-6] The acquittal of appellant on the charge of soliciting the offer of a bribe in violation of section 653f of the Penal Code makes it unnecessary for us to here consider the evidence addressed to that count. We are of the view that the conviction of appellant on the attempted grand theft charge is without support in the evidence for, even if we assume that throughout the preliminary conversations and meetings with the prosecuting witness, the appellant had entertained the intent to divert to his own use the $2,500 when received, we still fail to find in the record herein any direct ineffectual act on his part on the day of the alleged attempted grand theft whereby, but for extraneous circumstances, he would have perpetrated the offense of grand theft. As already stated, the record without contradiction discloses that appellant was ignorant of the prearranged plan of McNeil, the prosecuting witness, and Mrs. Werner, by which the former agreed to, and actually did, secretly deliver the money to the latter on the date specified in the indictment. It was the appellant's understanding and belief that the money was to be delivered on the following day. On the date specified in the indictment, as on the previous occasions, appellant's activities were, at best, but acts of preparation looking to the possible future perpetration of the offense of grand theft. As stated in 14 American Jurisprudence 786, section 25: "The law does not concern itself with mere guilty intention, unconnected with any overt act or outward manifestation. A lawful act cannot be rendered unlawful merely because the actors intended to follow it by an unlawful act. * * *" True, appellant was jointly charged with his wife as a principal in the attempted crime and while normally the acts of an accomplice done in pursuance of the common plan are imputable, under the peculiar facts of this case, where the only direct ineffectual act which might have served to characterize the offense as attempted grand theft was one performed by Mrs. Werner, without the knowledge of appellant, and while acting in secret agreement with the prosecuting witness for the very purpose of concealing such act from the appellant and thereby precluding him from getting any part of the money, it is our opinion that such act cannot be said to have been performed in concert with the appellant. This being so, it may not be imputed to him under the established rule. As stated in 14 American Jurisprudence 824, section 80: "This rule of criminal responsibility for the acts of others is subject to the reasonable limitation that the particular act of one of a party, for which his associates and confederates are to be held liable, must be shown to have been done for the furtherance or in prosecution of the common object and design for which they combined together. If one of a number of conspirators goes outside the common plan and commits a fresh and independent act, wholly outside and foreign to the common design, the others are not to be held equally guilty of that act." In other words, the act must not be the fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design. In view of the

positive and uncontradicted evidence of both the prosecuting witness and Mrs. Werner that the money by secret prearrangement between them was surreptitiously delivered to the latter without the knowledge of the appellant, and for the admitted purpose of foreclosing him from coming into its possession, it is our opinion that as a matter of law it must be held that the act of Mrs. Werner in so taking the money was not in furtherance of but foreign to the alleged common plan and, as stated, may not, in justice or reason, be imputed to the appellant.

[7, 8] However, even if we were to concede, without deciding, that the record sufficiently discloses both an intent and a direct ineffectual overt act by appellant toward the commission of a theft of the $2,500, the evidence still would not warrant his conviction either of theft or attempted theft for the reason that the prosecuting witness not only consented to the taking or attempted taking but actually delivered the property or money into the hands of the alleged offender. In so declaring, we are not unmindful that it often becomes necessary to resort to artifice in order to enforce the law and punish its violation. We have no quarrel with the settled rule that if the criminal intent originates in the mind of the accused and the criminal offense or attempt thereat is perpetrated, the fact that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him constitutes no defense. The cited rule is without application here. We do not regard this as a case of improper entrapment but rather as one involving an offense or an attempt to perpetrate an offense the commission of which to be punishable must be without the consent of the owner of the property. The pertinent rule is stated, with citation of supporting authorities, in 15 American Jurisprudence 26, section 336, as follows: "In the case of those crimes into which enters as an essential element the violation of individual rights of persons, the entrapment must not be under such circumstances as will amount to the consent of the person affected, or a necessary ingredient of legal guilt, the want of such consent, will be lacking, and the crime will not have been committed." In other words, when a person knows or suspects that a crime affecting him is about to be committed, he may, without being deemed to have consented thereto, remain passive and make no effort to prevent its commission, to the end that the criminal may be apprehended, but he may not actively participate, as here, to the extent of personally delivering his property or what purports to be his property to the offender and upon a prosecution for the theft or attempted theft thereof urge that it was taken or attempted to be taken without his consent—an element essential to a conviction therefor. The subject is discussed in People v. Hanselman, 76 Cal. 460, 462, 463, 18 P. 425, 426, 9 Am.St.Rep. 238, wherein it is stated that "It is, no doubt, true, as a general proposition, that larceny is not committed when the property is taken with the consent of its owner, but it is difficult, in some instances, to determine whether certain acts constitute, in law, such 'consent;' and, under the authorities, we do not think that there is such consent where there is mere passive submission on the part of the owner of the goods taken, and no indication that he wishes them taken, and no knowledge by the taker that the owner wishes them taken, and no mutual understanding between the two, and no active measures of inducement employed for the purpose of leading into temptation, and no preconcert whatever between the thief and the owner."

In Topolewski v. State, 130 Wis. 244, 109 N.W. 1037, 1041, 7 L.R.A.,N.S., 756, 118 Am.St.Rep. 1019, 10 Ann.Cas. 627, the following appears: "So if one procures his property to be taken by another intending to commit larceny, or delivers his property to such other, the latter purposing to commit such crime, the element of trespass is wanting and the crime not fully consummated however plain may be the guilty purpose of the one possessing himself of such property. That does not militate against a person's being free to set a trap to catch one whom he suspects of an intention to commit the crime of larceny, but the setting of such trap must not go further than to afford the would-be thief the amplest opportunity to carry out his purpose, formed without such inducement on the part of the owner of the property, as to put him in the position of having consented to the taking. If I induce one to come and take my property and then place it before him to be taken, and he takes it with criminal intent, *or if knowing that one intends to take my property I deliver* *it to him and he takes it with such intent, the essential element of trespass involving nonconsent requisite to a completed offense of larceny does not characterize the transaction, regardless of the fact that the moral turpitude involved is no less than it would be if such essential were present."*

[9] We are satisfied that there cannot be a theft or an attempted theft of a person's property when voluntarily and without compulsion of any sort and uninfluenced by any false or fraudulent representations, he actively hands it over to the alleged thief for the purpose of apprehending him as a thief or as an attempted thief—however reprehensible the latter's intent may be—for under such circumstances the essential element of lack of consent is missing. As already stated, the prosecuting witness herein was not induced by any trick or device or false representation upon which he had placed reliance to part with his property. Instead as shown, he had concluded that the Werners were not sincere or honest in their motives and for the purpose of securing their conviction he went far beyond the passive assistance that is permitted under the authorities to apprehend a potential offender, going to the extent of actively delivering or handing over his property or what purported to be his property, thereby depriving the offense, if any, of the essential element of lack of consent of the owner. Surely, it could not be held, all the other circumstances remaining the same, that appellant would be guilty of theft of the $2,500 if McNeil, the prosecuting witness, actually had placed that amount of money in an envelope and actively handed it over to the appellant for the purpose of apprehending him as he left the house. Under the cited circumstances, the money would have been voluntarily delivered to the appellant with the consent of the owner uninfluenced by artifice, device or false representation, precluding any theft thereof. The same is equally true as to the charge of attempted theft thereof based on the owner's substitution and delivery of something other than the $2,500. We are of the opinion that the evidence will not support appellant's conviction.

The order denying a new trial is reversed with directions to the court below to grant the same.

We concur: SHENK, J.; EDMONDS, J.; CURTIS, J.; MOORE, Justice pro tem.

NATIONAL RESERVE CO. OF AMERICA v. METROPOLITAN TRUST CO. OF CALIFORNIA et al.*

Civ. No. 11923.

District Court of Appeal, Second District, Division 1, California.

Sept. 20, 1940.

Hearing Granted Nov. 19, 1940.

1. Assignments 🔑72

Ordinarily, an assignment will be interpreted or construed in accordance with rules of construction governing contracts generally, the primary object being to ascertain and carry out intention of parties.

2. Assignments 🔑72

The intention of parties to an assignment is to be derived from a consideration of the whole instrument and is to be sought in language employed in instrument, and, if words are free from ambiguity and express plainly the purpose of the instrument, there is no occasion for interpretation.

3. Assignments 🔑72

Where necessary, words of an assignment must be interpreted in light of particular subject matter, and surrounding circumstances may be considered in order more perfectly to understand intention of parties.

4. Assignments 🔑72

In construing an assignment, object to be accomplished through assignment and relations and conduct of parties may be considered.

5. Assignments 🔑72

An assignment must be construed as a whole, and words or phrases which are wholly inconsistent with its nature or the main intention of parties are to be rejected, but language of assignment must be construed with reference to circumstances of particular case.

6. Assignments 🔑72

If intention of parties to an assignment is fairly evidenced and they have actually given expression to such intention, irrespective of how inapt that expression may be, effect must be given to their intention.

7. Assignments 🔑72

Where terms of an assignment are uncertain or ambiguous, circumstances under which assignment was made may be considered to determine its meaning and scope.

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* Subsequent opinion 112 P.2d 598.

8. Assignments ⟹23

Where plaintiff's assignor, who had purchased an investment certificate from plaintiff, owned a thrift certificate issued by a thrift corporation under a trust indenture wherein defendant was named as trustee, and assignor, in furtherance of desire to have thrift certificate applied as cash credit upon investment certificate, executed an assignment manifesting a conditional delivery of thrift certificate to plaintiff and an intention that plaintiff should have right to such proceeds as plaintiff could recover from receiver of thrift corporation and that plaintiff should return thrift certificate to assignor if unable to collect proceeds of such certificate, plaintiff did not acquire, under assignment, an alleged cause of action against defendant for breach of trust indenture and which breach allegedly occurred prior to execution and delivery of assignment.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by National Reserve Company of America, a Delaware corporation, on behalf of itself and all other holders of certificates and contracts of National Thrift Corporation of America, against Metropolitan Trust Company of California and another, to recover damages for alleged breach of a trust indenture. From an adverse judgment, plaintiff appeals.

Affirmed.

Hill, Morgan & Bledsoe, Charles P. McCarthy, and William L. Baugh, Jr., all of Los Angeles, for appellant.

William H. B. Haymond, Philip Grey Smith, and Judd Downing, all of Los Angeles, for respondent.

YORK, Presiding Justice.

On September 27, 1926, respondent Metropolitan Trust Company of California, as trustee, and the National Thrift Corporation of America, hereinafter referred to as corporation, entered into a written trust indenture, designated as Trust No. PT-109, the purpose of which was to create and maintain "a trust and trust deposit for the equal and proportionate benefit and security of the holders of (corporation's) bonds and contracts and annuity agreements" which it was selling as investments and to secure to the respective holders thereof the fulfillment by said corporation of all its obligations thereunder.

Said trust indenture provided that the "trust deposit and pledge of moneys, or of interest-bearing first mortgages owned and held by it (corporation) upon improved real estate", should be maintained "in an amount of principal thereof which is and at all times shall be not less than one hundred ten (110) per cent of the total aggregate amount of the principal of its said bonds and the cancellation value of its contracts (less loan or loans thereon by the corporation) and the redemption value of its annuity agreements, executed and outstanding, as therein respectively in said trust agreement declared and fixed". Further, that corporation should maintain the trust estate held by the trustee in an amount of principal not less than one hundred ten (110) per cent of total aggregate principal of its outstanding obligations less the total amount of subsisting loans.

It was also provided that upon the execution of corporation's bonds, contracts and annuity agreements, the trustee should identify them when requested, provided "Corporation shall not then be under any default hereunder known to the Trustee", with respect to the maintenance of the trust estate.

On February 1, 1927, corporation sold to one Ward Esplin a participation certificate for $1,000, secured by the trust indenture and duly identified by and registered with trustee thereunder. On November 1, 1933, before the commencement of the instant action, said certificate together with a purported assignment thereof to appellant National Reserve Company of America, dated July 8, 1933, were delivered to the defendant Mortimer, who had been appointed receiver of said trust estate on November 18, 1932, and to whom had been delivered the assets of said trust estate. On said November 1, 1933, E. S. Walker, as agent of Ward Esplin, the assignor, filed with said receiver a creditor's claim for $835.10 in connection with corporation's participation certificate.

This action was instituted on September 8, 1936, by appellant, as assignee, on behalf of itself and all other holders of participation certificates and contracts of corporation to recover damages from the trustee for breach of the trust indenture in that, in violation of the terms thereof said trustee knowingly "identified and certified certificates to be issued by" said corporation at various times prior to November 18, 1932, when there was on deposit in the trust estate collateral security of a face value less than 110 per cent of the total cancellation value of the participation certificates which corporation had issued and which were outstanding.

By stipulation it was agreed at the opening of the trial that before considering any other issue, evidence should be taken "as to whether any right to sue upon the cause or causes of action asserted by plaintiff in these proceedings was ever vested in plaintiff". Said issue was determined in favor of respondent trustee, the court finding in effect that said Ward Esplin did not sell or assign his contract to appellant National Reserve Company of America and that said appellant was not the owner thereof.

The court also found: "VII. That no cause nor causes of action sued upon by the plaintiff herein was, or were, ever assigned or transferred to the plaintiff prior to the filing of this action, and never have been assigned or transferred to it or owned by it. That plaintiff has never had any interest in any such cause or causes of action in any capacity whatsoever. That plaintiff never had any right to sue upon any cause or causes of action asserted herein. That plaintiff does not have any right or title upon which to maintain any cause or causes of action asserted herein, and has no right to maintain any such cause or causes of action."

From the judgment which was thereafter entered pursuant to such findings of fact, National Reserve Company of America, the alleged assignee, prosecutes this appeal.

The assignment which forms the basis of appellant's alleged interest entitling it to maintain the instant action reads as follows:

"Whereas, the undersigned having purchased of the National Reserve Company of America one of its investment certificates, hereinafter referred to as certificate, and

"Whereas, the undersigned is the owner of National Thrift Certificate #136B Class B Series F having an estimated value of $835.10, and hereinafter referred to as property, and

"Whereas, the undersigned is desirous of having the cash value of said property applied, at the earliest possible moment, as a cash interest-bearing credit on said certificate,

"Now, Therefore, in consideration that National Reserve Company agrees to give an immediate conditional credit (not a credit on my certificate) of 100 per cent of the above estimated value, and of the company's further agreement to convert said credit to a cash interest-bearing credit on the certificate immediately as received by it in the form of cash or its equivalent in acceptable first mortgages, and that it further agrees to immediately pass to the cashable interest-bearing credit on the said certificate all such amounts received by it from or out of said property, *the undersigned hereby assigns and transfers, for the purposes hereinabove stated, and for none other, all of his right, title and interest of, in and to the hereinabove described property,* and hereby constitutes, appoints and empowers any duly qualified officer of said National Reserve Company in his name, place and stead, and as his attorney in fact, for said purposes.

"Provided, that, at any time upon the determination and conclusion that it is or will be unable to collect further proceeds out of said property, said National Reserve Company may, or upon the written request at any time of the undersigned shall, *reassign and transfer to the undersigned, said property depleted by the amount of the aforesaid receipts arising out of said property* and credited as aforesaid to said certificate, whereupon this agreement shall become automatically terminated and cancelled. Executed and acknowledged by Ward H. Esplin * * * July 8, 1933."

Appended to said assignment is a receipt of said thrift certificate executed by National Reserve Company of America stating, among other things, "which property is this day delivered to the undersigned *under an express agreement respecting the handling and return of same.*" (Emphasis added.)

In the words of appellant:

"The only issues tried in the court below and before this court on this appeal are:

"*First:* Whether said Ward Esplin, to whom said certificate was originally issued, transferred and assigned said certificate to this plaintiff, and, *second:* Whether the plaintiff at the commencement of this action had the right to sue upon the cause of action set forth in the complaint."

Appellant urges that the assignment to it was complete, unlimited and unconditional and that the cause of action sued upon passed by such assignment as incidental thereto.

Respondent maintains that the assignment was solely for the limited purpose of giving the appellant authority to collect on behalf of Esplin such dividends as he might receive on his certificate through a liquidation of the trust collateral, and consequently the cause of action was not assigned.

[1-4] "An assignment will, ordinarily, be interpreted or construed in accordance with the rules of construction governing contracts generally, the primary object being always to ascertain and carry out the intention of the parties.

"This intention is to be derived from a consideration of the whole instrument, and is to be sought in the words and language employed; and, if the words are free from ambiguity and express plainly the purpose of the instrument, there is no occasion for interpretation. Where necessary, however, the words must be interpreted in the light of the particular subject matter, and surrounding circumstances may be considered in order more perfectly to understand the intention of the parties. Thus, the object to be accomplished through the assignment, and the relations and conduct of the parties may be considered in construing an assignment." 6 Cor.Jur.Secundum, Assignments, § 83, p. 1138.

[5-7] "The assignment must be construed as a whole, and words or phrases which are wholly inconsistent with its nature or the main intention of the parties are to be rejected. But the language of an assignment must be construed with reference to the facts and circumstances of the particular case. If the intention of the parties is fairly evident and they have actually given expression to it, no matter how inapt that expression may be, effect must be given to their intention. And the circumstances under which an assignment was made may be considered in order to determine its meaning and scope, where the terms are uncertain or ambiguous." 3 Cal.Jur. 282.

It is apparent from the terms of the document here under consideration that the assignor Esplin had purchased from appellant one of its investment certificates and that he owned a National Thrift certificate having an "estimated value of $835.10", which he desired to have applied immediately as a cash interest-bearing credit upon the newly purchased investment certificate. With this purpose in mind, and in consideration of appellant's proceeding to collect such amounts as it was able from the receiver of the National Thrift Corporation and crediting the same upon the investment certificate, said assignor assigned and transferred "for the purposes hereinabove stated and for none other", all of his right, title and interest of, in and to the said National Thrift certificate. After appointing appellant his attorney in fact, assignor then provided that at any time when appellant determined and concluded it was or would be unable to collect further proceeds from the receiver on account of the National Thrift certificate, appellant should reassign and transfer the same to the assignor depleted by the amounts so received and credited on the investment certificate. Moreover, appellant receipted for and accepted the National Thrift certificate "under an express agreement respecting the handling and return of the same".

The language of the instrument manifests a conditional delivery of the National Thrift certificate and an intention to pass to appellant the sole right to receive such proceeds as it could obtain from the receiver of the National Thrift Corporation of America and to credit the same upon the purchase price of the investment certificate. Nothing could be clearer than tha appellant accepted the assignment upon the understanding that it was to be restricted in its operation to the collection of the natural proceeds of the National Thrift certificate, and that, failing in this, appellant should reassign and return the said certificate to the assignor.

[8] This being so, the cause of action herein sued upon, namely, damages for breach of the original trust agreement which breach occurred prior to the execution and delivery of the assignment in question, was not acquired by appellant under the terms of the said assignment.

For the reasons stated, the judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

In re HENDERSON'S ESTATE.*

PECK v. EASTERN STAR HOMES OF CALIFORNIA.

Civ. 12696.

District Court of Appeal, Second District, Division 2, California.

Sept. 21, 1940.

Hearing Granted Nov. 19, 1940.

1. Courts 🔑**202(1)**

The rules of pleading that control in civil actions do not apply to probate proceedings except in those instances where other provision is not contained in Probate Code. Probate Code, § 1233.

2. Charities 🔑**1**

The essential features of a "public charity" are that it is not confined to privileged individuals but is open to an indefinite public.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Charity".

3. Wills 🔑**15**

A nonprofit corporation organized under statute by fraternal order to own, control, conduct and manage homes, hospitals and asylums for care of aged and indigent members of order was not a "charitable organization," within statute inhibiting bequest of property to a charitable or benevolent corporation or to any person in trust for charitable uses exceeding more than one-third of testator's estate if testator leaves any ascending, descending or collateral heirs, in view of fact that benefits of homes, hospital and asylum were extended exclusively to members of order. Civ.Code, § 593; Probate Code, § 41.

See Words and Phrases, Permanent Edition, for all other definitions of "Charitable Organization".

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding in the matter of the estate of Ella M. Henderson, deceased. Bessie Peck, executrix of the estate of Ella M. Henderson, deceased, petitioned for a partition of the estate on the ground that the Eastern Star Homes of California, a corporation, which was named residuary legatee, was a charitable corporation and for that reason was entitled to only one-third of the estate. From a judgment for petitioner, residuary legatee appeals.

Reversed.

Argabrite & Elver, of Ventura, for appellant.

Lawrence Edwards and Charles H. Epperson, both of Stockton, for respondent.

MOORE, Presiding Justice.

This is an appeal by the Eastern Star Homes of California, a corporation, from a judgment which decreed that a bequest to said corporation was a charitable bequest and consequently void by reason of the fact that it was in violation of section 41 of the Probate Code. Said section inhibits a bequest of property to a charitable or benevolent corporation or to any person "in trust for charitable uses" if the testator leaves any ascending, descending or collateral heirs, "unless the will was duly executed at least thirty days before the death of the testator" and, even though executed, such legacies shall not collectively exceed one-third of the testator's estate as against such heirs.

By her will, executed more than thirty days but less than six months prior to her decease, decedent Ella M. Henderson provided for a specific bequest of $500 to one Bessie Peck and bequeathed the residue of her estate, amounting to $15,729, to said corporation, appellant herein, "to be used by the trustees in such manner as may be most beneficial to the home and its inmates". The will having been admitted to probate, the executrix, at the request of a nephew of decedent, petitioned for a partition of the estate on the ground that appellant was a charitable corporation and for that reason was entitled to only one-third of the estate. Upon the issues presented by the petition the court made its findings in accordance with the petition of the executrix, whereby appellant was denied the right to an award of the whole of said residue, but, on the contrary, two-thirds of the residue was awarded to respondents, certain collateral heirs of decedent, each of whom gained his proportionate share.

Appellant is a non-profit corporation organized in 1930 under section 593, title XII, part IV, division I of the Civil Code, "by the Grand Chapter of the State of California of the Order of the Eastern

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* Subsequent opinion 112 P.2d 605.

Star (1) to own, control, conduct and manage homes, hospitals and asylums for the care, maintenance and support of aged, indigent or infirm members of the Order of the Eastern Star; (2) to assist and further all projects and activities connected with the foregoing purposes; (3) to do and perform every act and thing necessary or convenient to carry out the above named purposes to the same extent as natural persons might or could do." Said Order of the Eastern Star is a fraternal organization with approximately 96,000 members affiliated in 492 local chapters within the state. Its membership is limited to persons elected to membership from Master Masons, their wives, widows, daughters, mothers and sisters. Every member pays an initiation fee as well as annual dues and such assessments as are levied by the Grand Chapter or the local chapter with which the member is affiliated.

Appellant owns and maintains a home for aged, infirm and indigent members of the Order of the Eastern Star. In order to become a resident of said home one must be nominated by a local chapter in accordance with restrictions imposed by the laws of the Grand Chapter and the by-laws of the corporation, after which the board of trustees grants the membership. The restrictions considered by the board in awarding membership to the home relate to age, health, the previous term of the applicant's membership in his local chapter and to the number of residents which any such local chapter may have in the home at the time. When admitted into the home, a member must assign all of his assets to the corporation. Residence in the home is confined strictly to members in the order. The home has a capacity for 80 residents and *is supported by annual assessments levied on members of the order and by the income on investments made from the surplus of previous assessments.*

[1] At the trial appellant contended that said petition for partition did not state facts sufficient to constitute a cause of action against appellant, as required by section 426, Code of Civil Procedure. In view of our conclusion with reference to the nature of appellant it is unnecessary to discuss said petition at length. Suffice it to say that the rules of pleading that control in civil actions do not apply to probate proceedings except in those instances where other provision is not contained in the Probate Code. Probate Code, sec. 1233. The petition complies with section 1100 of said code in describing the property and in supplying the names of those claiming interests in the estate, and the share of each so far as is known to the petitioner. We therefore proceed to a consideration of the paramount issue presented by this appeal, namely, whether the finding that appellant is a charitable organization is supported by the evidence.

[2] Since the bequest to appellant did not by its terms create a trust but was in the form of an absolute bequest to appellant, our only problem is to determine whether appellant is a charitable corporation in contemplation of said section 41 of the Probate Code. While it is true that the act of rendering care to the aged and indigent members of the Order of the Eastern Star is benevolent in its nature, that fact alone is insufficient to establish the character of appellant as a charitable organization. "A charity in the legal sense may be more fully defined as a gift to be applied, consistent with existing laws, for the benefit of an indefinite number of persons". Zollman on Charities, sec. 201. "A charity is a donation in trust for promoting the welfare of mankind at large or of a community or some class forming a part of it, indefinite as to numbers or individuals." Sec. 203, Zollman, etc. "A gift or bequest for the benefit or aid of defined persons is not a charity, but a private trust only. * * * A fund, collected by rates and assessments being in no respect derived from bounty or charity, is not a charitable one." 11 Cor.Jur., 301-303, 14 C.J.S., Charities, § 1. "Since their benevolence begins and ends at home, they will not receive recognition as charities though they may contemplate the occasional exercise of charity and though they aim at the suppression of vice and immorality. * * *" Zollman, Chapter 206. The essential features of a public charity are that it is not confined to privileged individuals but is open to an indefinite public. It is this indefinite, unrestricted quality which gives it its public character. City of Bangor v. Masonic Lodge, 73 Me. 428, 40 Am.Rep. 369. "A charity maintained by the Odd Fellows for the benefit of such persons as they may see fit to admit to its enjoyment * * * is strictly a private charity." Widows' & Orphans' Home of Odd Fellows v. Bos-

worth, 112 Ky. 200, 65 S.W. 591, 592. In a case in Ohio, instituted to prevent the taxation of the assets of an Odd Fellows Lodge, it was held that the lodge was not a charitable organization. "A charitable or benevolent association which extends relief only to its own sick and needy members, and to the widows and orphans of its deceased members, is not 'an institution of purely public charity.'" Morning Star Lodge v. Hayslip, 23 Ohio St. 144.

In the case of a Masonic home, conducted by the Grand Lodge for the support of indigent, afflicted and aged Free Masons, it was held that the home was not a public charity because admission thereto depended entirely on the fact of voluntary association with a particular society so that the group from which the members were selected was not a class of the public. It was held that the word "public" relates to or affects the whole people of a state, whereas to be admitted to said Masonic Home one must be a Mason. "When the eligibility of those admitted is thus determined," said the court, "it seems to us the institution is withdrawn from public, and put in the class of private, charities. * * * when the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which concerns not the public at large." Philadelphia v. Masonic Home, 160 Pa. 572, 28 A. 954, 955, 23 L.R.A. 545, 40 Am.St.Rep. 736.

The distinction between a fraternal and a charitable organization is clearly defined in Re Rathbone's Estate, 170 Misc. 1030, 11 N.Y.S.2d 506, 529, where the court said: "The distinction between a beneficial and a charitable society is clear. In the beneficial society the world outside the association's doors is essentially a stranger. *The beneficial society is regardful only of its members.* * * * Its membership is formed * * * to satisfy onerous conditions—financial, moral [and] civil * * *. *The members have been drawn together by a mutual desire to be as they are. Once assembled they exclude all other persons from their society activities. The charitable institution is exactly the opposite in all the stated particulars* allowing of comparison. * * * Charity is the proof of the profound paradox that to get one must give *but the giving must not be for the purpose of the getting.* * * To qualify for admission to the primary benefits of charity the cardinal and sole requisite is need. *Charity is regardful of others.* To it the idea of a group of insiders excluding all outsiders—an idea so essential to an interpretation of the nature of a fraternal organization, especially secret fraternal organizations—is abhorrent." (Italics added.)

Turning now from these learned authorities and decisions of distant jurisdictions, we find that our Supreme Court has made the meaning of a charitable corporation so clear as to be beyond cavil. In the Estate of Dol, 182 Cal. 159, 187 P. 428, 430, a decedent had left a bequest to the French Hospital of the city of Los Angeles. He died within less than thirty days after the execution of his will. His heirs sued to invalidate the bequest as one to a charitable or benevolent corporation. It was held that the French Hospital was not a charitable corporation. One of the essential features of a charitable use, said the court, "is that it shall be for the public benefit, either for the entire public or for some particular class of persons, indefinite in number, who constitute a part of the public. The persons to be benefited must consist of 'the general public or some class of the general public indefinite as to names and numbers.'" The court held that the society which was the owner of the hospital was not a charitable society within the meaning of said section (at that time, Civil Code, sec. 1313). The society was established for the purpose of mutual assistance in case of sickness. Any white person was eligible for membership upon meeting the requirements and by paying the admission fee, and they were entitled to medical treatment in a hospital maintained by the society.

[3] The facts relative to the French Hospital are very similar to those of the appellant and the Order of the Eastern Star. Only members of the Order of the Eastern Star are eligible for admission to the home. Membership in the order is limited to Master Masons and specified relatives and requires the payment of an initiation fee, annual dues and assessments. From the facts in this case it is made clear that the benefits of the home are extended exclusively to members of the order and are withheld from the general public or any particular class of the public indefinite in number. The argument made by respondents that the particular inmates

of the home are indefinite in number, because their number is constantly changing and because membership in the order is likewise changing, is answered completely by the language of said last mentioned decision. The names and number of persons who may receive the benefits of the home are always ascertainable at any given time by reference to the records of the Order of the Eastern Star. Since it cannot be said that the beneficiaries of appellant are indefinite, it must necessarily follow that it is not a charitable organization within the purview of said section 41 of the Probate Code.

The Estate of Lubin, 186 Cal. 326, 199 P. 15, 16, cited by respondents, is clearly distinguishable from the facts of the instant case. That case involved the validity of bequests to the congregation of Beth Israel, a synagogue. The synagogue contended, as does appellant herein, that it was not a charitable corporation within the meaning of said section 1313 of the Civil Code because it was not an organization for the benefit of the public generally or for a particular class of the public, but was for the benefit of the particular individuals who make up the membership, and therefore comes within the rule of Estate of Dol, supra. "The immediate answer to this," said this court, "is that the by-laws relied upon do not have the effect of limiting the purpose of the corporation to that of benefiting in a religious way only those particular individuals only who happen at the time to be members of the corporation". The decision emphasizes that the privileges and benefits of said synagogue were extended to all of the Jewish faith as a class, whether members of the synagogue or not, and that included a part of the public indefinite in number. We have already adverted to the fact that the benefits of the home in the instant case are restricted to selected members of the Order of the Eastern Star and are not available to the public at large or to any class of an indefinite number of the public at large. Also cited are the Estate of Upham, 127 Cal. 90, 59 P. 315; Estate of Willey, 128 Cal. 1, 60 P. 471, but they are not apropos. The Upham case involved a bequest to the trustees of the Good Templars' Orphans' Home of Vallejo in trust for the use and benefit of the orphan children of said institution, which the court held to be given for charitable purposes. In the Willey case a similar bequest was made to certain Masonic lodges in trust for the use of the widows' and orphans' fund. Both bequests were declared to be for charitable purposes for the reasons that the persons to be benefited were vague and uncertain. In neither case were the beneficiaries required to be members of any organization or to pay dues or assessments for the privilege to be accorded to them. Moreover, from anything that appears, the beneficiaries in either case could not be ascertained by reference to the records of the Good Templars or of the Masonic lodges. Neither case involved the application of said code section 1313, Civil Code, to the validity of the bequest. The status of the Good Templars lodge and the Masonic lodge as charitable or non-charitable institutions was decided in neither case.

By reason of our conclusion that the evidence proves that appellant is not a public charity, it will be unnecessary to discuss other points raised by the appeal.

The judgment is reversed.

We concur: WOOD, J.; McCOMB, J.

BATES v. BLAKE.

Civ. 12041.

District Court of Appeal, Second District, Division 1, California.

Sept. 20, 1940.

Rehearing Denied Oct. 16, 1940.

Hearing Granted Nov. 19, 1940.

1. Limitation of actions 🔑58(5)

The statute requiring actions against corporate stockholders to enforce liability created by law to be brought within three years after liability is "created" begins to run on an action to enforce statutory assessment against stockholders of an insolvent bank when assessment is levied, and not when bank incurs debts for which the assessment is levied, or when the corporation becomes insolvent. Code Civ.Proc. § 359.

2. Limitation of actions 🔑2(2)

In action by Superintendent of Banking of the State of Iowa against a California resident to recover assessment levied against defendant as a stockholder of an insolvent Iowa bank, in determining when liability was created for purpose of applying three-year statute of limitations, recourse would be had to the Iowa law and its similarity, if any, to California law. Code Civ.Proc. § 359; Gen.Laws 1937, Act 652a, § 1; Code Iowa 1935, § 9251.

3. Banks and banking ⚷49(1)

Under Iowa statute, a creditor of an insolvent bank has no direct remedy against stockholders, but his only prerogative is to maintain an action in equity to determine the liability of the stockholders and the amount to which each creditor should be entitled. Code Iowa 1935, § 9253.

4. Banks and banking ⚷47(2)

Under Iowa statute imposing liability upon stockholders of insolvent bank and authorizing a creditor to maintain action in equity to determine liability of stockholders and amount to which each creditor shall be entitled, liability is created only when all interested parties are brought into court and a special decree determines its existence, the amount thereof, and the time when such liability must be met by stockholders. Code Iowa 1935, §§ 9251-9253.

5. Limitation of actions ⚷58(5)

Under statute requiring actions against corporate stockholders to enforce liability created by law to be brought within three years after liability is created, limitations commenced to run against action to enforce, in California, assessment against stockholders of an insolvent Iowa bank when Iowa court by decree levied assessment against stockholders and not when bank became insolvent. Code Civ.Proc. § 359; Code Iowa 1935, §§ 9251-9253.

6. Banks and banking ⚷49(2)
Constitutional law ⚷299
Judgment ⚷815

Where receiver of insolvent Iowa bank instituted assessment proceedings against stockholders, and stockholder residing in California was personally served with process which was equivalent to valid service by publication, Iowa court had jurisdiction to fix assessment against California stockholder and to instruct receiver to proceed by appropriate action to collect sum, since assessment proceedings did not establish money judgment against stockholder but merely established basis upon which subsequent suit to recover money judgment might be predicated, and stockholder was not deprived of property without "due process of law" but was free to assert any defense he might have, and assessment decree was entitled to full faith and credit in California courts. Code Iowa 1935, §§ 9251-9253.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by D. W. Bates, as Superintendent of Banking of the State of Iowa and as receiver of the Cedar Rapids Savings Bank & Trust Company of Cedar Rapids, Iowa, against Georgie Blake, to recover an assessment levied against the defendant as the owner of bank stock. From a judgment for the defendant, plaintiff appeals.

Reversed and remanded with directions.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for appellant.

Claire T. Van Etten, of Los Angeles, for respondent.

WHITE, Justice.

This is an action brought by the Superintendent of Banking of the State of Iowa to recover an assessment levied against the defendant, residing in Los Angeles county, California, and who was a stockholder of the Cedar Rapids Savings Bank & Trust Company of Cedar Rapids, Iowa. A demurrer to the amended complaint was sustained without leave to amend, resulting in the entry of a judgment of dismissal. The appeal is before us on the judgment roll alone.

There is no dispute as to the facts, which may be epitomized as follows: On January 24, 1933, the Cedar Rapids Savings Bank & Trust Company made application to the Superintendent of Banking of the State of Iowa to take over and operate such bank pursuant to the terms of an Iowa moratorium statute known as Senate File No. 111, published as sections 9283-e1 to 9283-e6, inclusive, of the Code of Iowa (1935). Pursuant to such application the banking superintendent did take over such management on January 25, 1933, and continued the same until May 3, 1934. During the interim just mentioned the bank by due corporate proceedings obtained a loan of $650,000 from the Reconstruction Finance

Corporation, and then entered into an agreement with another bank, the American Trust & Savings Bank, whereby there was formed the Guaranty Bank & Trust Company. Pursuant to this arrangement, the new bank agreed to purchase certain of the assets of the Cedar Rapids Bank and to assume its deposit liabilities, which agreement was consummated May 3, 1934, and resulted in officially closing the Cedar Rapids Bank on that date. Following such transfer of assets the Superintendent of Banking concluded that the Cedar Rapids Bank was then in an unsafe condition, and decided that he should take it over for the purpose of liquidation. In May, 1934, such banking superintendent filed an action in the proper court in the state of Iowa for the appointment of a receiver to liquidate the bank, and the superintendent himself was appointed to act in such capacity by order of the court made May 3, 1934. Approximately a year later, on or about April 27, 1935, such receiver filed in the Iowa court an application for an order authorizing the commencement of an action against the stockholders of the bank, asserting the existence of a deficiency in excess of $200,000 and alleging that an assessment against such stockholders was essential. Following the issuance of the order prayed for, an action was commenced by the receiver in the Iowa court against all stockholders of the insolvent bank. The defendant herein was named in a like capacity in such suit because of the ownership of 104 shares of stock in the bank, subject to a liability under statutory assessment in the sum of $10,400, such an amount being an assessment equal to the par value of the shares she held. What is termed in the Iowa court an "original notice", which corresponds to a summons under California procedure, was personally served upon the defendant in the instant action, but such service was actually made in the state of California. Thereafter, on September 18, 1936, the Iowa court entered its decree reciting all the jurisdictional statutory conditions and that the assessment should be levied against the defendant herein, Georgie Blake, in the sum of $10,400, and instructing the receiver to proceed by appropriate action in the state of California to collect such sum. The complaint filed herein included a transcript duly certified by the clerk of the district court of Iowa of the various pleadings, orders and proceedings in the matter.

[1, 2] In urging a reversal, appellant first presents for consideration the question of when under the facts alleged and the relevant statutes of Iowa, the applicable period of limitations against the plaintiff herein began. The instant action was filed in the Los Angeles county superior court on February 24, 1937. We are convinced that section 359 of the Code of Civil Procedure is the applicable statute of limitations, and this section prescribes a three-year limitation following creation of the liability. Richardson v. Craig, 11 Cal.2d 131, 136, 77 P.2d 1077. If the statute commenced to run when the Iowa Superintendent of Banking first assumed management of the Cedar Rapids Bank on January 23, 1933, then the action instituted in California in 1937 was outlawed; while should it be determined that the statute started to run from the date when the banking superintendent filed his action for appointment of a receiver to liquidate the bank on May 3, 1934, or upon the filing of the application of the banking superintendent on April 27, 1935, for permission to institute proceedings for the purpose of levying and collecting the statutory assessment against the stockholders, or from the date of the decree of the Iowa court on September 18, 1936, adjudging that a 100 per cent assessment should be levied against defendant herein as a stockholder, then the action under investigation was timely. In construing the California Bank Stockholders' Liability Act (Stats.1931, p. 338, amended by Stats.1937, p. 627), our Supreme Court, in Richardson v. Craig, supra, decisively held that the liability of the bank stockholder is not "created" when the corporation incurs the debt, or even when the corporation becomes insolvent, but that such "creation" takes place only when the assessment is made. Up to the time when the assessment is levied the stockholder's liability is regarded as a possibility, becoming a certainty only upon levy of the assessment. In arriving at a determination of the question as to when liability was "created" in the instant case, we must have recourse to the Iowa law and its similarity, if any, to the California law. If the statutes of both states parallel each other, then the reasoning and conclusions of our Supreme Court in Richardson v. Craig, supra, solve the question. The California statute (Deering's Gen.Laws, Act 652a, sec. 1), so far as it is relevant, reads: "The stockholders of every banking corporation

organized under the laws of the State of California shall be held individually liable, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; * * *."

The Iowa statute (section 9251 of the Code of Iowa, 1935) recites that: "All stockholders of savings and state banks shall be individually liable to the creditors of such corporation of which they are stockholders over and above the amount of stock by them held therein and any amount paid thereon, to an amount equal to their respective shares, for all its liabilities accruing while they remained such stockholders."

The similarity between the two statutes is at once apparent. True, the Iowa law makes the stockholder liable for debts *accruing* during the time the stock is held, while the California law simply makes the stockholder liable for debts of the corporation without specifying the time of incurring or the time of accruing of such debts. We hold, however, that the quoted Iowa law does not of itself "create" a liability on the part of the stockholders, but merely establishes the possibility of such liability arising when and if the provisions of other statutes are invoked. Let us therefore now give consideration to section 9252 of the Iowa code, which provides: "Should any such association or corporation become insolvent, its stockholders may be severally compelled to pay such deficiency in proportion to the amount of stock owned by each, not to exceed the extent of the additional liability hereby created."

And section 9253, reading as follows: "The assignee or receiver of any such corporation, or in case there is none, or of his failure or refusal to act, any creditor thereof, may maintain an action in equity to determine the liability of the stockholders, and the amount to which each creditor shall be entitled; and all parties interested shall be brought into court."

[3-5] We cannot agree with respondent that under the Iowa law the creditor has a direct remedy against the stockholder. His only prerogative is akin to that of an assignee or receiver of an insolvent corporation, viz., to maintain an action in equity "to determine the liability of the stockholders, and the amount to which each creditor shall be entitled". The stockholder is under no obligation to pay unless and until the court shall have determined his liability and the amount thereof. While a cause of action accrues to enforce the stockholder's liability when insolvency ensues to the corporation, the liability is created only when all interested parties are brought into court and a judicial decree determines its existence, the amount thereof, and the time when such liability must be met by the stockholder. So in the case at bar, we find that the plaintiff superintendent of banking, named as receiver for the insolvent Iowa bank, filed with the Iowa court a petition in equity against the stockholders of such insolvent bank to collect their statutory assessment. In his petition the receiver, among other things, prayed that the court determine the question of assets and liabilities of said bank, and that the court levy an assessment against each stockholder upon the shares of capital stock held by such stockholder. Pursuant to such application the Iowa court did levy a 100 per cent assessment against defendant Georgie Blake on the stock owned by her and fixed the amount of said assessment at $10,400. The decree of the Iowa court then directed the superintendent of banking, as receiver, to "proceed forthwith, with such action or actions in or out of the State of Iowa, and especially in the State of California, as are necessary to recover and collect said assessment * * * so levied herein against said defendant Georgie Blake". The Iowa procedure differs only in mechanical details from our California procedure, but in its essence it is the same. In our state the superintendent of banks proceeds without the interposition of a court. The superintendent himself determines the necessity for an assessment and the amount thereof. He gives the requisite statutory notices, and goes to court only when default occurs in payment of the assessment. In Iowa the facts are presented to the court in an equity proceeding, and the court determines the amount of the assessment and levies the same. We therefore hold that under section 359 of the Code of Civil Procedure, the time limitation commenced to run when by decree of the Iowa court on September 18, 1936, the assessment against respondent herein was levied, and that it was by such levy that her liability was "created". Therefore the instant action was filed well within the statutory time. Such is not

only the holding of our Supreme Court in Richardson v. Craig, supra, construing the California Bank Stockholders' Liability Act, which, as heretofore stated, is similar to the Iowa act, but the same conclusion was arrived at by the Ninth Circuit Court of Appeals in Johnson v. Greene, 88 F.2d 683, which dealt with liability under the National Bank Act, which legislation is substantially the same as the liability established by both Iowa and California law.

What we have herein said disposes of respondent's claim that the action of the bank in seeking the protection of the Iowa moratorium act entitled Senate File No. 111 conclusively proved its insolvency as of the date of such action on the part of the bank. This for the reason that it is not the insolvency of the corporation which "creates" the stockholder's liability. As was said in Richardson v. Craig, supra [11 Cal.2d 131, 77 P.2d 1080], "the possibility of liability which confronted the bank stockholder when the bank failed became a certainty when the assessment was levied".

[6] Respondent finally contends that the demurrer was properly sustained because the Iowa judgment obtained against respondent was void in California by reason of lack of jurisdiction over the person of respondent, who was personally served with process in California. In support of this claim respondent directs our attention to the provisions of section 9253 of the Iowa statute, which makes it necessary that all parties interested "be brought into court". It is conceded that personal service of process upon defendant Georgie Blake outside the state of Iowa has the same force and effect, and that the same jurisdiction is thereby acquired, as would be the case if the service were by publication. Such service, of course, would not clothe the Iowa court with jurisdiction to render a personal judgment against defendant Georgie Blake. The fallacy of respondent's argument lies in the fact that the suit brought in California is not predicated upon the theory that the Iowa court had rendered a judgment for $10,400 against Georgie Blake which could be enforced in this state as a personal judgment. The assessment proceedings in the Iowa court did not establish a judgment against the stockholder, but merely established the basis upon which a subsequent suit to recover a money judgment against the stockholder might be predicated. The stockholder is not deprived of his property without due process of law through the assessment proceeding. He is free to assert any defense he has against being required to pay the assessment in the subsequent suit brought to enforce such payment. We have no hesitancy, therefore, in saying that personal service upon respondent in California, concededly equivalent to a valid service by publication, met the requirements necessary to confer jurisdiction upon the Iowa court, not to enter a personal judgment against her, but sufficient to justify such court in decreeing the necessity for and amount of the assessment as to her. Bates v. Cooley, 187 Wash. 489, 60 P.2d 23. The decree of assessment entered by the Iowa court must therefore be given full faith and credit in the courts of California. Chandler v. Peketz, 297 U.S. 609, 56 S.Ct. 602, 80 L.Ed. 881.

The judgment is reversed and the cause remanded with directions to the court below to overrule the demurrer.

We concur: YORK, P. J.; DORAN, J.

BATES v. SPANGLER.

Civ. 12053.

District Court of Appeal, Second District, Division 1, California.

Sept. 20, 1940.

Rehearing Denied Nov. 16, 1940.

Hearing Granted Nov. 19, 1940.

1. Banks and banking 🔑49(2)

Where receiver of insolvent Iowa bank filed action in equity in Iowa court for assessment of stockholders and California resident in capacity as executrix of the stockholder was joined as a defendant and summons was personally served upon her, Iowa court had jurisdiction to determine the necessity for levying an assessment and the amount thereof since proceeding was in rem.

2. Banks and banking 🔑47(1)

Where action to enforce liability of stockholder of insolvent Iowa bank could have been maintained against decedent stockholder in California if he had then been living, action was maintainable against his executrix, since the estate in the person of the executrix was a stockholder.

3. Banks and banking ⚷47(1)

Where executrix of deceased stockholder of insolvent Iowa bank allegedly with knowledge of impending assessment petitioned for partial distribution of the estate of which executrix was sole beneficiary, leaving only the bank stock undistributed, the executrix took the estate burdened with the liability of the assessment, notwithstanding distribution was made before imposition of the assessment on shareholders by decree of Iowa court, and assets of decedent could be followed into her hands as sole beneficiary. Civ.Code, § 323.

4. Banks and banking ⚷47(1), 49(6)

Where it was alleged that executrix, who was sole beneficiary, speeded up distribution to her of entire estate except stock in insolvent Iowa bank in order to avoid assessment on stockholders, and that in pursuance of such plan she relinquished her right to impoverished bank stock, if the alleged facts were true, recovery could be had against executrix for her wrongful act, or, if assets were not distributed pursuant to order of partial distribution, stockholder's liability could be impressed upon funds and assets of estate, and it was proper to sue executrix both in her representative and individual capacity to collect assessment. Civ. Code, § 323.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by D. W. Bates, as Superintendent of Banking of the State of Iowa and as receiver of the Cedar Rapids Savings Bank & Trust Company of Cedar Rapids, Iowa, against Adelaide F. Spangler, individually and as executrix of the will of David E. Spangler, deceased, to recover an assessment levied against David E. Spangler, as stockholder of an insolvent Iowa bank. From a judgment for the defendant, plaintiff appeals.

Reversed and remanded with directions.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for appellant.

Claire T. Van Etten, of Los Angeles, for respondent.

WHITE, Justice.

This action comes before us on appeal from a judgment of dismissal entered after demurrer to an amended complaint was sustained without leave to amend. Except as to dates, the variation of which does not materially change or affect the various periods of time which are herein relevant, the factual situation here involved is the same as that presented by the case of Bates v. Blake, 105 P.2d 940, in which we have this day filed an opinion. Our decision in the cited case is determinative of all issues involved in this appeal, with the exception of the question of whether the respondent is liable, either as executrix of the will of a deceased stockholder or in her individual capacity as sole beneficiary under his will.

It is established by the record that David E. Spangler became a stockholder of the Cedar Rapids Savings Bank & Trust Company in 1909, at which time he held 52 shares of stock, which number was increased by a stock dividend in 1914, so that thereafter and at the time of his death he was the owner of 104 shares of such bank stock, each share having a par value of $100. No transfer was ever made from the name of David E. Spangler on the stock records of the bank. Mr. Spangler died testate on January 7, 1933. The will was offered for probate, and the defendant, Adelaide F. Spangler, became the executrix thereunder. By the will all property of the deceased was bequeathed in equal shares to the widow, Adelaide F. Spangler, and to a daughter, Catherine K. Smithers. The daughter, however, assigned all her right, title and interest in the estate to her mother.

Notice to creditors in the estate was first published on or about February 8, 1933. Consequently, the time within which to file claims against the estate expired about August 8, 1933. In July of that year an inventory and appraisement was filed, setting forth the value of the estate as in excess of $126,000, in which inventory was included the stock of the above-mentioned bank. On June 29, 1934, the executrix filed a final account and petition for distribution of the estate, in which she alleged that all claims which had been allowed and filed against the estate had been paid and that all tax obligations were likewise satisfied. Distribution of the entire estate to Adelaide F. Spangler was requested, except with respect to the 104 shares of bank stock here involved. In regard to that item the executrix in her petition alleged that the stock was apparently worthless, that its status was uncertain, and for that reason she did not desire to take distribution thereof. On August 6, 1934, after due notice, the Superior Court of Los Angeles County, sitting in probate, made its order settling such account and directing partial distribution of the estate. No further proceedings, so far as the estate is concerned, are reflected in the record, and it does not appear therefrom whether any actual partial distribution was made as authorized, but the estate proceedings were not terminated. The complaint filed herein by the banking superintendent alleged that the assets of the estate were in possession of Adelaide F. Spangler, either individually or as executrix.

Concerning the assessment upon which the present action is predicated, the amended complaint alleged that on January 24, 1933, the Cedar Rapids Savings Bank and Trust Company was taken over by the banking superintendent of the state of Iowa, pursuant to the terms of an Iowa moratorium statute known as Senate File No. 111, Code Iowa 1935, §§ 9283-e1 to 9283-e6, and that such banking superintendent continued to administer the affairs of the bank thereunder until May 3, 1934, on which date he closed the bank and instituted an action in equity in the district court of the county in which the bank was situated for the appointment of himself as receiver for the purpose of winding up its affairs. Such appointment was made by the court and letters of receivership issued on May 4, 1934. On or about April 27, 1935, the banking superintendent, as receiver, filed an action in equity in the Iowa court for the assessment of the stockholders of the bank, in which action Adelaide F. Spangler, defendant herein, was joined as a defendant in her capacity as executrix of the Estate of David E. Spangler, deceased. On July 25, 1935, summons in the cause was personally served on Adelaide F. Spangler in Los Angeles. She made no appearance in the Iowa action, and on February 20, 1936, the Iowa court entered its decree adjudging that proper service had been made upon her in the state of California; that she had had sufficient time to appear and defend, but had not done so; that it was necessary to levy an assessment of 100 per cent on each share of stock, and that Adelaide F. Spangler, executrix of the will of David E. Spangler, deceased, was a stockholder and owned and held 104 shares of stock of the par value of $100 each. Such decree further directed that a 100 per cent assessment should be and was thereby levied against each share of stock and that the amount of the assessment against Adelaide F. Spangler as such executrix was $10,400. The amended complaint further alleged that Adelaide F. Spangler, executrix of her husband's estate, well knowing the situation in Iowa with respect to the bank, had filed the aforesaid account and petition for distribution in an endeavor to prevent the filing of a claim against the estate and to prevent the assets of the estate from being applied in favor of any anticipated assessment, and that she not only failed to reserve from distribution assets sufficient to pay the assessment which might be levied against the stock, but failed to disclose to the probate court in California that she had been advised that the bank had been closed and that a 100 per cent assessment on the stock was then probable and imminent. The amended complaint further alleged that said executrix, contrary to the provisions of section 323 of the Civil Code of the state of California, did not apply for any order delaying distribution of the estate, notwithstanding that the assets of the estate were liable to such assessment. There was a further averment that the estate was at all times solvent and able to pay all just claims, including such assessment.

[1] We entertain no doubt that the method of service herein upon the defendant executrix clothed the Iowa court with jurisdiction. The action in Iowa to determine the necessity for levying an assessment and the amount thereof was a proceeding in rem. Our reasons for the conclusion just stated are contained in the case of Bates v. Blake, supra.

[2] Concerning the liability of defendant Adelaide F. Spangler as executrix of the estate of a deceased stockholder, it should be borne in mind that on July 25, 1935, when summons in the Iowa action was served upon her, as well as upon February 20, 1936, when the Iowa court determined the necessity for and amount of the assessment, the estate of the deceased stockholder was in process of probate. The amended complaint alleges, at the time the California probate court made its order for distribution, which order distributed to Mrs. Spangler the entire estate save and except the Iowa bank stock, knowledge on her part of the impending assessment and

avers that the petition for distribution was designedly filed in order to avoid the liability created by such assessment. Without doubt the action in California to enforce the stockholder's liability could have been maintained against the decedent stockholder had he been living. Owning as he did the stock in question at the time of his death, the action was maintainable against his executrix. Read v. Johnson, 213 Cal. 432, 436, 2 P.2d 377, because during all times herein pertinent the estate in the person of the executrix was the stockholder.

[3] We are satisfied that under the law the assets of the decedent may be followed into the hands of respondent, who received the entire estate, and which estate the amended complaint alleges was greatly in excess of the assessment made. Luce v. Thompson, 8 Cir., 36 F.2d 183, 185. The sole beneficiary took the estate burdened with the liability of this assessment, and such would be the case even though distribution be made prior to insolvency of the bank and before imposition of the assessment on shareholders therein by decree of the Iowa court. Jack v. Forrest, 10 Cir., 71 F.2d 264.

[4] There is a further ground upon which this action against respondent executrix and beneficiary under the will may be sustained. As heretofore pointed out, the amended complaint alleged that respondent executrix speeded up the distribution to her of the entire estate except the bank stock in order to avoid the liability imposed upon such stock; and that in pursuance of such plan she relinquished her right to the impoverished bank stock. Were the court to find upon the trial that the foregoing was true, then recovery could be had against her as executrix for such wrongful act. As was said in Luce v. Thompson, supra [36 F.2d 186]: "The rule thus announced has still more pointed application, where the executor is at the same time sole devisee and beneficiary under the will." It follows, therefore, that if the assets of the estate were actually received by respondent as beneficiary under the terms of the order of distribution, then she is liable in her individual capacity by reason of the general principles heretofore stated and the authorities cited in support thereof. If, however, the assets of the estate have not been distributed pursuant to the order of partial distribution and are held by respondent as executrix, then the stockholder's liability herein may be impressed upon the funds and assets of such estate. Respondent was properly sued in both her representative and individual capacity.

For the reasons given in Bates v. Blake, supra, as well as for the additional reasons herein advanced, the judgment is reversed and the cause remanded with directions to the court below to overrule the demurrer.

We concur: YORK, P. J.; DORAN, J.

40 Cal.App.2d 740

PEOPLE v. JAMES.

Cr. 461.

District Court of Appeal, Fourth District. California.
Sept. 25, 1940.

1. Criminal law 🔑369(1)

Generally, evidence of crimes other than that charged is inadmissible, but there are limitations and exceptions allowing introduction of evidence of other offenses.

2. Criminal law 🔑365(1), 369(15), 370, 371 (1, 12), 372(1)

Generally, evidence of crimes other than that charged is admissible, where it tends to establish intent, guilty knowledge, motive, and common scheme, identity of plan, design, or system, or where it tends to connect the defendant with the crime charged, or where the other crimes are part of the "res gestæ".

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

3. Criminal law 🔑372(5)

In prosecution for grand theft, wherein prosecuting witness testified that defendant spat on witness' trousers and then with profuse apology brushed witness off with a handkerchief and rubbed witness' trousers near the hip pocket, and that shortly thereafter witness discovered that his wallet was gone, trial court properly admitted testimony that the defendant had about the same time adopted the same procedure with respect to another victim.

4. Criminal law ⚷673(5)

Generally, trial courts should, by proper instructions, limit jury's consideration of evidence of offenses other than that charged to the purposes for which the evidence is received.

5. Criminal law ⚷824(8)

Where defendant offered no instruction to limit jury's consideration of evidence of offense other than that charged to the purposes for which the evidence was received, the District Court of Appeal could not predicate error on the trial court's failure to give the instruction.

6. Criminal law ⚷444, 1186(4)

In prosecution of alleged pickpocket for grand theft, the admission of testimony in reference to extrajudicial identification of photographs of pickpockets and failure to strike out testimony in reference thereto, was error, but the error was not prejudicial under the Constitution, where there was positive identification of the alleged pickpocket in court. Const. art. 6, § 4½.

7. Witnesses ⚷337(5)

Where a defendant who had been previously convicted of a felony, but who had been granted probation and a dismissal, became a witness in his own behalf in a subsequent prosecution for another offense, he subjected himself to impeachment on ground that he had been convicted of a felony. Pen.Code, §§ 1203.3, 1203.4.

◆

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Grey James was convicted of grand theft, and he appeals.

Judgment affirmed.

Edgar G. Langford, of San Diego, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant was charged with the crime of grand theft of $21, taken from the person of one Tosh Jackson. No prior conviction of a felony was charged. A verdict of guilty was found by the jury. A motion for new trial was argued and denied and judgment pronounced. This appeal is from the judgment and order denying the motion for new trial.

On February 22, 1940, in the forenoon, Tosh Jackson was walking on a street in the city of San Diego when the appellant, who was walking very fast in the same direction, passed him by for a distance of about 40 feet and suddenly turned around. As he was opposite Mr. Jackson the appellant spit on the person of Mr. Jackson and then with profuse apology brushed him off with a handkerchief, with which he also rubbed the outside of his trousers near the hip pocket. When Mr. Jackson arrived at his hotel he reached into his pocket for his key and discovered that his wallet containing his money was gone. During the episode hereinabove referred to Mr. Jackson claimed that he obtained a good look at the appellant. Several days later he selected the appellant out of a line-up of men and also identified him in the courtroom as the man who accosted him on the street.

The record discloses that the prosecution produced certain additional evidence in chief and the court allowed its reception over the strenuous objection of appellant, to the following effect: that on February 10, 1940, the appellant accosted one Rosendo G. Montijo on a street in the city of San Diego and adopted the same procedure of spitting on his victim and brushing him off, and with the same result experienced by Jackson. Montijo later pointed out the appellant from a line-up of prisoners and also identified the appellant in court as the man who spit on him and brushed him off. The trial court, over objection, also allowed certain testimony of a police officer to stand in evidence, bearing on an occasion when the victim Jackson, at the police station, identified and selected a certain photograph of appellant, who is colored, from several pictures of negroes. The testimony reads in part as follows:

"Q. By Mr. Curtis: Amongst those pictures was there a picture of this defendant? A. Yes, sir. * * *

"Q. And among those pictures of negroes how many pictures were shown Mr. Jackson, about? A. I showed him possibly a dozen pictures of negro pickpockets."

A motion was made to strike the last answer. The trial court denied the motion. The photographs which the witness was examining in court were not the pictures previously shown the victim but were pictures taken of appellant at a later date. The record does not indicate that these particular photographs were received in evidence. The witness only referred to them while testifying.

After the people rested their case appellant endeavored to establish an alibi. Several witnesses corroborated his statement that he was in Los Angeles on both February 10th and February 22d, at the times of the claimed thefts. Appellant was asked on cross-examination by way of impeachment if he had been convicted of a felony. He denied such a conviction. The prosecution then offered in evidence, over objection, a certified copy of an information charging appellant with the offense of grand theft in Los Angeles county, the judgment of conviction, and an order terminating felony probation under section 1203.3 of the Penal Code.

Appellant now argues first that the trial court committed prejudicial error in permitting the introduction of the testimony of Rosendo G. Montijo tending to show that the defendant had committed an offense independent of and not connected in its commission with the offense for which he was being tried, citing People v. Molineux, 168 N.Y. 264, 291, 61 N.E. 286, 62 L.R.A. 193; Miller v. State, 13 Okl.Cr. 176, 163 P. 131, 132, L.R.A.1917D, 383; People v. Morales, 45 Cal.App. 553, 555, 188 P. 58; People v. Gibson, 107 Cal.App. 76, 80, 289 P. 937; People v. Wagner, 133 Cal.App. 775, 779, 24 P.2d 927, and People v. Ranney, 213 Cal. 70, 75, 1 P.2d 423.

Second, it is contended that the trial court committed prejudicial error in admitting, over defendant's objection, testimony relating to the extrajudicial identification of a picture which was not presented in court or identified as being a photograph of the defendant, citing People v. Goltra, 115 Cal.App. 539, 551, 2 P.2d 35.

Third, appellant contends that the trial court committed prejudicial error in permitting the district attorney to impeach the testimony of the defendant by proof that he had previously been convicted of a felony, granted probation, served his term of probation, and received a discharge therefrom and dismissal of the case, citing People v. Bannon, 59 Cal.App. 50, 61, 209 P. 1029; People v. Mackey, 58 Cal.App. 123, 208 P. 135; Pen.Code, sec. 1203.4, and People v. Hainline, 219 Cal. 532, 534, 535, 28 P.2d 16.

[1, 2] It is conceded that the general rule is that evidence of other crimes is not admissible to prove the charges for which the defendant stands charged, but there are limitations and exceptions to the rule allowing introduction of evidence of other offenses and it is the contention of respondent that the evidence pertaining to the commission of a similar offense by appellant as here described brings the instant case within the exception and limitation of the rule, citing People v. Cosby, 137 Cal.App. 332, 334, 31 P.2d 218; People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806; People v. Knight, 62 Cal. App. 143, 216 P. 96; People v. King, 4 Cal. App.2d 727, 41 P.2d 593, and People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569. The general rule and many of its exceptions are set forth in People v. Lapierre, 205 Cal. 462, 469, 470, 271 P. 497, to the effect that it is not competent for the prosecution to prove the commission of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged, but it is held that this rule does not exclude such evidence when it logically tends to prove any fact necessary or pertinent to the proof of the crime for which the defendant is being tried. Generally speaking, such evidence is admissible when it tends to establish intent, guilty knowledge, motive, and common scheme, identity of plan, design, or system, or when it tends to connect the defendant with the crime charged, or when the other crimes are part of the res gestae. People v. Washburn, 104 Cal.App. 662, 286 P. 711; People v. Glass, 158 Cal. 650, 112 P. 281. To the same effect is People v. Cosby, supra, where evidence was admitted for the limited purpose of tending to establish that the defendant had a common plan or scheme of luring women to his apartment for the purpose of ravishing them. The evidence indicated that the defendant had on two previous occasions lured women to his apartment under similar circumstances. In affirming the judgment of conviction the court said [137 Cal. App. 332, 31 P.2d 220]: "While it is the general rule that a defendant in a criminal case cannot be tried for any other offense than that with which he is charged in the information, and that evidence of other

and distinct offenses is not admissible, still there are exceptions to this general rule, one of which is that where several crimes are committed as part of one scheme or plan, all of the same general character, tending to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular crime for which the prisoner is being tried, as tending to show logically that the crime in question was part of such common scheme," citing cases.

In Webb v. State, 27 Okl.Cr. 339, 227 P. 907, it was held that in a prosecution for grand larceny evidence of other thefts, explanatory of the system and manner of taking the things specifically charged was admissible.

Section 484 of the Penal Code merged the former offenses of larceny, embezzlement and obtaining money by false pretenses into one crime of theft, and proof of any one of them is sufficient to sustain the charge of theft.

In People v. Robinson, 107 Cal.App. 211, 290 P. 470, a case involving false pretenses, it was held that evidence of similar transactions was admissible to show guilty knowledge or intent where the transactions contained the material elements of the main case, and that such evidence was also admissible to establish a definite prior design or system which included the doing of the act charged as part of its consummation, and for that purpose it may be shown that defendant made substantially the same representations to other persons, it being sufficient if they tend to prove a scheme of the defendant which included the acts charged.

In People v. Stutsman, 66 Cal.App. 134, 225 P. 477, evidence of similar transactions between the defendant and another about six months later than the one involved in the prosecution was held admissible for the purpose of showing system or design, and that it was not necessary that the two transactions be identical so long as they were similar and of comparatively recent commission.

Cases holding that other offenses are admissible to show scheme, design, plan and identity of offenses are People v. Francisco, 112 Cal.App. 442, 297 P. 34, and People v. Barnes, 111 Cal.App. 605, 295 P. 1045.

[3-5] We have examined many authorities of other states and those cited by appellant with reference to the admissibility of other similar offenses. There is language in People v. Molineux, supra, relied on by appellant, based upon a different set of facts, which has a tendency to support his contention, but we must consider the identity of the novel scheme, plan or system employed by appellant in the instant case upon both victims to avail himself of the opportunity to take the money from them in the manner described. That such a plan or scheme is novel or unique is apparent and receives support in counsel's inability to cite a case which is factually similar. We are unable to conclude from the cases cited and the evidence that the acts of appellant, particularly in reference to the approach and the extraction of the money from the persons of the victims, were not the result of a scheme, system, plan or design employed by him for that purpose, and were not so related both as to time and character that proof of one did not tend to establish some material fact in connection with the other. From defendant's statement at the time of his arrest, when confronted with the two accusations, it became apparent that appellant was endeavoring to establish an alibi for he said that he was not in San Diego on February 10 or February 22, 1940, or since the year 1935. Under the circumstances related the ruling of the trial court in this respect must be sustained. See, also, People v. Glass, supra. We are firmly convinced, however, that trial courts, generally speaking, should, by proper instructions, limit the consideration of such evidence for the purposes for which it is to be received. People v. Sampsell, 104 Cal.App. 431, 440, 286 P. 434; People v. Le Roy, 192 Cal. 498, 505, 221 P. 353. However, no such instruction was offered by appellant in the instant case and we cannot therefore predicate error on the court's failure to give the same. People v. Collins, 48 Cal. 277; People v. Glass, supra.

[6] In reference to appellant's second contention, the court committed error in receiving certain testimony in reference to identification of photographs and on failing to strike the testimony in reference to "pictures of negro pickpockets". People v. Thorp, 104 Cal.App. 379, 285 P. 916; People v. Goltra, supra. However, this error, considered in the light of the positive identification of appellant in court and the circumstances related, cannot be

held to be prejudicial under section 4½ of article VI of the Constitution. People v. Britton, 6 Cal.2d 7, 56 P.2d 497. The third question presented by this assignment of error is whether or not a dismissal of a felony criminal action upon the completion of the term of probation, pursuant to section 1203.4 of the Penal Code deprives the district attorney in a subsequent prosecution where the prior conviction is denied, from introducing evidence for the purpose of impeachment to prove that the defendant had suffered a prior felony conviction. Section 1203.4 of the Penal Code permits a defendant who has fulfilled the condition of his probation to withdraw his plea of guilty and enter a plea of not guilty, or, if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty and the court shall thereafter dismiss the accusation or information against said defendant, and further provides as follows: "* * * provided, that in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." The last-quoted portion of section 1203.4 of the Penal Code hereinabove referred to was added by amendment, Stats.1927, ch. 770, pp. 1493–1496, subsequent to the decision in the case of People v. Mackey, supra, cited by appellant, wherein it was held that a witness (not a defendant) was not subject to impeachment upon the ground that he had been convicted of a felony where it was shown that the information to which he had entered a plea of guilty had been dismissed after fulfilling his term of probation, therefore releasing him from all penalties and disabilities resulting from the offense or crime of which he had been convicted. It is apparent that the amendment in 1927 of this section operates to reinstate all penalties and disabilities "in any subsequent prosecution of such defendant for any other offense" and is a qualification of the first portion of the section. It seems highly probable that by the amendment to this section after the decision in People v. Mackey, supra, the legislature intended to broaden the section in its application and particularly provided that in any subsequent prosecution of the defendant prior convictions may be pleaded and proved. The legislature has gone further and provided that under such circumstances the subsequent prosecution of such defendant for any other offense "shall have the same effect as if probation had not been granted". The argument that the former conviction is not to have a retroactive effect until after a subsequent conviction is obtained is dispelled by the case of People v. Majado, 22 Cal.App.2d 323, 325, 70 P.2d 1015, 1016, wherein it is said: "Any benefit from the dismissal is wiped out by a subsequent conviction of a felony (People v. Hainline, supra), but we think the effect of the statute is not limited to a situation where a subsequent conviction of a felony has first been obtained. By its terms the statute applies not merely to a felony but to any subsequent prosecution for any other 'offense.' Further, it does not provide that the former conviction is not to have a restored effect until after a subsequent conviction is obtained. It is specifically provided that in any subsequent 'prosecution' the prior conviction may be 'pleaded and proved and shall have the same effect' as if the former accusation had not been dismissed. * * *"

[7] We therefore conclude that where a defendant who has been previously convicted of a felony and granted probation and a dismissal obtained as in the instant case, and is subsequently prosecuted for another offense, in becoming a witness in his own behalf, he subjects himself to impeachment upon the ground that he has been convicted of a felony.

The evidence also discloses that appellant requested the police officer investigating the case to have the witnesses who attempted to identify him at the jail ask questions of him so they could hear his voice. This was done. A few weeks thereafter the appellant inquired of the same officer if he had shown a picture of one Willie Williams to the witnesses because he had talked to Williams and found out that he had committed the crimes related and that there was a discussion as to whether "Williams should give some defense money in this case". When appellant was arrested in Los Angeles he was asked by the officer what was meant by a "spitter", because that was the nature of the charge against him. Appellant replied that "it was where a person walked up alongside of an elderly man and spit on him and then drew out his handkerchief and began wiping it off, and apologizing profusely, and then would take what money he had on him". He also said they generally picked an elderly man.

For the reasons expressed and in view of the convincing evidence of appellant's guilt, the judgment and order are affirmed.

I concur: MARKS, Acting P. J.

40 Cal.App.2d 721

KOSSINE v. STYLIANO et al.

Civ. 12617.

District Court of Appeal, Second District, Division 2, California.

Sept. 20, 1940.

1. Landlord and tenant 🔑162

Owners of apartment house were not insurers of safety of tenants of building using stairway, but it was owners' duty to exercise ordinary care to see that the premises were kept in a safe condition.

2. Landlord and tenant 🔑169(4)

The burden was upon 14 year old daughter of tenants, seeking to recover for injuries sustained when she fell on a stairway in an apartment house, to establish that owners of apartment house failed to exercise ordinary care for safety of those using the stairway.

3. Landlord and tenant 🔑164(6)

Owners of apartment house could not be charged with responsibility for a defective condition in stairway unless they knew of such condition or should have discovered it in exercise of ordinary care.

4. Appeal and error 🔑1008(1)

In action by 14 year old daughter of tenants against apartment house owners for injuries sustained when she fell on stairway, it was for trial court to pass upon questions whether a dangerous defect in fact existed, whether such defect was known to owners of apartment house, and whether, if unknown to them, it had existed for such length of time as to charge them with notice.

5. Appeal and error 🔑1010(1)

Where appeals are taken from judgments based on findings made after trial of issues of fact, reviewing court will not disturb findings of trial court if findings are based upon substantial evidence, whether such evidence is contradicted or uncontradicted.

6. Appeal and error 🔑931(1), 1011(1)

The reviewing court must resolve all conflicts in evidence in favor of party prevailing in trial court, and must indulge all reasonable inferences in support of the decision.

7. Evidence 🔑595

The trial court is authorized to make findings based upon reasonable inferences supported by the evidence.

8. Landlord and tenant 🔑169(6)

Evidence supported finding that owners of apartment house were free from negligence, and were not liable for injuries sustained by 14 year old daughter of tenants when she fell on stairway.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Marcella Kossine, an infant, by her guardian ad litem, Bernard Kossine, against George Styliano and others for injuries sustained by plaintiff when she fell on a stairway in defendants' apartment house. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Orloff & Katz, of Los Angeles, for appellant.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles (John J. Ford, of Los Angeles, of counsel), for respondents.

WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries which she suffered when she fell on a stairway in an apartment house owned by defendants Styliano and managed by defendant Williams. The case was tried before the court without a jury. In presenting this appeal from a judgment in favor of defendants plaintiff contends that the findings of the trial court that defendants were free from negligence and that plaintiff's negligence was the cause of her injuries are without support in the evidence.

Plaintiff was at the time of the accident a minor of the age of fourteen years and had been living in the apartment house of defendants for a period of about two months, during which time she frequently used the stairway provided for the tenants of the building. Plaintiff testified that she fell down the stairway of the apartment house on May 23, 1938, between 7 and 7:30 p. m. Plaintiff was carried upstairs. After about a half hour she returned and, looking at the steps, observed that the carpet was "curled over, pulled away" from the rear part of one of the steps; that one of the tacks used to fasten the carpet was missing so that the carpet had pulled away from the riser. She stated that she had caught her foot in the carpet, causing the fall. She was not wearing high heel shoes but was wearing shoes with heels the size of heels on men's shoes. The carpet was a runner extending to within eight or ten inches from the edge of the stairs. A hand rail had been provided but plaintiff did not make use of it. Gloria Ducker, a friend of plaintiff, sixteen years of age, testified that she noticed the condition of the carpet in question three or four days before plaintiff's accident and at that time the carpet was pulled away about an inch and one-half from the back of the step and that it was curled a little.

The deposition of defendant Williams was received in evidence. She testified that she examined the carpet in question shortly after the accident and found that only one tack was missing, which she replaced. She found that the carpet was otherwise in good shape; that the carpet had not "pulled out" because the tack had come up; that "the carpet was not turned in any way at all, the tack was out but it was down as if there had never been anything happen to it". It was stipulated by the parties that Harry Brenner, who had "picked up" plaintiff when she fell, would if present testify that after helping plaintiff from the stairway, "she left him and walked toward the grocery store of her parents, and that she said to him that she had fallen downstairs"; that he would testify that "after the girl left he walked up the stairs to his apartment and he used the same stairway and noticed nothing wrong with the carpet".

[1-4] Defendants were not insurers of the safety of the tenants of the building using the stairway but it was their duty to exercise ordinary care to see that the premises were kept in a safe condition. Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76, and cases there cited. The burden was upon plaintiff to establish that defendants failed to exercise ordinary care for the safety of those using the stairway. Defendants cannot be charged with responsibility for a defective condition in the stairway unless they knew of that condition or should have discovered it in the exercise of ordinary care. What constitutes ordinary care depends upon the particular circumstances of the case. It was the function of the trial court to determine from the evidence whether defendant had failed to use ordinary care and in making such determination it was the duty of the trial court to pass upon the question whether a dangerous defect in fact existed, whether it was known to defendants, and whether, if unknown to them, it had existed for such length of time as to charge them with notice.

[5-7] Since the action came to trial and evidence was offered by both parties and findings of fact were made thereon, the rules which govern motions for a nonsuit do not prevail. The rules prevailing where appeals are taken from judgments based on findings made after the trial of the issues of fact require that the reviewing court shall not disturb the findings of the trial court if the findings are based upon substantial evidence, whether such evidence be contradicted or uncontradicted. If a reasonable inference has been deduced from the facts by the trial court the reviewing court may not substitute another deduction which also may be drawn from the facts. The reviewing court must resolve all conflicts in the evidence in favor of the party prevailing in the trial court and must indulge all reasonable inferences in support of the decision. Crawford v. Southern Pacific Company, 3 Cal.2d 427, 45 P.2d 183. The trial court may make findings based upon reasonable inferences supported by the evidence. Rideout v. City of Los Angeles, 185 Cal. 426, 197 P. 74; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371.

[8] The testimony of defendant Williams, offered through the medium of her deposition, presents a sharp conflict with the testimony of plaintiff and that of her main witness. In their brief respondents suggest several inferences which the trial

court could reasonably have drawn in support of their contentions. Such arguments are primarily for the trial court, and although they have been helpful to this court, it would be inappropriate to discuss them at length in this opinion. It is sufficient to say that the decision of the trial court is amply supported by the facts established together with such reasonable inferences as could be drawn therefrom.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

40 Cal.App.2d 732

BELLETICH v. BELLETICH et al.

Civ. 11296.

District Court of Appeal, First District, Division 1, Califorina.

Sept. 23, 1940.

1. **Deeds 🔑195**

Under statute, a written instrument such as a deed is itself presumptive evidence of a consideration. Civ.Code, § 1614; Code Civ.Proc. § 1963, subd. 39.

2. **Reformation of Instruments 🔑36(1)**

In action to reform a deed, it was unnecessary for plaintiff to allege in his complaint, or for trial court to find, that deed was given for a consideration, since the written instrument was itself presumptive evidence of consideration. Civ.Code, § 1614; Code Civ.Proc. § 1963, subd. 39.

3. **Reformation of Instruments 🔑38**

In action to reform a deed, defendants had burden of pleading that the deed was not based on a sufficient consideration, and where defendants did not so plead no issue as to consideration was raised and no finding relating thereto was necessary. Civ. Code, § 1614; Code Civ.Proc. § 1963, subd. 39.

4. **Appeal and error 🔑616(1)**

On defendants' appeal on judgment roll from judgment reforming a deed, a map, and a photostatic copy of escrow instructions which were included in clerk's transcript, but were not authenticated in any manner by trial judge or court reporter, formed no part of judgment roll, and defendants were not entitled to have them considered in determination of the appeal.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Constantine Belletich against John Belletich, Mary Belletich, and others to reform a deed. From judgment for plaintiff, the two named defendants appeal.

Affirmed.

George C. Watson, of Los Angeles, for appellants.

A. Frederick Lamken, of Los Angeles, for respondent.

KNIGHT, Justice.

This is an appeal from a judgment in plaintiff's favor in an action to reform a deed. It was taken on the judgment roll by John and Mary Belletich, two of the several defendants sued.

The following are the principal facts of the case as they appear from the trial court's findings: The defendants John and Mary Belletich and Antonio and Mary Kudrich agreed to convey to plaintiff certain residential premises in the city of Los Angeles known as 713 North Hill street, upon which there was built a two-story frame dwelling, and subsequently, in consummation of said agreement, a grant deed was executed by Antonio and Mary Kudrich and delivered to plaintiff, conveying to him lot 51 of the Rosas tract. However, the premises agreed to be conveyed included also the north half of lot 52, and the dwelling rested partly on each lot. This situation was known to the defendants at the time these transactions took place, but was unknown to plaintiff. In this connection the trial court found that the premises known as 713 North Hill street had a frontage of 45 feet on the west side of said street, and that the entire width of the premises (lot 51 and the north half of lot 52) was necessary to accommodate said house and to permit reasonable passageway to the rear; that there was an old fence running along the northerly line of lot 51, and another fence running along the southerly line of the north half of lot 52, which fences for many years enclosed the premises along the north and south lines; that the premises had the appearance of one lot, and had been used as such for "a single-home residential property", and had but a single street address. The court also found that during the negotiations leading up to the making of said agreement the defendants told plaintiff the property he would receive and which would be deeded to him was the premises at 713 North Hill street, and that throughout said negotiations the plaintiff believed and the defendants knew he believed that when reference was made to the property known as 713 North Hill street all parties referred to and had in mind the premises as a whole; that when plaintiff accepted the deed he believed it conveyed to him the entire premises, and that defendants "knew or suspected" that plaintiff accepted the deed under the mistaken belief that it conveyed to him the entire premises; that they knowingly took advantage of the plaintiff's mistake and for the purpose of deceiving him deeded to him only part of the property they had agreed to convey. Furthermore, the trial court found that under said agreement "the consideration that was to move to the plaintiff was" the premises known as 713 North Hill street; that after the execution and delivery of the deed to plaintiff the grantors Kudrich transferred title to lot 52 to John and Mary Belletich, who simultaneously executed a deed of trust thereto to the Kudriches as beneficiaries and naming Security First National Bank of Los Angeles as trustee.

[1-3] It is stated by appellants on the first page of their brief that the question involved on the appeal is: "May plaintiff have an oral contract reformed where he does not allege in his complaint, and the court does not find, that the contract sought to be reformed is in writing and based upon a consideration;" and the arguments advanced in their brief are based upon the assumption that the purpose of the action was to reform an oral agreement; also the authorities cited by them have application to such a case. But the purpose of the action was not to reform the agreement of the parties. It was brought to revise the deed executed and delivered in consummation of the agreement so that the deed would conform to such agreement, all of which clearly appears from the complaint and the findings. Nor does the judgment make any reference whatever to any agreement. It decrees only the revision of the description of the property set forth in "the deed executed by Antonio Kudrich and Mary Kudrich, dated the 7th day of March, 1935, and recorded in Book 13361 at page 310 of the Official Records of the County of Los Angeles, State of California, * * * as of the 7th day of March, 1935". Therefore, since a written instrument such as a deed is itself presumptive evidence of a consideration, Civ.Code, sec. 1614; Code Civ.Proc., sec. 1963, subd. 39, it was unnecessary for plaintiff to allege in his complaint or for the trial court to find that the deed was given for a consideration. 6 Cal.Jur. p. 205; 21 Cal.Jur. p. 23. If the deed here sought to be revised was not based on a sufficient consideration it was incumbent on appellants so to plead in their answer (Peasley v. McFadden, 68 Cal. 611, 10 P. 179), and not having done so no issue as to consideration was raised, and no finding relating thereto was necessary.

[4] In the clerk's transcript, immediately following the copy of the judgment roll, there is inserted a map and a photostatic copy of certain escrow instructions, which were alluded to by counsel for appellant during his oral argument on the appeal. Apparently the documents were included in the transcript by the clerk pursuant to the written request to prepare the transcript. However, they form no part of the judgment roll, nor are they authenticated in any manner by the trial judge or the court reporter; hence appellants are not entitled to have them considered in the determination of the appeal. In any event neither is important. The situation of the property involved is made plain by the findings, and said instructions indicate merely that plaintiff delivered into escrow a "Reconveyance of Trust Deed" which is identified by record reference. The property to which it relates does not appear, nor do the instructions reveal the nature of the transaction, by whom the reconveyance was executed, nor the other parties thereto. It will be seen, therefore, that in the absence of a transcript of the evidence the escrow instructions serve no useful purpose on the appeal.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

40 Cal.App.2d Supp. 840

PORTER v. LOS ANGELES TURF CLUB, Inc.

No. Civ. A 4696.

Appellate Department, Superior Court, Los Angeles County, California.
Sept. 24, 1940.

1. Bailment 🔑1

Where plaintiff parked automobile in defendant's parking lot, paid fee, and received ticket stating that holder was licensed to park automobile and that management was not responsible for theft, fire, or damage, and automobile was locked and keys retained by plaintiff, who was at all times entitled to remove automobile without surrendering parking ticket or identifying herself, plaintiff acquired a mere license to park automobile on the premises, and there was no contract of "bailment" upon which plaintiff could recover for removal of automobile and theft of parts and accessories. Civ.Code, §§ 1814, 1815, 1835.

See Words and Phrases, Permanent Edition, for all other definitions of "Bailment".

2. Bailment 🔑1

The mere fact that automobile parked in parking lot was locked and keys retained by owner would not necessarily preclude a finding that a contract of bailment existed upon which owner might recover of parking lot proprietor for theft of or damage to automobile. Civ.Code, §§ 1814, 1815, 1835.

3. Bailment 🔑5

In order to constitute a "bailment", possession of the article must be delivered to bailee. Civ.Code, §§ 1814, 1815, 1835.

Appeal from Municipal Court of Los Angeles; Ellis A. Eagan, Judge.

Action by Mrs. Ross M. Porter against the Los Angeles Turf Club, Incorporated, for breach of an alleged contract of bailment. From judgment for plaintiff, defendant appeals.

Judgment reversed and cause remanded for new trial.

Victor Ford Collins, of Los Angeles, for appellant.

Thomas P. Walker and Alfred R. Meyers, both of Los Angeles, for respondent.

SCHAUER, Judge.

The evidence establishes that for a fee plaintiff purchased a license to park her automobile on land owned and maintained by defendant for the purpose of affording convenient parking space to its patrons. For the fee she was permitted to and did drive her car onto defendant's land, park it, lock it and leave it while she was temporarily on another part of defendant's premises attending a horse racing event. During plaintiff's absence from her car while it was so parked it was removed and many of its parts and accessories were stolen. Plaintiff sued defendant and recovered judgment on the theory that a contract of bailment was breached and that the bailee was responsible to the bailor on the principles enunciated in U Drive, etc., v. System Auto Parks, 1937, 28 Cal.App.2d Supp. 782, 71 P.2d 354. Defendant appeals, and the judgment must be reversed because the evidence is not sufficient to establish that a bailment was created.

[1-3] The parking area apparently was enclosed and at the entry plaintiff was required to pay the fee and she received a ticket reading, in part, "Auto Park This Ticket Licenses the Holder to Park One Automobile in This Area Lock Your Car The Management hereby declares itself Not Responsible for Theft, Fire, or damage to any Car or Article left in same." Defendant did not take possession of plaintiff's car; the keys to it were retained by plaintiff and she was at all times entitled to remove it without surrendering the parking ticket or identifying herself as the owner of the vehicle.

Under the circumstances depicted, a contract of bailment is not shown. The mere fact that an automobile was locked and the keys retained by the owner would not necessarily preclude a finding that a contract of bailment existed; locked trunks and other objects are commonly deposited for safekeeping and the bailment of "fastened" articles is recognized in section 1835 of the Civil Code. But in order to constitute a bailment, possession of the article must be given the bailee (8 C.J.S., Bailments, § 15, pp. 248, 249; see also Civil Code, sections 1814, 1815); he cannot be responsible for redelivering that which has not been delivered to him. Since here the plaintiff reserved at all times possession of the car in herself, defendant acquiring no dominion over the vehicle nor any right to control removal of it, there was no bailment. Plaintiff, for the fee, acquired a mere license to park her car on defendant's premises. Defendant assumed no responsibility for safekeeping such car and is not liable for its theft or damage. Upon a quite similar state of facts the Supreme Court of Alabama reached the same conclusion. Ex parte Mobile Light & R. R. Co., 1924, 211 Ala. 525, 101 So. 177, 34 A.L.R. 921; see also annotation and cases reviewed in 34 A.L.R. at page 925 et seq.

The judgment is reversed and the cause is remanded to the Municipal Court for a new trial, appellant to recover its costs of appeal.

SHAW, P. J., and BISHOP, J., concur.

16 Cal.2d 247

PEOPLE v. STANFORD.

Cr. 4305.

Supreme Court of California.

Oct. 1, 1940.

1. Embezzlement 🔑44(1)

Evidence that funds came into defendant's hands as trust funds, and that defendant used funds in purchasing property which became the property of defendant and defendant's wife, sustained conviction for "grand theft" on theory of embezzlement.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

2. Indictment and Information 🔑130

The question of whether a series of wrongful acts constitutes a single or multiple offense must be determined by circumstances of each case.

3. Indictment and Information 🔑130

Where thefts of trust funds referred to in counts of indictment for grand theft were separate transactions, which occurred on different dates and involved the taking of different sums of money, such separate transactions constituted "separate offenses".

See Words and Phrases, Permanent Edition, for all other definitions of "Separate Offenses".

4. Larceny 🔑18

In "larceny", defendant obtains possession of victim's property by wrongful means, and completion of offense is not dependent upon whether defendant thereafter appropriates fruits of theft by a single act or at successive intervals.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny".

5. Embezzlement 🔑11(1)

The essence of "embezzlement" is defendant's subsequent fraudulent appropriation of property after it has come into defendant's rightful possession. Pen.Code, § 503.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzlement".

6. Criminal law 🔑878(4)

In prosecution for grand theft, acquittal on fourth and fifth counts of indictment and conviction on first three counts did not result in fatal repugnancy, where evidence showed that thefts referred to in first three counts were separate and distinct transactions from those referred to in fourth and fifth counts.

In Bank.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Leland G. Stanford was convicted of grand theft, and he appeals.

Affirmed.

For prior opinion, see 100 P.2d 796.

Bertrand L. Comparet and Clarence Harden, both of San Diego, for appellant.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and James B. Abbey, Dist. Atty., and Seymour Wurfel, Deputy Dist. Atty., both of San Diego, for respondent.

PER CURIAM.

This is an appeal from a judgment of conviction of the crime of grand theft, after trial by the court sitting without a jury.

Appellant was employed as the attorney in a proceeding to probate the will of Edwin R. Stevens, deceased, by his widow, Jennie C. Stevens, upon the recommendation of Mrs. Edith Christy who had been a friend of Mrs. Stevens for forty years and who had known appellant since his childhood. Mrs. Stevens was about seventy-five years old at the time, was unaccustomed to business dealings and signed everything appellant gave her to sign. Upon appellant's advice Mrs. Stevens applied for letters testamentary of her deceased husband's estate and was appointed and qualified as executrix. Later, she resigned as executrix and appellant was appointed and qualified as administrator with the will annexed and administered the estate.

On March 5, 1936, and before the estate was closed, at the suggestion of appellant, Mrs. Stevens conveyed to appellant all of her property, including the property to which she was entitled as the sole devisee under her husband's will, in trust for her life, the remainder, upon her death to be distributed to designated persons. Appellant later prepared a letter dated July 18, 1936, authorizing him to invest $10,560 of the trust money in the purchase of property shown to her and Mrs. Christy. The letter stated that according to Mrs. Stevens' instructions appellant was preparing for escrow the purchase of a residence on Palm street in San Diego; that he was doing so in order that she might place a first mortgage on the place in the sum of $10,560; that he was not borrowing that sum or any sum from her, and that her only security was to be the mortgage on the house; that he intended to live there and pay $44 to her each month, which was the interest provided by the mortgage; that the mortgage was to be for five years and bear interest at the rate of 5 per cent per annum and renewable for an additional period of time at his option. Appellant procured title to said property to be vested in him and his wife, but in appellant's escrow instructions no mention is made of any mortgage nor of any interest in the property on the part of Mrs. Stevens. Appellant procured fire insurance on the house, he and his wife being named as the assured with no mention of Mrs. Stevens' interest.

The mortgage was not executed on the property until September 16, 1937. It was not delivered to Mrs. Stevens and was not recorded until April 21, 1939, which was after The State Bar began an investigation of the matter. See Leland G. Stanford v. State Bar, Cal.Sup., 104 P.2d 635. The mortgage covered only a little more than one-sixth of the total area purchased. Under its unusual and novel terms the mortgagors (appellant and his wife) agreed to pay Mrs. Stevens $45 per month "which sum is understood to be the equivalent of interest at the rate of 5 per cent (5%) per annum on the sum of $10,800 but not actually to be interest on any obligation". It also provided that the mortgagors were not obligated "by promissory note, or any promise at all, to pay to the mortgagee any sum of money whatsoever". The mortgage was to be for five years and was renewable for an additional five years at the option of appellant and his wife. The mortgagee was given the right of foreclosure ninety days after August 15, 1946, at which time Mrs. Stevens would be eighty-six years of age.

On July 18, 1936, appellant, as trustee, drew a check on the trust account for $500 and deposited it in the escrow referred to as the initial payment on the purchase price of the property. This transaction is the basis of count one of the indictment. On July 26, 1936, appellant drew out the entire balance of the trust account in the sum of $7,458.80, which he paid into the escrow together with $2,041.20, which he borrowed personally from the bank, as the balance of the purchase price of the property. The use of this sum of $7,458.80 is the basis of count two of the indictment. Thereafter as moneys came into the trust account he applied them to his own use to the extent of the amount which he had personally borrowed and paid into the escrow, and the total amount of these items, $2,041.20 forms the basis of count three of the indictment.

Appellant was found guilty of grand theft on the theory of embezzlement on each of these three counts. On count four charging appellant with the crime of grand theft in that on or about May 27, 1937, he wilfully took the property of Jennie Stevens consisting of the sum of $240, and count five charging him with grand theft in that on or about May 1, 1939, he wilfully took the property of Jennie Stevens in the sum of $675, the trial court found appellant not guilty. Motion for new trial was denied.

[1] There is ample evidence to sustain the judgment of conviction and the order denying the motion for a new trial. Appellant suggested to Mrs. Stevens the creation of the trust of all of her property and that he should be trustee. He knew that Mrs. Stevens was unaccustomed to business dealings, had implicit confidence in him and signed everything he gave her to sign. The funds came into his hands as trust funds and he used them in the purchase of property which became the property of himself and wife. Under the terms of the mortgage there is no assumption of liability by himself or wife but instead there is an express provision therein that neither petitioner nor his wife should be personally liable for the indebtedness. He did not deliver or record the mortgage until three years after the purchase of the property and then only after investigation of his activities was commenced by The State Bar. Moreover, the mortgage embraced only part of the property purchased with the trust funds. Although an attorney, and presumably competent to judge the duties of a trustee, he procured her signature to a document which no person with a knowledge of business would have approved even if there had been no trust relation between the parties.

[2, 3] There is no merit in appellant's contention that the entire transaction could not constitute more than one offense, and that the conviction of three separate offenses was error. The question of whether a series of wrongful acts constitutes a sin-

gle or multiple offense must in the last analysis be determined by the peculiar facts and circumstances of each individual case. In the present case the evidence showed that the thefts referred to in the first three counts of the indictment were separate and distinct transactions, which occurred on different dates, and involved the taking of different sums of money. Such separate transactions constituted separate offenses. People v. Hatch, 13 Cal.App. 521, 109 P. 1097; People v. Rabe, 202 Cal. 409, 261 P. 303; People v. Bartnett, 15 Cal.App. 89, 113 P. 879; People v. McCann, 96 Cal.App. 664, 274 P. 621; People v. Ellison, 26 Cal.App.2d 496, 79 P.2d 732; People v. Miles, 37 Cal.App.2d 373, 99 P.2d 551; Edelhoff v. State, 5 Wyo. 19, 36 P. 627; State v. Davis, 37 R.I. 373, 92 A. 821; Storm v. Territory, 12 Ariz. 26, 94 P. 1099.

[4, 5] While transactions in series have frequently been held to constitute but parts of one continuous proceeding, and hence but one offense, this result is more commonly reached in cases of larceny than in those of embezzlement. This follows from the fact that in the crime of larceny the defendant has obtained possession of his victim's property by wrongful means, and completion of the offense is not dependent upon whether he thereafter appropriates the fruits of his theft by a single act or at successive intervals. On the other hand, in the case of an embezzlement, the property is already in the rightful possession of the defendant, and his subsequent fraudulent appropriation is of the essence of the crime. (Pen Code, sec. 503.) Thus in each of the cases relied upon by appellants (People v. Mills B. Sing, 42 Cal.App. 385, 183 P. 865; People v. Bratton, 125 Cal.App. 337, 14 P.2d 125; People v. Fleming, 220 Cal. 601, 32 P.2d 593; People v. Dillon, 1 Cal.App.2d 224, 36 P.2d 416), the particular facts and circumstances showed that the exact time of completion of the misappropriation was not controlling and for this reason the court was justified in concluding that the several transactions involved constituted one offense. In the present case, the evidence, as already stated, established clearly the commission of separate offenses by distinct appropriations of different sums of money on separate occasions. The rule of People v. Hatch, supra, and like cases above cited, is therefore the one properly applicable.

[6] Appellant's further contention that there was a fatal repugnancy between the acquittal on the fourth and fifth counts and the conviction on the first three counts, because the transaction which formed the basis of all of the counts was single, is answered by the above discussion. See, also, People v. Edwards, 72 Cal.App. 102, 117, 236 P. 944, and People v. Stovall, 94 Cal.App. 635, 637, 271 P. 576.

The judgment and order denying a new trial are, and each of them is, hereby affirmed.

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16 Cal.2d 253

HOWARD v. ADAMS et al.

L. A. 17490.

Supreme Court of California.
Oct. 1, 1940.

Rehearing Denied Oct. 31, 1940.

1. Contracts 🔑153

A contract should, if possible, be construed to make it valid and enforceable.

2. Contracts 🔑111

The law does not countenance any contract having for its object the dissolution of marriage contract or facilitating such result.

3. Contracts 🔑111

A contract whereby aunt promised to support niece and her children if niece, who was California resident, would obtain divorce in Nevada, and waive her right to alimony and allowance for support of children, was not void as against "public policy", where it appeared that niece had finally decided on divorce before contract was entered into, and that aunt proposed manner in which niece should proceed in order to avoid local publicity.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

4. Contracts 🔑108(1)

The impropriety of a transaction should be clear in order to justify court to exercise its power to invalidate bargain of parties on ground of "public policy".

5. Contracts 🔑111

The consideration for contract whereby aunt promised to support niece and her children if niece, who was a California resident, would obtain divorce in Nevada and waive her right to alimony and allowance for support of children, was not illegal on ground that it required niece to procure a divorce in Nevada on simulated residence there, which was an evasion of divorce laws and a violation of public policy of California, and the commission of fraud upon courts of Nevada, where nothing was said at time contract was made, nor was there any stipulation in it, or inference to be drawn from it, that niece's residence in Nevada was not to be a bona fide and permanent one.

6. Frauds, statute of ⚷157

Failure of defendant to object to parol proof of contract was a "waiver" of defendant's right to rely upon defense that oral contract was within statute of frauds. Civ. Code, § 1624, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

7. Contracts ⚷311

The rule that an executory contract of a strictly personal nature is terminated by death of party by whom personal service is to be performed is not applicable where service is of such a character that it may as well be performed by another, or where contract by its terms shows that performance by others was contemplated.

8. Contracts ⚷311

A contract whereby aunt promised to support niece and her children if niece, who was California resident, would obtain divorce in Nevada, and waive her right to alimony and allowance for support of children, was not a "personal contract", so as to be terminated by death of aunt.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Contract"

9. Damages ⚷140

Judgment of $85,727 to niece against aunt for breach of contract to support niece and her children, as reduced by trial court, was not excessive, where award, invested in an annuity, would produce annual income, over period of niece's life expectancy, of approximately $5,200, and it appeared from the valuation of family's ordinary needs, measured by their standard of living according to their station in life, that such sum was reasonable.

10. Damages ⚷218

In action by niece against aunt for breach of contract to support niece and her children, failure of trial court, in instructing on measure of damages, to instruct jury that credit should be made for any amounts which niece or children might earn, was not error, where there was no agreement that possible earnings of niece were to be deducted from allowance made for her support, and children by terms of contract were to be taken care of only until they became self-supporting.

11. Appeal and error ⚷930(4), 1031(6)

In action by niece against aunt for breach of contract to support niece and her children, it would be presumed, in absence of requested instruction on allowance for present or commuted value of future payments awarded on basis of niece's life expectancy, that such factor received due consideration in jury's deliberations, or, if it did not, that the omission was cured by trial court's reduction of the verdict.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Vivian A. Howard against Lily B. Howard for breach of contract to support plaintiff and her children, wherein, upon defendant's death, C. A. Adams and others, as executors of the estate of Lily B. Howard, deceased, were substituted as parties defendant. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Rehearing denied; HOUSER, J., dissenting.

For prior opinion, see 98 P.2d 1057.

Leonard Wilson, Gibson, Dunn & Crutcher, H. F. Prince, and Walter G. Danielson, all of Los Angeles, for appellants.

A. Brigham Rose and Alfred M. Einstein, both of Los Angeles, for respondent.

PER CURIAM.

Action to recover damages for breach of an oral contract for support and maintenance. The jury returned a verdict for plaintiff in the sum of $120,800, and judgment was entered thereon. As a condition of denial of motion for new trial, the court ordered a reduction of the award to $85,727, and upon plaintiff's acceptance of the remission it was incorporated in an order of modification of the judgment. Defendants appealed from the judgment and from the order modifying it. The word "appellant" will be used in this opinion to refer to the original defendant, Lily B. Howard, who died just prior to close of the trial, and for whom appellant executors were substituted as parties defendant.

Plaintiff was the niece of appellant, but their association for many years resembled that of mother and daughter. From the time of plaintiff's birth in 1896 to that of her secret marriage in 1918, she lived with and was supported by appellant, and between them there was a great intimacy and affection. Subsequent to the marriage this affectionate relationship was broadened to embrace plaintiff's three children.

In June, 1927, plaintiff decided to obtain a divorce and informed appellant of this decision. Appellant was concerned lest there be publicity damaging to her social and business connections. Her conversation with plaintiff at this time, according to the latter's testimony was as follows: Plaintiff: "I had driven over to my aunt's home with my three children; and I walked into her bedroom; and my aunt said, 'My heavens, what has happened to your eyes?' I said, 'Homer has blackened both of my eyes; he has beat me up all over my body and threatened to kill the children; I am afraid of him; I cannot live with him any longer; I am going right down now to see an attorney and get a divorce.' My aunt said, 'You can't do that here; think of my banks; think of the Baldwin name having any scandal here'; and I said, 'I have heard if I go to Reno, Nevada, to get a divorce, I can't get alimony.' My aunt said, 'Never mind about that; if you do that and go to Reno, Nevada, and get a divorce, I will support you the rest of your life; I will take care of the children and I will educate them.' * * * I said that for her sake that I would do what she asked me to do."

Plaintiff acted promptly upon appellant's proposal. With money supplied to her by appellant, she left for Reno about June 10, 1927, and there procured a divorce. She made no demand for alimony or for an allowance for support of the children. In the month of October she returned to Los Angeles, and reestablished her residence and that of the children in their family home. From that time until June, 1929, she received from $200 to $250 a month from appellant. Appellant then asked that the family move in with her, saying, so plaintiff testified: "* * * There is no need for us both keeping houses, and I have to take care of you anyway; you might as well come over here and bring the children and live with me and protect me from Will (appellant's husband), I am afraid of him." Plaintiff and the children thereupon moved to appellant's home where appellant cared for them and, until some time in the year 1933, gave them about $150 a month. Thereafter they received no allowance, but they continued to reside with appellant until July 6, 1936. On that date, following a quarrel between plaintiff and appellant's husband, they were barred from the house.

On December 23, 1936, plaintiff commenced the present action. She charged that the ouster constituted a breach of the contract whereby, in consideration of plaintiff giving up her possible right to alimony and support at the time she secured her divorce, appellant had agreed to support her for the rest of her life and to care for her children until they became self-supporting. Appellant answered the complaint with a general denial, and upon trial of the cause flatly stated that she had never entered into any such contract. This testimony and that of plaintiff to the contrary created a conflict of evidence on the issue of existence of the agreement, which conflict was resolved by the jury in plaintiff's favor. The sufficiency of the evidence to support its conclusion is not questioned.

[1-4] The principal contention urged on this appeal is that the agreement was void as against public policy and therefore the trial court erred in permitting plaintiff to recover upon it. Bearing in mind the rule that a contract should, if possible, be construed to make it valid and enforceable, we cannot agree that illegality is established. While the law does not countenance any contract "having for its object the dissolution of the marriage contract, or facilitating that result" (Pereira v. Pereira, 156 Cal. 1, 5, 103 P. 488, 490, 23 L.R.A.,N.S., 880, 134 Am.St.Rep. 107), the agreement here involved does not fall within the inhibited class. The evidence shows without dispute that it was not until after plaintiff had finally decided to divorce her husband, and had so informed appellant, that appellant proposed the manner in which she should proceed in order to avoid local publicity. Nor was the relinquishment of the possible right to alimony and support an inducement to the husband to permit plaintiff to prosecute her action without opposition. The husband testified that his marital relations

with plaintiff were discordant, and admitted that on at least one occasion she had suffered physical abuse at his hands. Aside from any question of alimony, it appears that she had a good cause of action for divorce against which he could not have successfully defended. There is no intimation that the divorce was collusive. The husband was not a party to the agreement between plaintiff and appellant. There is no proof that he was aware of it. In short, the agreement does not fall within the category of a "collateral bargaining promotive of [divorce]", such as that condemned in Newman v. Freitas, 129 Cal. 283, 61 P. 907, 909, 50 L.R.A. 548, and like cases. Its purpose was directed solely to a means of avoiding local publicity, and it was without effect in so far as the actual question of procuring of the divorce was concerned. In 5 Williston on Contracts, Rev.Ed., p. 4557, section 1629, it is said: "Though the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is obviously necessary, the impropriety of a transaction should be clear in order to justify the exercise of the power. * * * No doubt, wherever it is possible, the courts will interpret the contract so as to uphold it."

[5] It is argued that the consideration for the contract was illegal in that it required plaintiff to procure a divorce in Nevada on simulated residence there, which was not only an evasion of the divorce laws and a violation of the public policy of this state, but also the commission of a fraud upon the courts of Nevada. Delanoy v. Delanoy, 216 Cal. 27, 39, 13 P.2d 719, 86 A.L.R. 1321; Kegley v. Kegley, 16 Cal. App.2d 216, 60 P.2d 482; Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069; Presson v. Presson, 38 Nev. 203, 147 P. 1081. A complete answer to this argument lies in the fact that nothing was said at the time the contract was made, nor was there any stipulation in it, or inference to be drawn from it, that plaintiff's residence in Nevada was not to be a bona fide and permanent one. No demand was made upon her to get the divorce upon a simulated residence, or to return to California after it was granted. Indeed, the evidence shows without contradiction that it was not until some two years after plaintiff's return to California that she was invited to move in with appellant.

[6] Appellant's plea of the statute of frauds (Civ.Code, sec. 1624, subd. 1) is of no avail because she failed to properly urge it in the trial court. Although the general denial of her answer was sufficient to raise the issue (12 Cal.Jur., § 109, p. 940), she thereafter failed to pursue it. When the cause came on for trial, she permitted parol proof of the contract to be admitted without objection on her part. This was a waiver of her right to rely upon the statute. Nunez v. Morgan, 77 Cal. 427, 19 P. 753; Schultz v. Noble, 77 Cal. 79, 19 P. 182; Livermore v. Stine, 43 Cal. 274; Christie v. Commercial Casualty Ins. Co., 6 Cal.App. 2d 710, 720, 45 P.2d 263; Durbin v. Hillman, 50 Cal.App. 377, 195 P. 274.

[7, 8] Upon the announcement of appellant's death just prior to submission of the cause, the trial court correctly instructed the jury that the action was one which survived, and that the death did not in any way affect the issues which were to be decided. The rule, that an executory contract of a strictly personal nature is terminated by the death of the party by whom the personal service is to be performed, is not applicable where the service is of such a character that it may as well be performed by another, or where the contract, by its terms, shows that performance by others was contemplated. Janin v. Browne, 59 Cal. 37; Husheon v. Kelly, 162 Cal. 656, 124 P. 231; Guardianship of Cornaz, 8 Cal. 2d 347, 65 P.2d 784; 11b Cal.Jur., p. 194, § 796; 12 Am.Jur., p. 949, § 375. Under the contract here involved no strictly personal service was required of appellant, nor was any intent manifested that performance should depend upon her continued existence.

Two years after the divorce, plaintiff and her children took up their residence with appellant at appellant's request. Appellant's promise to support plaintiff for life and to educate and care for the children until they became self-supporting did not involve the rendition of any personal service. The allowance of a fixed sum of money would have constituted a full and practical compliance with all that she agreed to do. Guardianship of Cornaz, supra, 8 Cal.2d at page 354, 65 P.2d 784.

Misconduct on the part of plaintiff's counsel is assigned as ground for reversal of the judgment. The trial was punctuated by acrimonious discussion and offensive repartee, calling forth severe reprimands from the trial court. The record shows that the court was justified in including counsel for both sides in his censure. But it also shows that any danger of prejudice to the rights of either party was removed by due admonishment and instruction to the jury.

[9] The jury, by special interrogatories, found that plaintiff suffered damage in the sum of $78,300, and that the children, age 19, 17 and 13 years, were damaged in the respective sums of $10,000, $15,000 and $17,500. The verdict of $120,800 represented the total of these sums. As a condition of denial of motion for new trial, the court reduced this figure approximately 29 per cent, or to the sum of $85,727. Appellant contends that even in the reduced figure the award is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and raise a presumption that it was the result of passion, prejudice, speculation, or conjecture, rather than of an honest and sober judgment. Kirschbaum v. McCarthy, 5 Cal.2d 191, 195, 54 P.2d 8. The facts presented by the record on appeal, however, do not support this position. The reduced award, invested in an annuity, would provide an annual income over the period of plaintiff's life expectancy (26.72) years, of approximately $5,200. From an evaluation of the family's ordinary needs—not measured by extravagance or by their ability to spend, but by their standard of living according to their station in life (Canfield v. Security-First Nat. Bank, 13 Cal.2d 1, 87 P.2d 830)—it appears that the judgment is reasonable.

[10, 11] Comprehensive instructions were given to the jury on the subject of the measure of damages and the elements which might properly enter into their computations, but they were not told specifically to consider the following factors: (1) Allowance for the present or commuted value of the future payments awarded on the basis of plaintiff's life expectancy; and (2) credit for any amounts which plaintiff or the children might earn. Although appellant did not request any instructions on these subjects, she now contends that their omission rendered the charge fatally defective. That, however, is not the case. So far as earnings are concerned, there was no agreement that possible earnings of plaintiff were to be deducted from the allowance made for her support. The children were to be taken care of only until they became self-supporting. These terms were so clear as to require no explanation to the jury. As to allowance for the present value of future payments, it may be presumed in the absence of a requested instruction on the subject, that this factor received due consideration in the jury's deliberations, or if it did not, that the omission was cured by the reduction of the verdict. Appellant, so far as the record shows, made no demand upon the trial court to explain the manner in which the reduction was computed; hence she cannot complain of the absence of such a specification (Draper v. Hellman Commercial, etc., Bank, 203 Cal. 26, 41-42, 263 P. 240), but must submit the verdict for review as if it had in the first instance been returned by the jury in the reduced amount. Sherwood v. Jackson, 126 Cal.App. 441, 444, 14 P.2d 861. In such amount, the award is not excessive as a matter of law.

The judgment is affirmed.

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16 Cal.2d 260

HAYS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 17298.

Supreme Court of California.

Oct. 2, 1940.

1. Courts 🔑27

The trial court has the power to exercise a reasonable control over all proceedings connected with litigation before it, and such power necessarily exists as one of the inherent powers of the court, and should be exercised in order to insure the orderly administration of justice.

2. Depositions 🔑9

Statutory right of a party litigant to take a deposition "at any time after the service of summons or the appearance of the defendant" is not an absolute right, but is a right which, like all rights relating to procedural matters, is qualified by existence of power of court to exercise a reasonable control over exercise of such right. Code Civ. Proc. §§ 1049, 2021.

3. Mandamus 🔑40

Where the trial court acts unreasonably in deferring the taking of a deposition or acts in such a manner as to in effect deny the right of a party litigant to have deposition taken, the trial court is acting beyond its powers and its actions may be controlled by mandamus or other appropriate remedy. Code Civ.Proc. §§ 1049, 2021.

4. Mandamus ⚷12

A writ of mandamus will not issue generally to control exercise of discretion by one in whom the law reposes such discretion, but an abuse of discretion is not an "exercise of discretion" but is an action beyond limits of discretion, and hence a writ of mandamus will issue to correct such abuse if the facts otherwise justify its issuance.

See Words and Phrases, Permanent Edition, for all other definitions of "Exercise of Discretion".

5. Depositions ⚷9

The trial court had power to exercise a reasonable control over deposition proceedings by deferring the taking of a deposition. Code Civ.Proc. §§ 1049, 2021.

6. Depositions ⚷9

Trial court did not abuse its discretion by ordering that the taking of deposition of a defendant should be deferred until after an appeal from judgment of dismissal of action for delay of more than two years in bringing it to trial had been determined by reviewing court, where action had been dismissed at time defendant appeared before notary, and there was no showing that reasonable delay in taking deposition would result in denying plaintiff right to a deposition if judgment of dismissal should be reversed. Code Civ.Proc. §§ 1049, 2021.

CARTER and EDMONDS, JJ., dissenting.

In Bank.

Proceeding by Jack Hays against the Superior Court of the State of California in and for the County of Los Angeles for a writ of mandate to compel the court to order Gertrude Temple to give her deposition as a defendant in an action in which petitioner was plaintiff.

Peremptory writ denied.

Prior opinions, 100 P.2d 1050, superseding opinion in 92 P.2d 665.

William C. Ring, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Deputy Co. Counsel, Loyd Wright, and Charles E. Millikan, all of Los Angeles, for respondent.

SPENCE, Justice pro tem.

Petitioner seeks a peremptory writ of mandate to compel the respondent court to order Gertrude Temple, defendant in the case of Hays v. Temple et al., being action numbered 407-515 in the files of respondent court, to give her deposition.

Said action was commenced on October 7, 1936. Defendant's motion to dismiss said action, which motion was made upon the ground of the failure to bring the action to trial within two years, was granted on March 22, 1939, and judgment of dismissal was entered on March 31, 1939. Petitioner, as plaintiff in that action, appealed from said judgment and the appeal is still pending.

Shortly after the filing of the motion to dismiss said action, petitioner herein sought and obtained an order for a subpoena to issue requiring defendant Gertrude Temple to appear before a notary public for the taking of her deposition. When said defendant appeared before the notary public on April 8, 1939, she refused to be sworn or to testify upon the ground that the action had been dismissed. She was then cited to appear before the respondent court to show cause why she should not be ordered to give her deposition. Upon the hearing of the order to show cause, the respondent court ruled that, "The proposed order is refused because the case has been dismissed, and the judgment pursuant to the order of dismissal is now pending on appeal, and that the taking of such deposition should be deferred until the determination of said appeal, for the convenience of the parties and in the interests of justice." It will be noted that the respondent court did not refuse unreservedly to compel the witness to give her deposition but only "that the taking of such deposition should be deferred until the determination of said appeal". Following said ruling by the respondent court, petitioner commenced this proceeding.

Petitioner contends that a party has an "absolute right" to take the deposition of an adverse party "at any time after the service of the summons or the appearance of the defendant" (Code Civ.Proc., sec. 2021); that such "absolute right" continues through the entire time that the action is pending (Code Civ.Proc., sec. 1049; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P.

359, 17 Ann.Cas. 933); and that the trial court has no discretion whatever in controlling the exercise of such right. In clarifying his position in his petition for rehearing herein he states, "This presents the question of whether or not petitioner had the immediate, absolute right to the deposition order, the reverse aspect of which is,—was the trial court empowered to impose such conditional delay?"

Our review of the authorities cited by the parties leads us to the conclusion that the contentions of petitioner are too broad and that they therefore may not be sustained. A careful reading of the cited cases shows that many of them dealt solely with the question of the jurisdiction of the trial court to enforce the right to take the deposition of a witness. In such cases as Burns v. Superior Court, 140 Cal. 1, 73 P. 597; Pollak v. Superior Court, 197 Cal. 389, 240 P. 1006, and Paddon v. Superior Court, 65 Cal.App. 34, 223 P. 91, the orders of the trial courts enforcing the right were affirmed in proceedings in certiorari while in Most v. Superior Court, 25 Cal.App.2d 394, 77 P. 2d 532; Rossbach v. Superior Court, 43 Cal.App. 729, 185 P. 879; Kibele v. Superior Court, 17 Cal.App. 720, 121 P. 412, and Lamphrey v. Superior Court, 8 Cal. App. 80, 96 P. 389, petitions for writs of prohibition to prevent the trial courts from enforcing the right were denied. It is entirely clear that such cases are not in point for in each of said cases the trial court had acted or was threatening to act in the enforcement of the right and its jurisdiction to do so was challenged in proceedings in certiorari or prohibition. This is a proceeding in mandamus seeking to compel the trial court to order the witness to give her deposition immediately and the precise question here is whether the trial court, in the exercise of its admitted jurisdiction, had the power to exercise a reasonable control over the proceedings. Stated in another way, the question is whether the trial court could exercise its discretion and defer the taking of the deposition, under the circumstances presented, until after the appeal had been determined. Two cases which are closely in point on this precise question are Patrick Farms, Inc. v. Superior Court, 13 Cal.App.2d 424, 56 P.2d 1283, and Bar Association v. Superior Court, 64 Cal.App. 590, 222 P. 185.

In Patrick Farms, Inc. v. Superior Court, supra, the trial court determined that, under the circumstances there presented, the motion for the issuance of a commission to take a deposition of a certain witness at a distant point should not be granted until the question of plaintiff's right to an accounting had been first determined. A petition for a writ of mandate to compel the respondent court to issue the commission was denied. It was there said at page 425 of 13 Cal.App.2d, at page 1284 of 56 P.2d, "While ordinarily a party is entitled to the issuance of a commission as a matter of right at any time after the service of summons or the appearance of the defendant (Code Civ.Proc., § 2020; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933), the exercise of that right is subject to a reasonable control by the trial court (Levin v. Superior Court, 139 Cal.App. 693, 34 P.2d 832; Bar Ass'n of San Diego v. Superior Court, 64 Cal.App. 590, 222 P. 185). In other words, we believe that the authorities last cited clearly indicate that the trial court is not compelled under all circumstances to order the issuance of the commission at any time that a request is made therefor after the service of summons or appearance of the defendant, and that the trial court may exercise its discretion and refuse the issuance thereof under certain circumstances. Therefore the action of a trial court in refusing to issue a commission should not be disturbed in the absence of a showing of an abuse of discretion in the particular case."

In Bar Association v. Superior Court, supra [64 Cal.App. 590, 222 P. 186], the trial court continued the taking of a deposition upon a showing of the illness of a party. Petitioner sought annulment of the order of continuance claiming "the absolute right to have said deposition taken at the time and place fixed in its notice of motion to take the same, and that there is no authority vested in respondent to vary said procedure by extending the time or fixing a different date on which said deposition should be taken". It was there admitted by all parties that the precise question had not been previously presented to the appellate courts of this state. The court affirmed the order of the trial court continuing the deposition holding, upon the authority of Burns v. Superior Court, 140 Cal. 1, 73 P. 597, that the taking of a deposition is one of the proceedings of the court, subject to the control of the court in the exercise of a "legal discretion" in the same manner as other proceedings of the court. It further held that although the party had no absolute right to be present at the taking of the deposition, the trial court did not abuse its discretion in ordering the continuance to permit such party's presence.

While the writ of mandate was issued in Levin v. Superior Court, 139 Cal.App. 693, at page 695, 34 P.2d 832, 833, to compel the issuance of a commission, the court there recognized the right of the trial court to exercise its discretion and to refuse to order the issuance of a commission under certain circumstances. It was there said, "Although the Code provisions include all of the time from the service of summons until final determination of a suit, and in general the issuance of the commission is a matter of right, as applied to a particular case this must be taken with such qaulification as the facts of such case may demand."

[1-3] There is nothing novel in the concept that a trial court has the power to exercise a reasonable control over all proceedings connected with the litigation before it. Such power necessarily exists as one of the inherent powers of the court and such power should be exercised by the courts in order to insure the orderly administration of justice. We find nothing in the code sections relating to the taking of depositions which can be construed as an attempt to withdraw that power with respect to deposition proceedings. It is true that the language of section 2021 of the Code of Civil Procedure permits the taking of a deposition "at any time" and that the permissive language of said section may be said to confer a right upon the litigants. But such right is not an absolute right but is a right which, like all rights relating to procedural matters, is qualified by the existence of the power of the court to exercise a reasonable control over the exercise of such right. To deny the existence of such power is to deny the power of the trial court to order the continuance of a deposition in case of the illness of the witness or in case of the illness or the death of a party or his counsel. We do not believe that it would be seriously contended that the power to order a continuance does not exist under such circumstances; and if the power does exist under such circumstances, it may exist under other circumstances for its existence in the suggested cases must necessarily be based upon the power of the court to exercise a reasonable control over the proceedings. If, in any case, the trial court acts unreasonably or in such manner as to deny the right rather than to exercise merely a reasonable control over the exercise of the right, then the trial court would be acting beyond its powers and its actions would be controlled by mandamus or other appropriate remedy.

[4] We believe that the authorities relied upon by petitioner are all distinguishable. We have pointed out above that those authorities dealing with purely jurisdictional questions in certiorari and prohibition proceedings and affirming the jurisdiction and power of the trial court to enforce the deposition right are not in point here. The main authority relied upon by petitioner, involving a mandamus proceeding is San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933. It is entirely clear from a reading of the decision, and particularly pages 32 and 33 thereof in 155 Cal., pages 359 and 360 in 99 P., 17 Ann.Cas. 933, that the sole ground upon which the respondent court there denied the application for the issuance of the commission was that it was of the opinion that it had no jurisdiction to order the issuance thereof while the cause was on appeal. It was not suggested by the respondent court there that it had denied the application in the exercise of its discretion for the obvious reason that, assuming that jurisdiction existed, it would have constituted a clear abuse of discretion to deny the issuance of the application under the circumstances. The witness whose deposition was there sought was the only witness who could prove petitioner's defense upon a possible retrial and said witness was under sentence of death and was to be executed within a short time. Under such circumstances, the refusal to issue the commission constituted a complete denial of the right to take the deposition of said witness and therefore constituted a clear abuse of discretion. The passing reference to the absence of discretion in the trial court, found on page 39 of the opinion in 155 Cal., on page 362 in 99 P., 17 Ann.Cas. 933, was made only with respect to the propriety of the writ of mandate as a remedy. The court there no doubt had in mind the familiar rule that the writ of mandate will not issue ordinarily to control the exercise

of discretion by one in whom the law reposes such discretion (16 Cal.Jur. p. 809), but that rule is qualified in that, "An abuse of discretion, however, is not the exercise of discretion, but is action beyond the limits of discretion, and it is settled that the writ will issue to correct such abuse if the facts otherwise justify its issuance." 16 Cal.Jur., pp. 810 and 811. The law on the availability of the writ of mandate as a remedy was clarified shortly after the decision in the case under discussion. In Ex parte Ford, 160 Cal. 334, 116 P. 757, 35 L.R.A.,N.S., 882, Ann.Cas.1912D, 1267, this court expressly disapproved its former ruling in Strong v. Grant, 99 Cal. 100, 33 P. 733, and declared that the writ of mandate would issue to correct an abuse of discretion. See, also, Inglin v. Hoppin, 156 Cal. 483, 491, 105 P. 582. We are therefore of the view that said reference to the absence of discretion in San Francisco Gas & Electric Co. v. Superior Court, supra, was not necessary to the decision as the court there might well have stated that the remedy by writ of mandate was available as the facts showed a clear abuse of discretion. The same may be said regarding any reference to the absence of discretion found in the other authorities relied upon by petitioner.

Other cases, involving mandamus proceedings and relied upon by petitioner, are Crocker v. Conrey, 140 Cal. 213, 73 P. 1006; Scott v. Shields, 8 Cal.App. 12, 96 P. 385; Wissman v. Cabaniss, 34 Cal. App. 487, 168 P. 150, and Austin v. Turrentine, 30 Cal.App.2d 750, 87 P.2d 72, 88 P.2d 178. These cases are likewise distinguishable. In Crocker v. Conrey, supra, it appears that respondent refused to act upon the "sole ground" of lack of "power or jurisdiction to compel the defendant to answer." See page 214 of 140 Cal., page 1006 of 73 P. In Scott v. Shields, supra, the respondent refused to act on the "sole ground" that he "had no jurisdiction to make an order requiring the said witness to complete his deposition". See pages 13 and 14 of 8 Cal.App., page 386 of 96 P. In Wissman v. Cabaniss, supra, the respondent refused to act upon the erroneous assumption that all questions concerning the property rights of the parties had been determined in a former action. In Austin v. Turrentine, supra, the witness had been examined at length on various matters on the taking of his deposition but he refused to produce certain books and records. The trial court refused to order their production on the ground "that it did not have jurisdiction so to do". See page 759 of 30 Cal.App.2d, page 76 of 87 P.2d. In the mandamus proceeding, the court held that the trial court had jurisdiction and that it should have required the production of such books and records. In each of these cases last mentioned there was an unqualified and unjustified refusal to act upon the part of the trial court and therefore an abuse of discretion. None of said cases involved an order of the trial court which merely temporarily delayed the exercise of the right to take the deposition. In other words, the trial court's action in each of said cases amounted to a denial of the right rather than a reasonable control over the exercise of the right.

[5, 6] From what has been said, we conclude that both reason and authority support the view that the trial court here had the power to exercise a reasonable control over the deposition proceedings. The question remains as to whether the trial court merely exercised such reasonable control or whether it acted unreasonably and in such manner as to constitute an abuse of discretion in ordering that the taking of the deposition should be deferred until after the appeal from the judgment of dismissal had been determined.

The petition herein shows that petitioner claims the right to take the deposition of Gertrude Temple upon the ground that she is a defendant in the action and is "a material witness". This showing is ample to establish the right, qualified as above indicated, but there are other factors to be considered in determining whether the trial court merely exercised a reasonable control over the exercise of the right. It appears that the action had been pending over two and one-half years before petitioner sought the aid of the court for the purpose of obtaining the deposition of said witness; that he did not seek the issuance of a subpoena until after the service of the notice of motion to dismiss said action; and that the action had been dismissed at the time that the witness appeared before the notary. There is no showing here that said witness was the only witness who could testify to a material fact or that said witness was aged, infirm or about to leave the jurisdiction. In short, there is no showing made to this court, nor does it appear that there was any showing made to the trial court, that there is any likelihood that a reasonable delay in the taking of the deposition will result in denying to petitioner the right to take the deposition of the witness prior to any trial that may be had in the event of a reversal of the judgment of dismissal. Under these circumstances we believe that the trial court merely exercised a reasonable control over the proceedings in refusing to compel the giving of the deposition forthwith and that it did not act unreasonably or in such manner as to constitute an abuse of its discretion.

The petition for a peremptory writ of mandate is therefore denied.

We concur: SHENK, J.; HOUSER, J.; CURTIS, J.; McCOMB, Justice pro tem.

CARTER, Justice.

I dissent.

As I understand the opinion approved by a majority of this court, the petitioner had the right to take the deposition of defendant Gertrude Temple, notwithstanding a judgment of dismissal had been entered in the action in which the deposition was sought to be taken and an appeal had been taken from said judgment, but the majority opinion appears to hold that the defendant was justified in refusing to answer questions propounded to her on the taking of said deposition, and the trial judge was justified in refusing an order to petitioner directing said defendant to answer said questions upon the ground that the deposition might be taken at a later date.

In my opinion, the trial judge had no discretion in this matter, and it was his plain duty to make the order requested by petitioner directing the witness to answer any questions which might be propounded to her on the taking of her deposition which were germane to the issues in the case. This view is clearly in accord with the provisions of the Code of Civil Procedure authorizing the taking of depositions, and with all of the cases on the subject, with the exception of Patrick Farms, Inc. v. Superior Court, 13 Cal.App.2d 424, 56 P.2d 1283. The case just cited is contrary to all of the other cases dealing with the subject, and in my opinion the rule announced therein is unsound and should not be followed.

I think it is obvious that section 2021 of the Code of Civil Procedure confers upon a litigant an absolute right to take depositions in the cases provided for therein. By the express provisions of this section such depositions may be taken *"at any time after the service of the summons or the appearance of the defendant"*, which has been construed to mean *at any time before the judgment becomes final.* San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933. No discretion is conferred upon a trial court to determine when a litigant may take a deposition, and it is a matter over which the trial court has no control whatever, except to use the process of the court to enforce the provisions of the code when necessary to aid the party who is seeking to obtain the deposition.

It is well recognized by trial lawyers that the taking of depositions long prior to the time when they are to be used is essential to the proper and successful handling of cases, and the legislature in its wisdom saw fit to confer upon litigants the absolute right to take depositions *at any time they see fit after the service of summons or the appearance of the defendant in pending actions.*

The effect of the decision of the District Court of Appeal in the case of Patrick Farms, Inc. v. Superior Court, supra, and the majority opinion of this court in the case at bar, is to confer upon a trial court the power to specify the time when a litigant may take a deposition in certain cases, or, stating it another way, to require a litigant to defer the taking of a deposition to a time when it appears to a trial court reasonable and proper that such deposition be taken. In other words, these decisions interpret section 2021 of the Code of Civil Procedure to read: "The testimony of a witness in this State may be taken by deposition in an action at any time after service of the summons or the appearance of the defendant, *except in cases where a trial court for good cause shown shall otherwise specify*". (Italicized portion added.) These decisions amount to nothing less than judicial legislation. They read an exception into section 2021 of the Code of Civil Procedure which is not there and which should not be there.

A litigant should not be subjected to the uncertainty of a discretionary ruling of a trial judge every time he attempts to procure evidence by deposition which the litigant thinks is essential to the proper preparation or presentation of his case.

The administration of justice is already so cumbersome and burdensome that poor litigants have great difficulty in meeting the requirements now imposed upon them in the presentation of their cases to our courts, and if we are to lay down a rule which will enable one who desires to conceal and suppress evidence to successfully resist the taking of his deposition by the refusal of a trial judge to exercise his discretion in favor of the taking of such deposition, we are increasing such burden without in any way improving the administration of justice. In fact, the administration of justice is usually aided by requiring full disclosure of all facts within the knowledge of either party to the litigation. Furthermore, it quite often happens, and it has been approved as proper legal procedure, that depositions may be taken to determine whether it is advisable to further prosecute an action, either from the standpoint of whether the party seeking to take the deposition can prevail in the action, or can satisfy any judgment which he might recover if he does prevail. Demaree v. Superior Court, 10 Cal.2d 99, 73 P.2d 605.

To say that the effect of the majority opinion in the case at bar does not deny a litigant his statutory right to take a deposition "at any time after service of the summons or the appearance of the defendant" is to disregard the inevitable consequences of long delays in securing evidence. It may be that if and when the judgment of dismissal in the case at bar is reversed, Gertrude Temple may be deceased, or out of the jurisdiction where it would be extremely difficult or even impossible to secure her deposition. The fact that the case involves an accounting and that the plaintiff's right to an accounting must be first determined before an accounting can be ordered, does not change the situation. If such a rule is to be invoked, then in every case where certain issues must be determined before evidence can be offered relating to other issues in the case, a litigant would be barred from taking depositions relating to any subject matter except the preliminary issues until after such issues were determined; in other words, in a case in eminent domain, a litigant would be barred from taking the deposition of a witness on the issue of damages until after the issue of necessity had been determined, and in a personal injury case a litigant would be barred from taking a deposition relating to the nature and extent of the injuries suffered by the plaintiff until the issue of liability was determined. A complete answer to the reasoning advanced in the majority opinion in the case at bar and in the opinion in the case of Patrick Farms, Inc. v. Superior Court, supra, is that no power, authority, or discretion is conferred upon the trial court to limit or restrict the right of a litigant to the taking of depositions relating to any issue in an action until some other issue is determined and since the right to take a deposition in this state is purely statutory, the litigants should be permitted to exercise the right conferred upon them by statute without being hampered by restrictions imposed by the court in derogation of express statutory authority.

It has been repeatedly held that when a litigant follows the procedure provided for in the Code of Civil Procedure for the taking of a deposition and the witness refuses to answer proper questions propounded to him on the taking of his deposition, and such refusal is certified to a judge of the superior court, such judge has no discretion to refuse to exercise the powers which the law has invested in him so far as necessary to secure to the litigant the right which the law confers upon him to take the deposition of a witness. 9 Cal. Jur., p. 403, sec. 8; p. 407, sec. 10; Burns v. Superior Court, 140 Cal. 1, 73 P. 597; Crocker v. Conrey, 140 Cal. 213, 218, 73 P. 1006; Scott v Shields, 8 Cal.App. 12, 96 P. 385; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933; Kibele v. Superior Court, 17 Cal.App. 720, 121 P. 412; Rossbach v. Superior Court, 43 Cal.App. 729, 185 P. 879.

The majority opinion attempts to distinguish the case at bar from the case of San Francisco Gas & Electric Co. v. Superior Court, supra, upon the assumption that in that case the trial court had refused to issue the commission for the taking of the deposition upon the ground that it had no jurisdiction to do so, instead of holding that in the exercise of its discretion it was not a proper case for the issuance of such commission. I do not believe that the opinion in the case of San Francisco Gas & Electric Co. v. Superior Court, supra, is susceptible of such an interpretation, as in that case the court stated in its opinion that since the proceeding had been instituted for the taking of the deposition of

Harry Orchard, his sentence had been commuted to life imprisonment, and therefore the immediate necessity for the taking of his deposition was obviated. But, notwithstanding this circumstance, this court in that case issued a writ of mandate directing the trial court to forthwith issue a commission for the taking of Orchard's deposition pending the determination on appeal of the case in which the deposition was to be used. In other words, the effect of the decision of this court in the case of San Francisco Gas & Electric Co. v. Superior Court, supra, is that the trial court had no discretion to deny a litigant the right to take a deposition in a case pending on appeal.

It seems obvious to me that it should be immaterial whether the trial court denies a litigant the right to procure a deposition in a case which is pending on appeal because it is of the opinion that it has no jurisdiction to require the witness to submit to the taking of his deposition during such time, or that the ends of justice will be promoted by delaying the taking of the deposition until the case is decided on appeal. The effect of the ruling is the same. And if we are to hold that a trial court can in its discretion defer the taking of a deposition while a certain case is pending on appeal, it must necessarily follow that such right can be denied in any case. To hold otherwise would be to confer upon a trial court the power to pass upon the merits of a case while it is pending on appeal in the Supreme or Appellate Court.

All the superior court decided in the case at bar was that the petitioner was not entitled to the order requested because the case in which he sought to take a deposition had been dismissed and the taking of such deposition should be deferred until the determination of the appeal from the order of dismissal. This, in effect, is all that the superior court had decided in the case of San Francisco Gas & Electric Co. v. Superior Court, supra, and in all of the other cases cited herein or in the majority opinion, except the case of Patrick Farms, Inc. v. Superior Court, supra. In other words, if the granting of such an order was within the discretion of the trial court in the case at bar, it would likewise be within the discretion of the trial court in every other case in which a litigant sought to take the deposition of a witness while a case is pending on appeal.

The majority opinion holds that the right to take a deposition under the provisions of section 2021 of the Code of Civil Procedure is not an absolute right, but is qualified by the existence of the power of the court to exercise a reasonable control over the exercise of such right, and that such a power necessarily exists as one of the inherent powers of the court in the orderly administration of justice. The fallacy of this holding, as applied to the case at bar, is that while it is conceded that petitioner has the right under the above-mentioned section of the Code of Civil Procedure to take the deposition of the defendant pending the appeal from the order of dismissal, the trial court has denied him that right for no other reason than that the case has been dismissed. Such control by the trial court amounts to an arbitrary denial of the statutory right granted to every litigant. The majority opinion states: "To deny the existence of such power is to deny the power of the trial court to order the continuance of a deposition in case of the illness of the witness or in case of the illness or the death of a party or his counsel." In making the foregoing statement, the author of the opinion has apparently overlooked the proposition that before a penalty of any sort can be imposed upon a witness for his failure to respond to a subpoena or submit to the taking of his deposition, he must be cited for contempt of court, and upon the hearing of such citation, the court can purge him of the charge of contempt on such conditions as the court may see fit to impose. In other words, if the witness had justifiable excuse for failing to submit to the taking of his deposition, the court would clearly have the power to exculpate him from any charge arising out of such failure. This is quite a different matter than refusing to require a witness to submit to the taking of his deposition when his only request is that the taking of his deposition be delayed until the case is disposed of on appeal.

In my opinion a proceeding for the taking of a deposition is not a proceeding within the control of the trial court in the sense that it is administered by such court and is therefore subject to its discretionary power. For instance, the court has no power to specify the officer before whom or the place where a deposition shall be taken; neither has the court control over the form of the questions or the order or manner in which they shall be propounded to the witness. If the witness refuses to answer the questions propounded to him or produce documents which the party taking the deposition is entitled to have answered or produced, the trial court may be called upon to require the witness to respond, but in so doing the court is not exercising a discretion, but is simply ruling on questions of law, which rulings are subject to review by an appellate court.

In my opinion, there is no basis whatever for the contention that a trial court should be invested with a discretion which it might exercise to relieve a witness from giving his deposition because the action in which the deposition is taken may not be brought to trial for an indefinite time, or may never be brought to trial, as no such discretion is provided for in our statutes.

It is obvious that the legislature did not see fit to include in the statutory provisions authorizing the taking of depositions, a safeguard against a litigant abusing the privilege thus granted, as the expense to which a litigant is subjected in the taking of a deposition is a sufficient deterrent to restrain the use of the privilege for mere personal gratification. This thought is clearly expressed by Chief Justice Beatty in the case of San Francisco Gas & Electric Co. v. Superior Court, supra. At page 37 of the opinion in that case in 155 Cal., at page 361 in 99 P., 17 Ann.Cas. 933, he said: "The only substantial argument against this construction of statute is that it enables a contentious litigant to subject the successful party to an action to great and unnecessary expense in the taking of depositions pending a frivolous appeal. This objection, however, does not seem to have been deemed by the Legislature sufficiently grave to prevent the enactment of a statute which easily admits of the same abuses, even when restricted in its application to pending issues, and to controversies which may never reach an issue. There seems also to be less reason to apprehend the inconveniences suggested when it is remembered that the party taking depositions in a case like this must pay the costs of the proceeding without hope of recovering them back except in the event of a reversal of the judgment or order, and not then unless the final judgment is in his favor. Moreover, the respondent may, in case of an appeal manifestly frivolous, ignore the whole proceeding to take new depositions, or, if he deems it unsafe to omit the employment of counsel to attend and cross-examine, he may invoke the power of this court to impose an adequate penalty, on affirmance of the judgment, to recompense him for the unnecessary expense to which he has been subjected in consequence of a frivolous appeal. In view of these considerations, it is not to be feared that a liberal construction of the Code provisions in question will result in serious abuses."

Furthermore, the 1939 legislature added section 1032a to the Code of Civil Procedure, which provides that the prevailing party may recover as costs, any expenditures he is required to make for a copy of any depositions taken in an action, which furnishes an added deterrent against a litigant resorting to the practice of taking depositions which are not necessary for the proper presentation of his case.

The majority opinion appears to confuse the procedure taken by petitioner in the case at bar with a contempt citation against the witness. In this, it is clearly erroneous, as the order prayed for in the trial court was that the witness be directed to give her deposition. If she thereafter refused to appear and be sworn, or give her deposition, and she was cited to show cause why she should not be punished for contempt of court for such failure, she would then have the right to present such defense as might be available to her, such as illness, or the necessity that she be at some other place at the time she was directed to submit to the taking of her deposition. On the hearing of such citation, of course, the trial court would have discretion to determine whether or not she was guilty of contempt of court, but such is not the situation in the case at bar. In my opinion, the witness furnished no justifiable excuse for her refusal to give her deposition, and it was the unquestionable duty of the trial judge to make an order directing her to submit to the taking of her deposition or be adjudged guilty of contempt of court.

In view of what I have stated above, the petitioner is clearly entitled to a writ of mandate and a peremptory writ should issue forthwith.

EDMONDS, Justice (dissenting).

I agree that a party litigant does not have an absolute right to take the deposition of a witness at the particular time and place which he specifies, and that the trial judge may exercise a reasonable control over such proceedings. But this discretion must be reasonably exercised, and the court may not arbitrarily postpone the taking of a deposition.

The order here challenged expressly recites that the taking of the defendant's deposition was postponed because the case against her had then been dismissed and an appeal from the judgment based upon that order was pending. There was, therefore, as I read the record, no exercise of discretion but the denial of the right to take testimony until "the determination of said appeal". The fact that this was said to be "for the convenience of the parties and in the interests of justice" does not change the situation because the defendant relied entirely upon the fact that the appeal was pending as the ground for her demand for a postponement. Under these circumstances the case falls squarely within the rule stated in San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933, and the peremptory writ of mandate should issue.

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16 Cal.2d 252

STANFORD v. STATE BAR OF CALIFORNIA.

L. A. 17478.

Supreme Court of California.

Oct. 1, 1940.

Attorney and client 🔑57

Where an order of disbarment was made against attorney in a prior proceeding based upon different charges and such order had become final, petition, to review a recommendation of Board of Governors of the State Bar that attorney be disbarred, was dismissed.

◆

In Bank.

Proceeding by Leland G. Stanford to review a recommendation of the Board of Governors of the State Bar of California that petitioner be disbarred.

Proceeding dismissed.

Bertrand L. Comparet, of San Diego, for petitioner.

Philbrick McCoy, of Los Angeles, Fred E. Lindley, Frank Downer, Jr., and Arthur F. H. Wright, all of San Diego, and Claude Minard, of San Francisco (Philbrick McCoy, of Los Angeles, of counsel), for respondent.

PER CURIAM.

This is a petition to review a recommendation of the Board of Governors of The State Bar that petitioner be disbarred. In prior proceedings an order of disbarment was made against petitioner, based upon different charges. This order of disbarment has become final. See Stanford v. State Bar, Cal.Sup., 104 P.2d 635.

No useful purpose can be served by further consideration of this petition for review.

The proceeding for review is dismissed.

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16 Cal.2d 285

BECHTOLD et al. v. BISHOP & CO., Inc., et al.

McKINLEY et al. v. SAME.

L. A. 17471.

Supreme Court of California.

Oct. 2, 1940.

1. Appeal and error 🔑1011(1)

In actions for death and personal injuries, trial court's finding on conflicting evidence that one defendant, who took no appeal from judgments for plaintiffs, was guilty of willful misconduct is conclusive as to such defendant on codefendants' appeal. Code Civ.Proc. § 377.

2. Automobiles 🔑206

A truck driver, approaching intersection of arterial street, on which he was driving, with avenue, on sides and pavement of which at entrance to intersection were stop signs, was entitled to assume that automobile approaching intersection on such avenue would make required arterial stop, and is not chargeable with negligence in acting on such assumption.

3. Appeal and error 🔑994(3), 1012(1)

In case tried without jury, witness' credibility and weight of his testimony are for trial judge, who, under proper circumstances, may accept all or such part of any witness' testimony as he believes true or reject all or any part which he believes untrue.

4. Appeal and error ⚷1012(1)

In actions against drivers of automobile and truck for death of one guest and injuries to another guest in automobile as result of its being struck by truck at street intersection, automobile driver's and injured person's statements, not inconsistent with trial court's finding of willful misconduct by such driver, who did not appeal from judgments for plaintiffs, or having no bearing on such issue, but tending to establish truck driver's lack of due care, must be accepted by Supreme Court as evidence in support of trial court's finding that truck driver was negligent, though such witnesses' estimates of speed and distance were mathematically inexact, and injured person had only fraction of second in which to appraise situation, as such facts did not render their testimony inherently incredible.

5. Automobiles ⚷244(11, 36)

In actions against drivers of automobile and truck for death of one guest and injuries to another guest in automobile as result of its being struck by truck at street intersection, evidence *held* sufficient to support trial court's finding that truck driver was guilty of negligence constituting contributing proximate cause of accident.

6. Trial ⚷404(2)

In actions for death and personal injuries, trial court's specification of amount of general damage in conclusions of law, instead of fact findings, was not reversible error, as such specification, though mistakenly classified as conclusion of law, may be regarded as fact finding.

7. Appeal and error ⚷1013

The assessment of damages for death and personal injuries is committed to discretion and sound judgment of trier of facts, whose conclusion will not be disturbed by appellate court, unless sum awarded is so disproportionate to injury proved as to justify view that award was given under influence of passion or prejudice.

8. Death ⚷99(4)

In action for death of 56 year old able-bodied and healthy married woman, who was exceptionally good cook and housekeeper, judgment awarding her surviving 68 year old husband and 32 and 44 year old sons $12,000 general damages for deprivation of her love, society, comfort, companionship, counsel, protection, care and services was not so clearly excessive as to justify conclusion that it was impelled by passion or prejudice.

9. Damages ⚷132(1)

A judgment awarding $17,250 damages to husband and his 34 year old wife for injuries to wife, who sustained lacerations almost severing an ear, fractures of jaw bones, loss of several teeth, abscesses causing permanent disfiguring facial scars, permanent 50 per cent. loss of hearing in one ear, fracture of arm and pelvic bone, and severe nervous shock, resulting in great pain, mental anguish and permanent impairment of health, *held* not so excessive as to justify intervention by appellate court.

In Bank.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Actions, consolidated for trial, by John B. Bechtold and others and by Harry T. McKinley and his wife, Ethel Gladys McKinley, against Bishop & Co., Inc., John G. Baker, and others to recover damages for the death of Rachel A. Bechtold and injuries to plaintiff wife, in which defendant Baker filed a cross-complaint against codefendants. Judgments for plaintiffs, and defendants, except defendant Baker, appeal.

Affirmed.

Prior opinion, 98 P.2d 575.

Sarau & Thompson and Roy W. Colgate, all of Riverside, for appellants.

Kenneth Evan Schwinn and Joseph Seymour, both of Riverside, for respondent.

PER CURIAM.

These two causes, denominated the "McKinley case" and the "Bechtold case", were consolidated prior to trial, and were heard by the court sitting without a jury. Separate findings of fact, conclusions of law, and judgments were entered in favor of the respective plaintiffs, and will be considered as one document. Union Lumber Co. v. Simon, 150 Cal. 751, 89 P. 1077, 1081; Willamette, etc., Co. v. College Co., 94 Cal. 229, 29 P. 629; Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001. An appeal has been taken by all of the defendants except John G. Baker, on the ground that certain findings are not supported by the evidence.

Shortly after ten o'clock on the clear dry morning of March 2, 1937, Ethel Gladys McKinley and Rachel A. Bechtold were riding in a 1927 Model T Ford coupe as guests of defendant Baker. Baker was driving easterly on Jurupa avenue, in Riverside county, toward a point where the avenue, at an angle slightly northeast-southwest, crosses Garnet street, a north-south arterial highway. At the same time defendant West was driving a heavy truck north on Garnet street toward the same crossing. On each side of the avenue at entrance to the intersection, stop signs had been erected in the customary manner, and on the westerly side the word "Stop" was painted on the pavement. The view of those approaching the crossing from the south or west was at least partially obscured by rows of eucalyptus trees. The automobile and the truck came together in the intersection a few feet south of the center line of Jurupa avenue and east of the center line of Garnet street. The truck struck the right rear side of the automobile, causing it to slide to the northeast, and overturn. Mrs. McKinley was injured seriously, and Mrs. Bechtold fatally.

The Bechtold action was brought under section 377 of the Code of Civil Procedure by the surviving husband and two sons of Mrs. Bechtold, to recover damages for her death. The other action was brought by Mrs. McKinley and her husband to recover for her injuries. The defendants were Baker, truck driver West, his employer, Bishop & Company, and the owner of the truck, National Biscuit Company. In the Bechtold case judgment was rendered for plaintiffs in the sum of $12,418.16, and in the McKinley case in the sum of $17,250. These judgments ran against all of the defendants, except that in the Bechtold case, due to absence of an allegation of agency of the truck driver for National Biscuit Company, the liability of that company was limited to $5,000.

[1] The trial court found on conflicting evidence that Baker was guilty of wilful misconduct in that he wilfully and wantonly failed to stop the Ford coupe at the westerly stop sign on Jurupa avenue, and carelessly and recklessly drove into the intersection without regard to traffic on Garnet street, thereby proximately causing and contributing to the collision with the truck. As no appeal was taken by Baker, this finding is conclusive as to him. The court also found that West, while acting in the scope of his employment, so carelessly and negligently operated the truck as to proximately cause it to collide with and run into the automobile, and that as a direct and proximate result of the said wilful misconduct of Baker and carelessness, recklessness, and negligence of West, concurring and contributing jointly to cause the accident, the plaintiffs were injured as aforesaid.

Appellants contend that the record does not contain any substantial evidence to support the finding that West was negligent. Testimony on this issue was given by West, by Baker, Mrs. McKinley, and disinterested witnesses.

Both Baker and West were familiar with the intersection. West testified that he had driven over that portion of Garnet street once or twice a month for six or seven years. He stated that just prior to the accident, when he was 500 feet south of the intersection, he was traveling at a rate of 40 to 45 miles an hour in "over-drive", the fifth or fastest gear effective only when the truck was running at a speed of 30 to 40 miles an hour or more. He commenced to slow down, touching his brakes three or four times, and when within 100 feet of the intersection, his rate of travel had decreased to 20 or 25 miles an hour. He applied the brakes a fifth time when he was about 25 feet from the crossing. At a distance of 20 feet he had to cross a railroad track which paralleled Jurupa avenue. At about that point he "stood on his brakes", and continued to "ride" them up to the moment of collision. He first saw the Ford when he was 100 to 125 feet south of the intersection. It was then approximately the same distance west, and was traveling between 15 and 20 miles an hour. He next saw it "coming out of the trees" into the open, 35 to 40 feet from the crossing. He was then also about a like distance south, 40 feet, traveling at approximately 15 miles an hour. He watched the Ford "continuously the last 40 feet" as it approached the edge of the intersection. Its speed of 15 to 20 miles an hour did not vary, nor did it stop before proceeding into the crossing. Up to the time it reached the arterial point, he expected it to stop; when it did not—the truck then being 20 to 25 feet from the center of the intersection and 18 feet from the point of collision—he "got up" on his brakes, grabbed the wheel, and used all the energy he had to avoid a collision. When he entered the intersection he was not going over five miles an hour. He did not and could not swerve the truck to right or left. Its front end hit the right side of the Ford at a point about four or five feet south of the center line of the avenue and two to six feet east of the center line of Garnet street. The right rear wheel of the Ford seemed to be "hung up" on the bumper of the truck, until the Ford slid north, started to wabble, and turned over. The truck stopped at about the center line of the avenue.

A traffic officer reached the scene shortly after the accident, talked with the parties, and made a record of the physical evidences of collision, skid marks left by the Ford, etc. Apparently no marks were left by the truck. Testing its brakes, the officer found that their application did not cause the wheels to slide and that they were "fair".

Two ladies who were standing in a driveway off Garnet avenue, about 200 feet south of the intersection, testified that they noticed the truck passing that point at a speed of about 30 miles an hour. They did not see the collision, but they heard the noise caused by it, and immediately rushed to the scene.

A nine-year-old school boy, who was standing in the driveway of his home near the northwest corner of the intersection testified that he observed the Ford as it traveled easterly to the point of collision, and that it was "going pretty fast", and made no arterial stop before entering Garnet street.

Baker testified that when he was about 100 feet west of the intersection, he was traveling about 15 miles an hour, and that as he continued easterly, he slowed down. In obedience to the arterial sign, he stopped before starting over the crossing. He looked north and south on Garnet street and saw no vehicle. He then proceeded at a speed of from five to eight or ten miles an hour. About the time he reached the center of the intersection he again looked to the south and saw the truck 400 or 500 feet away, traveling from 45 to 55 miles an hour. He continued across the street, which is paved to a width of 18 feet, and when he was four or five feet beyond the center line, he again saw the truck. It was from 5 to 15, or maybe 20, feet to his right, coming toward him at the same speed. He tried to increase his speed and turned slightly to the left, but the truck crashed into the right rear of the Ford. At the time of the collision the front wheels of the Ford had passed completely over the intersection and a few feet more of travel would also have brought the rear wheels beyond the crossing line.

Mrs. McKinley also stated that the Ford made an arterial stop before entering the intersection. She stated that as it neared the stopping point, going about 18 miles an hour some 50 feet from it, she glanced up from her lap, where she was sorting letters for mailing, and looked 450 or 500 feet both ways on Garnet street. She saw no vehicles and returned her attention to the letters in her lap. When she heard Mrs. Bechtold scream, she raised her head and looked out of the window to her right. She saw the truck bearing down on them, about two feet away. The truck was traveling 45 miles and hour "easy", and the Ford five or six miles an hour. Before she could turn her head away the collision occurred.

[2] Appellants urge that the testimony of both Baker and Mrs. McKinley is discredited by the conclusive finding of wilful misconduct on the part of Baker, and that except for said discredited testimony, the record is utterly devoid of any evidence of sufficient substantiality to support the finding that West was negligent. Their argument is this: Accepting as a premise the finding that Baker was guilty of wilful misconduct, which is tantamount to accepting as a fact that he intentionally, deliberately, and wantonly drove into the intersection and the path of the oncoming truck, without making a boulevard stop and with express or implied knowledge that the probable result of such act would be injury to his guests (Hagglund v. Nelson, 23 Cal.App.2d 348, 73 P.2d 265; Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194), it must follow that such wilful misconduct was the sole proximate cause of the collision. West was entitled to assume, while approaching the intersection, that the Ford car would make the required arterial stop and could not be charged with negligence for acting upon that assumption. Gritsch v. Pickwick Stages, 131 Cal.App. 774, 22 P.2d 554. When he discovered that the Ford was not going to stop, his conduct under the circumstances was that of a reasonably prudent man. So far as the testimony of Mrs. McKinley is concerned, her statement that the Ford did stop before entering the intersection must, under the conclusive finding of Baker's wilful misconduct, be taken as untrue. Her estimate as to the speed of the truck just prior to the moment of im-

pact must be regarded as incredible. If, as she stated, the truck was moving at a rate of 45 miles an hour, she could have had it under observation but an infinitesimal fraction of a second, which was too brief a time for anyone in her position to estimate the speed of its approach. Even if it was traveling but five miles an hour, as claimed by West, the time and distance were still too short to afford opportunity for a credible estimate. Moreover, mathematical calculation demonstrates that if the Ford and the truck had been traveling the respective distances at the respective speeds estimated, the collision would not have occurred as it did. Hence, the testimony of both Baker and Mrs. McKinley must be considered as inherently untrue.

[3, 4] Appellants' argument is one which might be persuasive if addressed to a trial court. Addressed to an appellate court, it fails to carry conviction. In this state the credibility of a witness and the weight to be accorded to his testimony are questions directed to the trial judge, who under proper circumstances may accept all or such part of the testimony of any witness as he believes to be true, or may reject all or any part which he believes to be untrue. Pedrow v. Federoff, 77 Cal. App. 164, 247 P. 212; Bushey v. Union Oil Co., 13 Cal.App.2d 350, 56 P.2d 1272; Winning v. Board of Dental Examiners, 114 Cal.App. 658, 300 P. 866, and cases cited. Thus in the present case although it is evident from the finding of wilful misconduct that the trial court disbelieved many of the statements of Baker and Mrs. McKinley, particularly those with reference to the making of an arterial stop, it does not necessarily follow that their testimony as a whole was rejected and discredited. Statements made by them which were not inconsistent with the finding of wilful misconduct, or which had no bearing on that issue but did tend to establish lack of due care on the part of West, must therefore be accepted as evidence in support of the finding that West was negligent and that his negligence was a contributing proximate cause of the accident. The fact that their estimates of speed and distance were inexact from the standpoint of mathematical calculation, and that Mrs. McKinley had but a fraction of a second in which to appraise the situation, does not stamp the testimony with inherent incredibility. The impressiveness of an event, more than the element of time, may serve to etch a vivid mental picture. Intersection collisions are generally occurrences which take place in split seconds, and yet parties and witnesses are usually able to detail such happenings with substantial accuracy.

[5] Both Baker and Mrs. McKinley testified that on entering the intersection they looked up and down Garnet street and saw no vehicle approaching, and that when they did see the truck it was bearing down upon them at so great a speed that the collision could not be avoided. This version is as plausible as that of the truck driver to the effect that he entered the intersection at a speed of not over 5 miles an hour and yet had insufficient opportunity to stop the truck. In short, that part of the testimony of Baker and Mrs. McKinley which may have been credited by the trial court affords support for the view that under the circumstances the speed at which West drove into the intersection was excessive, and his conduct was not that of a reasonably prudent man. Further support for the same conclusion is found in the physical facts as testified to by the traffic officer, and in the testimony of the witnesses other than Baker and Mrs. McKinley. Admittedly the automobile must have entered the intersection ahead of the truck. It had practically completed the crossing at the time the truck crashed into its right rear side. The truck driver, according to his own statement, had observed its progress for a considerable distance, and yet his speed was such that when the collision occurred the impact was of sufficient force to slide the automobile forward a number of feet and cause it to overturn, while the truck continued forward the full distance within which it should have been stopped by application of the brakes alone, without the additional slowing caused by the temporary weight of the Ford, "hung up" on its bumper. The truck driver was not entitled to rely upon the fact that the Ford did not make the required arterial stop as absolving him from all responsibility. The trial court, of course, had the advantage of hearing the witnesses and observing their manner while testifying. He visited the scene of the accident, and also inspected the Ford coupe. Under this record it cannot be said that his finding as to the negligence of West is not sufficiently supported by evidence of a substantial character.

[6] Appellants complain that the trial court failed to find upon a material issue.

The basis of this contention lies in the fact that although the court found the amount of special damages suffered in each case, and made a detailed finding describing the general damage, it specified the amount of the general damage in the conclusions of law and not in the findings. This was not reversible error. The specification of the amount of general damage, although mistakenly classified as a conclusion of law, may be regarded as a finding of fact. Linberg v. Stango, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555; Roloff v. Hundeby, 105 Cal. App. 645, 288 P. 702; Gustafson v. Blunk, 4 Cal.App.2d 630, 41 P.2d 953.

[7, 8] Appellants assert that the award in the Bechtold case is excessive. It is elementary that the assessment of damages is a matter committed to the discretion and sound judgment of the trier of facts, whose conclusion will not be disturbed by an appellate court unless the sum awarded is so disproportionate to the injury proved as to justify the view that it was given under the influence of passion or prejudice. Meek v. Pacific Elec. Ry., 175 Cal. 53, 164 P. 1117. In the present case the evidence showed, and the court found, that Mrs. Bechtold was 56 years of age at the time of her death and had a life expectancy of 16.89 years. Her husband, one of the plaintiffs, was 68 years of age, and had a life expectancy of 10.23 years. The couple had been happily married for over 41 years. Their sons, the other two plaintiffs, were 32 and 44 years of age, having respective life expectancies of 33.03 and 25.09 years. They did not reside with their parents. Mrs. Bechtold was an able-bodied woman, well in mind and body, and loving and affectionate to her husband and sons, who reciprocated the feeling. She performed the ordinary household duties for her husband and was an exceptionally good cook and housekeeper. Her death deprived plaintiffs of her love, society, comfort, companionship, counsel, protection, care, and services in keeping and maintaining the home.

Appellants claim that these facts were not sufficient to establish the pecuniary loss, if any, suffered by the adult sons from their mother's death, or the pecuniary value of her services, or to justify the award of $418.16 special damages, and $12,000 general damages, with $5,000 limitation of liability as to defendant National Biscuit Company. The pecuniary value of the services of a wife or mother is not susceptible of measurement by any uniform standard of market value. Evidence of the general type here adduced is commonly used as a basis of computation of damages of this character. Meek v. Pacific Elec. Ry., supra. While the award made by the trial court in this case is liberal, it is clearly not so excessive as to justify the conclusion that it was impelled by passion or prejudice and therefore it will not be disturbed. Compare awards in Bach v. C. Swanston & Son, 105 Cal.App. 72, 286 P. 1097, and cases there reviewed; Hill v. Peres, 136 Cal. App. 132, 28 P.2d 946; Nitta v. Haslam, 138 Cal.App. 736, 33 P.2d 678.

[9] Likewise without merit is appellants' claim that excessive damages were awarded to Mrs. McKinley and her husband. They had judgment for the sum of $17,250. The trial court found among other things that at the time of the accident Mrs. McKinley was 34 years of age, had two minor children, and was performing all of the housework and duties of a wife and mother. As a result of the collision she sustained severe injuries, lacerations almost severing the left ear from her head, a compound fracture of the right mandible, a fracture of the maxilla, the loss of several teeth, destruction of a portion of the bone of the lower right mandible, resulting in abscesses which cause permanent and disfiguring scars upon the right side of her face, a definite elevation of the right side of the jaw or mandible causing asymmetry of the face so that the normal side is definitely lower than the right side, a fifty per cent loss of hearing in the left ear, which is permanent, injury to right arm with permanent scar therefrom and limitation in the use of the arm resulting from a fracture of the greater tuberosity of the right humerus, a fracture of the right os pubis of the pelvic arch, and severe shock to the entire nervous system. Prior to the injury she was in good health, but since she has suffered and will suffer great pain and mental anguish and her health will be permanently impaired, and she will permanently sustain unsightly, disfiguring and repulsive face scars and partial deafness.

Appellants claim that these findings are only partially supported by the evidence and that they exaggerate the extent of Mrs. McKinley's injuries, and of her permanent disfigurement, or loss of beauty. The record does not show that this is the case. So far as the extent of facial disfigurement and permanent injury is concerned, the trial court had ample opportunity, while listening to Mrs. McKinley's testimony, to observe her appearance. The fact that this physical evidence was available to him, coupled with a consideration of the comprehensive testimony of medical experts, and other witnesses, compels the conclusion that there is ample support in the record for the findings in question and that the award is not so excessive as to justify intervention by an appellate court.

The judgments are, and each of them is, hereby affirmed.

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41 Cal.App.2d 18

SULLWOLD v. MORRIS et al.

Civ. 12844.

District Court of Appeal, Second District, Division 2, California.

Oct. 2, 1940.

Appeal and error 🔑479(1)

Where plaintiff, on defendants' application for writ of supersedeas to restrain plaintiff from enforcing judgment of superior court against defendants, conceded that District Court of Appeal would probably reverse judgment, writ of supersedeas would be issued to preserve status quo in superior court until District Court of Appeal had opportunity to pass upon defendants' appeal on its merits.

Action by H. H. Sullwold against Wade H. Morris and another. From a judgment for plaintiff, defendants appeal. On original application by defendants for a writ of supersedeas to restrain plaintiff from enforcing the judgment.

Writ of supersedeas issued in accordance with prayer of petition.

Hastings & Baker and Eldon V. Soper, all of Los Angeles, for appellants.

Prentiss Moore and John M. Dvorin, both of Los Angeles, for respondent.

McCOMB, Justice.

This is an original application for a writ of supersedeas to restrain respondent from enforcing a judgment of the superior court of Los Angeles county No. 453573 of said court, entitled *H. H. Sullwold, Plaintiff,* v. *Wade H. Morris and Zora Morris, husband and wife, Defendants,* and from enforcing any writ of execution heretofore issued in connection with said case.

The essential facts are:

That on August 19, 1940, the superior court of Los Angeles county granted a motion for a summary judgment against petitioners herein; on August 23, 1940, said judgment was entered in the county clerk's office of said superior court; and thereafter a writ of execution on said judgment was issued by said superior court. August 28, 1940, petitioners herein filed a notice of appeal from the aforementioned judgment.

This is the sole question for determination:

Have petitioners shown this court a valid reason for the issuance of the writ of supersedeas?

This question must be answered in the affirmative. At the time petitioners presented their motion to this court respondent's attorney in discussing whether or not there was any merit to the position taken by appellants on the appeal in this case said, "I feel from the opinions of this court that it will find particular reasons for reversing this matter. * * *"

In view of the fact that respondent is of the opinion that this court will reverse the judgment which he has obtained against petitioners, it is clear that a writ of supersedeas should issue for the purpose of preserving the status quo in the superior court until this court has had the opportunity of passing upon the appeal on its merits.

For the foregoing reasons it is ordered that a writ of supersedeas issue in accordance with the prayer of the petition filed herein.

I concur: WOOD, J.

MOORE, P. J., being disqualified, does not participate in this case.

41 Cal.App.2d 16

PEOPLE v. BOSWELL.

Cr. 3378.

District Court of Appeal, Second District, Division 1, California.

Oct. 1, 1940.

Sodomy ⚷6

Evidence *held* sufficient to support conviction for commission of lewd act on body of eight year old boy, as against contention that it created strong doubt as to prosecuting witness' credibility and showed that he had been instructed to testify as he did. Pen.Code, § 288.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

William Boswell was convicted of committing a lewd or lascivious act on the body of a boy under 14 years of age, and he appeals.

Affirmed.

Selma K. Ellner, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was charged in an information filed by the district attorney of Los Angeles county with a violation of section 288 of the Penal Code. This is an appeal from the judgment of conviction which was rendered following the jury's verdict finding appellant guilty as charged.

A reversal is urged upon the ground of the insufficiency of the evidence to support the verdict, in that it was of such character that it created a "strong doubt as to the credibility of the prosecuting witness"; and furthermore that it showed the prosecuting witness had been instructed.

The prosecuting witness in this case was a boy of the age of eight years, who answered intelligently the qualifying questions put to him by the trial court before he was allowed to testify.

The child stated that during the summer school vacation of 1939 he went to the residence of a neighbor where appellant was living; that no one was at home except appellant, who was sitting in his bedroom at a table writing, and that he asked the prosecuting witness to come in and wait for the neighbor to return; that appellant was dressed in a bathrobe, and when the child entered the room appellant said "hello to me, and then he took off his bathrobe", at which time the offense here charged was committed. The child testified that he waited until the following morning when he told his father what had happened; he also said that his father was not at home on the day the offense occurred.

In an effort to fix the date of the offense, the child was asked upon cross-examination: "When did you first meet Mr. Boswell?", to which he replied: "Oh, about three months before he exposed himself. * * *

"Q. Do you know when this occurrence happened that you testified to here yesterday, when you say he exposed himself to you? A. No, we can't just remember the date.

"Q. What do you mean by 'we'? A. My mother and I were trying to figure it out.

"Q. Have you talked this matter over quite a bit with your mother? A. Yes sir.

"Q. And has she told you any time of the months or anything like that concerning when this happened? A. Once in a while, sir.

"Q. Just what do you mean by that? A. Oh, she just talked this over with me once in a while, about certain times.

"Q. Did she talk it over with you before you testified on the preliminary examination of Mr. Boswell? A. Will you repeat the question?

"Q. You remember you were up in court here once before when you testified? A. Yes sir.

"Q. Did your mother talk it over with you before you testified then? A. Yes sir."

Upon redirect examination the following took place:

"Q. Bruce, Mr. Sprague asked you a question a little while ago, he asked you if you and your mother talked this over, and you said you did talk it over. Do you remember that? A. Yes sir.

"Q. Did your mother tell you what to come in here and testify to? A. Will you read that again?

"Q. Yes, I will repeat it in a different form. Did your mother tell you what to say here in court? A. No sir, just to tell the truth. That is all."

The child testified without hesitation or confusion and with exceptional intelligence for one of such tender years. A review of the record indicates that he was competent to testify and that his story of the offense was neither unreasonable nor incredible. Moreover, while the boy stated he and his mother had attempted to fix the date of the occurrence, there is no evidence in the record which establishes the fact that he was coached by his mother with respect to the story which he narrated upon the witness stand.

The judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

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40 Cal.App.2d 810

McCLOSKEY v. KRUEGER et al.

Civ. 12848.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1940.

Appeal and error 🔑801(1)

Where appellees filed motion to dismiss appeal supported by certificate of clerk of superior court setting forth facts required by court rule, and it appeared that all grounds stated in motion were supported by certificate and by authorities cited, appeal was dismissed. Rules of the District Court of Appeal, rule 6.

◆

Appeal from Superior Court, Los Angeles County.

Action by John A. McCloskey against Ray Krueger and others. From a judgment for the defendant, plaintiff appeals. On defendant's motion to dismiss the appeal.

Appeal dismissed.

Lawrence Hall and Havelock Fraser, both of Long Beach, for appellant.

Joseph A. Ball and Robert E. Krause, both of Long Beach, for respondents.

PER CURIAM.

The respondents having filed their motion to dismiss the appeal in the above-entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and by the authorities cited,

It is hereby ordered that this appeal be, and it hereby is, dismissed.

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40 Cal.App.2d 811

JOHNSON v. CHASE.

Civ. 12850.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1940.

Appeal and error 🔑801(1)

Where appellee filed motion to dismiss appeal supported by certificate of clerk of superior court setting forth facts required by court rule and it appeared that all of the grounds stated in the motion were supported by the certificate and by the authorities cited, appeal was dismissed. Rules of the District Court of Appeal, rule 6.

◆

Appeal from Superior Court, Los Angeles County.

Action by Ethel Johnson against Fred W. Chase, administrator of the estate of G. C. Wickham, etc. From a judgment for the plaintiff, defendant appeals.

Appeal dismissed.

Harry W. Chase, of Glendale, for appellant.

S. S. Hahn, W. O. Graf, and C. P. Von Herzen, all of Los Angeles, for respondent.

PER CURIAM.

The respondent having filed her motion to dismiss the appeal in the above-entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and by the authorities cited,

It is hereby ordered that this appeal be, and the same hereby is, dismissed.

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40 Cal.App.2d 808

McCALLON v. STURDEVANT et al.

Civ. 12842.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1940.

Appeal and error 🔑**801(1)**

Where defendants' motion to dismiss plaintiff's appeal was supported by superior court clerk's certificate setting forth facts required by court rule and all grounds stated in motion were supported by certificate and authorities cited, appeal was dismissed. Rules of District Court of Appeal, rule 6.

◆

Appeal from Superior Court, Los Angeles County.

Action by E. Mae McCallon against Grace Sturdevant and others. From an unsatisfactory judgment, plaintiff appealed and defendants filed a motion to dismiss appeal.

Appeal dismissed.

Harold D. Kraft, of Los Angeles, for appellant.

Schell & Delamer, of Los Angeles, for respondents.

PER CURIAM.

The respondents having filed their motion to dismiss the appeal in the above-entitled cause, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and by the authorities cited,

It is hereby ordered that this appeal be, and it hereby is, dismissed.

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40 Cal.App.2d 793

HOLMES v. KOEPSEL.

Civ. 2476.

District Court of Appeal, Fourth District, California.

Sept. 30, 1940.

Automobiles 🔑**245(69)**

Evidence presented question for jury as to whether collision of defendant's automobile and plaintiff's horse-drawn three-wheel wagon occurred at time when it was sufficiently dark to require lights on vehicles using highway, so as to render plaintiff guilty of contributory negligence for failure to have his wagon equipped with lights and warning as required by law. Vehicle Code, § 618(a), St.1935, p. 201.

◆

Appeal from Superior Court, Orange County; Harry C. Westover, Judge.

Action by Felix Robert Holmes against Vernon Koepsel for injuries resulting from the collision of defendant's automobile with plaintiff's horse-drawn three-wheel wagon. From a judgment for plaintiff, the defendant appeals.

Affirmed.

L. A. West and George H. Tobias, both of Santa Ana, for appellant.

B. Z. McKinney, of Santa Ana (Adrian Marks, of Santa Ana, of counsel), for respondent.

GRIFFIN, Justice.

Plaintiff and respondent brought this action to recover damages for personal injuries resulting from the collision of defendant and appellant's automobile with respondent's horse-drawn three-wheel wagon. The accident occurred on Newport road east of Santa Ana, in the county of Orange, on the 27th day of October, 1937. The appellant was driving his car through the outskirts of Tustin and proceeding north on Newport road. The respondent was transporting equipment, used for plowing and cultivating farm land, on the wagon.

Respondent testified that he quit his cultivating work a little before 5 p.m., loaded his wagon with his equipment, and proceeded through Tustin and north on Newport road towards his home. It was stipulated that there were no lights on the rear of the horse-drawn vehicle. The two-lane pavement upon which respondent and appellant were driving was about 16 feet wide with an 18-inch shoulder on either side. Respondent's wagon was moving slowly along the right side of the road with the two rear wheels straddling the right edge of the paved portion. As appellant was proceeding northerly in the same direction as respondent, he noticed the lights of three other vehicles, one traveling in the same direction, which he proceeded to pass, a second car making a boulevard stop at a dead-end intersection to his left, some distance ahead, and a third car approaching from the opposite direction. About the time appellant had passed the first car and was resuming his position on the right side of the roadway, he came to a point about even with the second car which was making the boulevard stop. As he passed the stopped car, which was on his left, he approached within about 60 to 80 feet of the third car, that is, the oncoming car. He then noticed for the first time an obstacle in his lane of traffic about 30 to 40 feet ahead, which later proved to be the respondent and his wagon. To avoid a head-on collision with the oncoming car he caught the left-hand wheel of the wagon with his right fender and almost simultaneously struck one of the handles of the implement on the wagon, tipping the wagon over and throwing respondent out on the ground.

There was considerable evidence given by witnesses for both parties as to the exact time of day or evening the accident happened, varying from about 5:10 p.m. to as late as a few minutes before 6 p.m. It was stipulated by counsel that the sun had set at 5:04 p.m. on the day in question.

Appellant denied the allegation of negligence and alleged contributory negligence on the part of respondent. The trial was had without a jury and the court rendered judgment for $1,368 in favor of the respondent. A motion for new trial was denied and defendant appealed from the judgment.

The first point presented for our consideration is appellant's claim that the uncontradicted evidence shows that respondent was guilty of contributory negligence as a matter of law in this, that respondent did not comply with section 618 of the Vehicle Code, St. 1935, p. 201, which provides: "When Vehicles Must Be Equipped. (a) Every vehicle upon a highway at any time from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible any person or vehicle on the highway at a distance of two hundred feet shall be equipped with lighted lamps and lighting devices as respectively provided in this chapter for different classes of vehicles subject to the exceptions set forth in this chapter."

Appellant argues that even though the evidence was conflicting as to the time when the accident happened, the court, though justified in the conclusion that the accident happened within a half hour after sunset, disregarded and ignored the testimony that it was so dark that all other vehicles at the time and place of the accident had their lights turned on and that it was dark at that time and therefore the court did not give consideration to the condition of visibility or discernibility under the second provision of said section.

It is appellant's position that viewing all the testimony on behalf of the respondent, there is no contradiction upon the fact that it was sufficiently dark to require lights on vehicles using the highway at that particular time and that appellant could not be held responsible for his failure to anticipate that the respondent's vehicle would not be equipped with lights and warning as required by law, citing Robbiano v. Bovet, 218 Cal. 589, 24 P.2d 466; Furuta v. Randall, 17 Cal.App.2d 384, 62 P.2d 157; Fouch v. Werner, 99 Cal.App. 557, 279 P. 183; and Hudgins v. Standard Oil Co., 5 Cal.App.2d 618, 43 P.2d 597.

Respondent points out that the evidence discloses that the sun had been shining the day of the accident; that it was clear and that there were no clouds. One witness testified that she was standing in the driveway in front of her garage 150 to 250 feet away from the highway and saw the Holmes horse run by after the accident. She also testified that the accident happened about 5:15 p.m.

Another witness testified that she saw Mr. Holmes and his cart and horse and another car behind him; that there was no fog, and that there was nothing to interfere with the visibility on the highway and that it was not raining.

A Mr. Patterson, driver of the car making the boulevard stop, testified that he could see the Holmes cart plainly without headlights; That he could see a person up Newport road for 100 yards or more; that he saw the Koepsel car go about 300 feet down the road to where it stopped; that it was not dark and he had driven without lights up to Newport road just immediately prior to the accident and the visibility was good; that he saw some of the folks over 300 feet away, coming out and running into the road and starting down to the accident.

Another witness testified that only one car on the highway had lights on it. The record is replete with similar evidence. We therefore conclude that the trial court was justified in finding that respondent was not, at the time of the accident, required to equip the wagon with lights as provided in section 618 of the Vehicle Code. It therefore must follow that the finding of negligence on the part of appellant as well as the finding that respondent was not guilty of contributory negligence at a matter of law, are supported by the evidence.

Judgment affirmed.

I concur: BARNARD, P. J.

MARKS, J., being disqualified, does not participate herein.

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40 Cal.App.2d 808

NEWMAN v. JOHNSTONE.

Civ. 12788.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1940.

Appeal and error 🔑801(1)

Where respondent's motion to dismiss appeal was supported by certificate of clerk of superior court setting forth facts required by court rule and all of the grounds stated in the motion were supported by the certificate and by cited authorities, appeal was dismissed. Rules for District Court of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by Lela E. Newman against Homer E. Johnstone. From the judgment, defendant appeals.

Appeal dismissed.

Sidney H. Wyse, of Los Angeles, for appellant.

Martineau & Stratton, of Los Angeles, for respondent.

PER CURIAM.

The respondent having filed her motion to dismiss the appeal in the above-entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and by the authorities cited,

It is hereby ordered that this appeal be, and it hereby is, dismissed.

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40 Cal.App.2d 809

ELSOM v. BROOKS CLOTHING OF CALIFORNIA, Limited, et al.

Civ. 12846.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1940.

Appeal and error 🔑801(1)

Where respondents served and filed motion to dismiss appeal, supported by certificate of clerk of superior court setting forth the facts required by rule of District Court of Appeal, and it appeared that grounds stated in motion were supported by the certificate and by the authorities cited, the appeal was dismissed. Rules of the District Court of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by Alice Gertrude Elsom against Brooks Clothing of California, Limited. From an adverse judgment, the plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

Henry M. Lee, of Los Angeles, for appellant.

George L. Greer and James V. Brewer, both of Los Angeles, for respondents.

PER CURIAM.

The respondents having served and filed their motion to dismiss the appeal in the above-entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and by the authorities cited,

It is hereby ordered that the appeal be, and the same hereby is, dismissed.

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41 Cal.App.2d 1

WILSHIRE MORTG. CORPORATION v. O. A. GRAYBEAL CO. et al.

Civ. 11950.

District Court of Appeal, Second District, Division 1, California.

Oct. 1, 1940.

1. Judgment 🔑134

Where corporation named as party defendant in injunction suit did not appear and its default was duly entered, and no attempt was made by corporation to be relieved of default, by such default, corporation tacitly consented to issuance of injunction and confessed truth of material facts alleged in complaint in suit for injunction.

2. Injunction 🔑238

A surety company which had furnished an undertaking for plaintiffs in suit for injunction was released from liability by dissolution of injunction and dismissal of suit by stipulation between parties thereto where company was not a party to injunction suit or stipulation.

3. Injunction 🔑235

A mutual agreement between parties to an injunction suit, whereby the suit is terminated, does not amount to an admission by plaintiff that he is not entitled to injunction so as to entitle defendant to recover on bond.

4. Injunction 🔑238

The dismissal of a suit for injunction by mutual consent of parties thereto does not bind surety on bond furnished to procure injunction when surety was neither a party to litigation nor to stipulation for dismissal.

5. Injunction 🔑239

The liability of a surety on a bond given to procure issuance of an injunction is measured by terms of bond.

6. Injunction 🔑235

Where undertakings furnished by surety company for plaintiffs in injunction suit provided that surety would pay defendants such damages, not exceeding a certain amount, as defendants sustained by reason of temporary restraining order and injunction pendente lite if superior court finally decided that plaintiffs were not entitled to order and injunction pendente lite, until a final determination was had showing that injunction was wrongfully issued, or until, by their conduct in dismissing suit, principals under undertakings, in effect, conceded that they were not entitled to injunction, no liability could attach to surety.

7. Injunction 🔑235

Dismissal of suit for injunction by mutual agreement of parties does not operate as a "judgment" that plaintiff has no right to injunction so as to entitle defendant to recover on bond.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

8. Injunction 🔑238

Where defendants in injunction suit had opportunity, by refusing to sign stipulation dismissing suit, to insist either that plaintiff voluntarily dismiss suit or that trial court determine whether temporary restraining order was properly granted to the end that action might be prosecuted upon surety bond furnished for plaintiffs, defendants by consenting to dismissal of suit, "waived" such rights as they possessed under bond.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

9. Assignments 🔑90

Where plaintiff, in action to recover upon undertakings which were filed by defendant surety company upon issuance of temporary restraining order and injunction pendente lite in previous injunction suit, derived its cause of action against surety from answering defendants in injunction suit, and such defendants, by their conduct in agreeing to dismissal of suit, had waived their rights under bond, plaintiff, as assignee of answering defendants, could not recover from surety damages, if any, sustained by issuance of temporary restraining order and injunction pendente lite.

YORK, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by the Wilshire Mortgage Corporation against the O. A. Graybeal Company and the Fidelity & Casualty Company of New York, to recover upon certain undertakings which were filed by defendant casualty company upon issuance of a temporary restraining order and a subsequent injunction pendente lite in a previous action. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Robert E. Austin and John N. Helmick, both of Los Angeles, for appellant.

Davis & Thorne and Leland S. Davis, all of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a judgment of nonsuit rendered upon motion of the defendant at the conclusion of plaintiff's case. The instant action was instituted to recover upon certain undertakings required to be filed and which were filed by the defendant casualty company upon the issuance of a temporary restraining order and a subsequent injunction pendente lite in an action begun in the superior court of Los Angeles county by O. A. Graybeal Company, a corporation, against Wilshire Mortgage Corporation et al., and in which action the complaint was characterized as one "for injunction, accounting and declaratory relief". The original complaint in the case now before us named O. A. Graybeal Company and the Fidelity & Casualty Company of New York as defendants. Following the interposition of a demurrer thereto, an amended complaint was filed naming only the casualty company which latter corporation appears herein as respondent. The cause was tried before the court sitting without a jury upon the amended complaint and a further amendment thereto filed with leave of court on the day of the trial, coupled with defendant's answer, which in addition to certain denials, interposed six affirmative defenses.

The facts pertinent and necessary to a disposition of the questions raised on this appeal may be thus epitomized: On or about November 16, 1928, plaintiff herein loaned to Charles A. Gee and Elizabeth Gee, his wife, the sum of $21,000 for which the borrowers executed and delivered six promissory notes, each bearing date October 16, 1928, and each being for the principal sum of $3,500, due three years after date with interest. At the same time and for the purpose of securing the payment of each of said notes, the borrowers executed and delivered six deeds of trust, each securing the payment of one of said notes, and by which deeds of trust six separate parcels of property were conveyed to Title Guarantee & Trust Company with power of sale by the trustee in the event of default. Said deeds of trust also secured the payment of costs and expenses incurred by the trustee in any proceedings taken thereunder. Subsequently plaintiff and appellant herein for a valuable consideration transferred the notes and trust deeds to six separate individuals. By the amended complaint it was alleged that at the time of said conveyances and as a part of the agreement therefor, the plaintiff guaranteed to each of said transferees, his successors and assigns, the payment in full of the principal and interest of each of said notes, and all costs and expenses incurred in connection therewith. Subsequently the makers of the aforesaid notes defaulted, and each of the holders of said notes elected to declare each of said instruments wholly due and payable, and each holder filed for record an election to have the trustee sell the respective properties conveyed by the deeds of trust. In conformity with the requirements of law, the trustee, Title Guarantee & Trust Company, proceeded to sell the property in question and fixed the day of sale thereof for June 3, 1930. Prior to such fixed date it appears that O. A. Graybeal Company filed a suit as aforesaid in the superior court of Los Angeles County against the Title Guarantee & Trust Company, each of the holders of said notes and the Wilshire Mortgage Corporation, in which action the Graybeal Company alleged that the defendants had no right to have the trust deeds foreclosed and asked the court to issue a restraining order enjoining the defendants from proceeding with the sale of the properties. The superior court on the 29th day of May issued its restraining order by which the defendants in said action were enjoined from carrying on the sale advertised for June 3. It was in conformity with a condition of the order granting the restraining order that the Fidelity & Casualty Company of New York furnished and filed in said court an undertaking in the sum of $5,000.

Thereafter, on June 6, 1930, following a hearing on an order to show cause, the superior court granted a temporary injunction enjoining the defendants from selling said property until further order of the court, and as a condition of said order required the filing of an undertaking in the sum of $5,000, which last-named undertaking was executed and duly filed by the Fidelity & Casualty Company on June 11, 1930. It might here be stated that all of the defendants, with the exception of appellant herein, Wilshire Mortgage Corporation, in the original action vigorously opposed the granting of said restraining order and injunction pendente lite, but appellant herein defaulted, and its default was duly entered. The temporary injunction remained in full force and effect until February 21, 1931, when by stipulation of all parties to such action, with the exception of the defaulting Wilshire Mortgage Corporation, such temporary injunction was vacated, dissolved and set aside. Subsequently the same defendants made a motion to dismiss the suit, which motion was denied by the court.

A trial was thereafter had, resulting in the granting of a nonsuit on motion of the defendants, which order, however, was later set aside and a new trial ordered. Following numerous delays in the matter of a retrial, the action in which the injunction was issued was dismissed April 13, 1933, upon an order therefor signed by attorneys for both plaintiff and all answering defendants. Upon dissolution of the injunction, but prior to final dismissal of the action, after appropriate proceedings the properties were sold April 4, 1931. It appears that there being no other bidders at the sale, appellant herein, pursuant to its agreement with the holders of the notes, purchased the property for a price much less than it was alleged and proved would have been obtained had the property been sold at the time the sale was first set, June 3, 1930. An action for the deficiency was thereafter commenced against the trustors, but the latter could not be located, nor did search reveal any other property owned by them.

It was alleged and proved that two years after the sale of the property in 1931 appellant, Wilshire Mortgage Corporation, in May, 1933, paid to the persons who held the notes and trust deeds by assignment from appellant the full amount they were entitled to recover of principal and interest on their notes, as well as the expenses incurred by them in the foreclosures. Upon such payment the holders of such notes reassigned all their rights under the trust deeds, together with their claims for damages occasioned by delay due to the pendency of the restraining order and injunction pendente lite, to appellant herein as against the plaintiff in the injunction suit, O. A. Graybeal Company, and the latter's bondsman or surety, respondent herein. Fortified with such assignments, appellant in the cause now before us brought this action against respondent surety company.

[1-4] We are satisfied that the nonsuit should have been granted. In the first place, the evidence shows without contradiction that appellant was named a party defendant in the injunction suit in which the undertakings were issued; that appellant did not appear in that proceeding, and its default was duly entered. No attempt was made by appellant to be relieved of its default. By such default appellant must be held to have tacitly consented to the issuance of the injunction and to have confessed the truth of all material facts alleged in the complaint. Title Insurance, etc., Co. v. King Land & Improvement Co., 162 Cal. 44, 46, 120 P. 1066. We are further convinced that respondent surety company was also released from any liability by reason of the dissolution of the injunction and dismissal of the injunction action by stipulation and agreement between the parties thereto. We cannot agree with appellant that when the injunction suit was dismissed upon stipulation signed by the defendants that plaintiff was in the same position as if the court had dismissed the suit on motion of the defendants, nor can we agree with appellant that the stipulated dismissal of the action was equivalent to a determination that plaintiffs were not entitled to an injunction. Conceding it to be the law that the voluntary dismissal by plaintiffs of an action such as the one with

which we are here concerned would have the same effect as a decision by the court that plaintiffs were not entitled to an injunction (Moore v. Maryland Casualty Co., 100 Cal.App. 658, 280 P. 1008; Hatch v. National Surety Corp., 105 Mont. 245, 72 P.2d 107), nevertheless it cannot be said that where by agreement between the parties the action is terminated, such mutual agreement amounts to an admission by plaintiff that he was not entitled to an injunction; and in any event, such dismissal by mutual consent cannot bind the surety when the latter was neither a party to the litigation nor to the stipulation for dismissal.

[5-7] A surety's liability is measured by the terms of his bond. In the instant case both the undertaking given upon issuance of the temporary restraining order and the injunction pendente lite provided in plain and unequivocal language that the surety, in the case of the temporary restraining order, "will pay to the said parties so enjoined such damages not exceeding the sum of Five Thousand ($5,000.00) Dollars as such parties may sustain by reason of the said temporary restraining order *if the said Superior Court finally decide that the said plaintiff was not entitled thereto*"; and in connection with the injunction pendente lite the terms of the undertaking provided "that in case said Injunction Pendente Lite shall issue, the said plaintiff will pay to the said party so enjoined such damages, not exceeding the sum of Five Thousand and no/100 ($5,000.00) Dollars as such party may sustain by reason of the said Injunction Pendente Lite *if the said Superior Court finally decide that the said plaintiff was not entitled thereto*". Until, therefore, a final determination was had showing that the injunction was wrongfully issued, or until by its conduct in dismissing the action the principal, in effect, conceded he was not entitled to the injunction, no liability could attach to the surety under the terms of the bonds herein. There is ample authority for the statement that where, as here, the dismissal of the action was by an amicable, mutual and voluntary agreement of the parties, the same is not a confession by plaintiff that he had no right to the injunction granted, nor does such dismissal operate as a judgment to that effect. See St. Joseph, etc., Power Co. v. Graham, 165 Ind. 16, 74 N.E. 498, 6 Ann.Cas. 399, and citations therein contained.

[8, 9] In the litigation forming the basis of the instant proceeding the defendants had an opportunity, by refusing to sign the stipulation dismissing the action, to insist either that plaintiff voluntarily dismiss the suit or that the court determine whether the injunction was properly granted, to the end that an action might be prosecuted upon the bond. Failing so to do, and consenting to the dismissal of the action, defendants must inferentially be charged with intent to waive such rights as they possessed under the bond. To hold otherwise would serve to promote injustice and open wide the door for practicing oppression and fraud upon bondsmen and sureties. Appellant herein deriving its cause of action against respondent surety company from the answering defendants in the injunction suit, and the latter by their conduct in agreeing to and acquiescing in the dismissal of the action having waived their rights under the bond, their assignee, appellant herein, is equally bereft of any cause of action against the surety upon such bond.

By reason of the foregoing other points raised do not require discussion or consideration.

Judgment affirmed.

I concur: DORAN, J.

YORK, Presiding Justice (dissenting).

I dissent, for the reason that the instant action is one brought to fix and determine the amount of damages sustained by reason of the issuance of a temporary restraining order referred to in the bond, and is the only means that the plaintiff has to have the said superior court finally determine that the plaintiff in the injunction suit was not entitled to said order. It is also the only method whereby the plaintiff herein can have fixed and determined the damages which were sustained by reason of the issuance of said injunction pendente lite. The amount of the damage so alleged was for damages which accrued prior to the bringing of this particular action, and although the words "finally decide" were used in the bond, we cannot read into them a limitation that such a decision must be made in the action in which the injunction was issued.

Many times a defendant would suffer great damage if the action were not dismissed within a given time, and the fact that a defendant in an action might consent to the dismissal of the suit against him should not prevent his recovery if a court having jurisdiction of the subject-matter and the parties finally determines that the injunction was wrongfully issued and damages were sustained thereby prior to such dismissal.

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40 Cal.App.2d 807

PEOPLE v. PASCUA.

Cr. 3384.

District Court of Appeal, Second District, Division 2, California.

Sept. 30, 1940.

Criminal law 🔑1182

Where transcripts on appeal were filed in District Court of Appeal and thereafter time for filing briefs elapsed and an order to show cause why appeal should not be dismissed was issued and on date when show cause order was returnable there was no appearance on behalf of defendant either by brief or otherwise, judgment and order denying motion for new trial were affirmed. Pen.Code, § 1253.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding by the People against George Pascua. From an adverse judgment and an order denying a motion for new trial, defendant appeals.

Affirmed.

Beecher S. Stowe, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

August 7, 1940, the transcripts on appeal were filed in this court. Thereafter, the time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed was issued, returnable September 25, 1940. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code the judgment and the order of the trial court denying motion for new trial are, and each of them hereby is, affirmed.

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41 Cal.App.2d 20

BLACKMAN v. SHERMAN et al.

Civ. 6237.

District Court of Appeal, Third District, California.

Oct. 2, 1940.

Venue 🔑4, 46

Causes of action, set up in two counts of complaint, to recover money judgment against purchaser of timber tract for breach of contract and foreclose chattel mortgage on sawmill agreed to be erected by defendant, were transitory, so as to entitle defendant to change of venue from county in which land was situated to county of his residence, though cause of action, stated in third count, to quiet title to land was local. Code Civ. Proc. §§ 392, 395.

◆

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Lulu E. Blackman against George J. Sherman and another, to recover a money judgment for breach of a land contract, foreclose a chattel mortgage, and quiet title to land. From an order denying named defendant's motion to change the place of trial to the county of his residence, he appeals.

Reversed.

Kaplan & Kaplan and Monte E. Livingston, all of Los Angeles, for appellant.

George W. Robinson, of Mariposa, for respondent.

PULLEN, Presiding Justice, delivered the opinion of the court.

This is an appeal from an order denying the motion for change of venue to the county of defendant's residence.

Plaintiff and defendant entered into an agreement in writing wherein plaintiff agreed to sell a particular tract of timber to defendant, the title thereto to remain in plaintiff until the full purchase price therefor had been paid. Defendant agreed to erect a sawmill upon the property and to cut the timber thereon, paying to plaintiff $3 for each 1000 feet of lumber sold from the property, with a provision for an annual minimum aggregate amount equivalent to 1,500,000 board feet of lumber, regardless of whether such lumber had been cut or sold. It was also agreed that the defendant could, after paying plaintiff no less than $4,500, cancel the agreement. Defendant also agreed to and did execute a chattel mortgage upon the sawmill for $4,500.

Some sixteen months after the execution of this agreement plaintiff served upon defendant, a notice of termination of the contract based upon a failure to pay the minimum aggregate amount required to be paid annually, failure to pay taxes or interest, and failure to pay $3 per thousand for lumber actually sold.

Thereafter a complaint was filed setting up three causes of action. The first count set forth the execution of the contract and the breach, and prayed first, for judgment in the sum of $808.83 for the quantity of timber cut from the lands in question; for $125 for taxes due; for $574.27 for unpaid interest upon the purchase price; for possession of the premises, and costs. The second count was for the foreclosure of the chattel mortgage, and the third count was to quiet the title of plaintiff in the lands.

A motion of defendant to change the place of trial to the county of his residence was denied, and this appeal was taken.

It is the contention of respondent that the complaint states a cause of action which is essentially local in nature and therefore is triable in the county in which the real property is situated. Appellant claims that where a transitory and a local cause of action are joined in the same complaint the defendant is entitled to have the case tried in the county of his residence. Section 392 of the Code of Civil Procedure provides that actions for the recovery of real property or the determination of an estate or interest therein and for injuries to real property, must be tried in the county where the real property or some part thereof is situated. Section 395 of the Code of Civil Procedure applies to all other sections, with certain immaterial exceptions.

It is recognized by both parties here that a pleader may not deprive a defendant of the right to have a cause of action tried in the county of the residence of defendant by merely including in his complaint a nonessential cause of action local in character, and the problem here is to determine the primary object of this action.

It is apparent from an examination of the first cause of action in the complaint that the principal relief sought by the pleader is for the recovery of a money judgment. This is based upon a breach of contract and is transitory in nature. It has been held in the case of Work et al. v. Associated Almond Growers of Paso Robles, 76 Cal.App. 708, 245 P. 790, 791, that where an action was commenced to recover the balance of a purchase price for land, the proper place for trial was the county of defendant's residence, and in order to retain the case in the county where the land was situated it must clearly appear that title to the land would be directly affected by the judgment of the court; the court saying: "An action which has for its object the mere recovery of money is essentially an action for debt, and therefore transitory and not local."

The second cause of action is to foreclose the chattel mortgage, and is clearly transitory and personal.

The rule is stated in Jones on Chattel Mortgages, 5th edition, section 782, at page 987: "A suit to foreclose a chattel mortgage should be brought in a court having jurisdiction of the defendant. It is a transitory and not a local action and it is immaterial where the property may be."

There is no question but what a suit to quiet title as set forth in the third cause of action is local, but as title was distinctly retained by the vendor respondent in his agreement, title is not, therefore, the primary issue in this action; obviously what plaintiff was seeking was the recovery of the moneys which defendant had agreed to pay.

The respondent has cited a number of cases to sustain her contention, but these are distinguishable from the case at law. Among these cases is the case of State v. Royal Consolidated Mining Co., 187 Cal. 343, 202 P. 133, where plaintiff sought to recover possession of certain real property and the rents, issues and profits thereof.

There the rents, issues and profits were of the nature of interest in the lands and were local, and the primary right to be adjudicated was an issue of title.

So also in Coley v. Hecker, 206 Cal. 22, 272 P. 1045, plaintiff sought to recover on a complaint sounding in quiet title and slander of said title. The decision of the court was based upon the proposition that slander to title of real property constituted an injury to the real property, and therefore no transitory action was involved.

In Lefurgey v. Prentice, 36 Cal.App. 338, 171 P. 1080, the plaintiff sought (1) immediate possession of the premises; (2) cancellation of promissory notes and mortgages, and (3) that defendant have no claim against plaintiff for moneys expended upon the property. Plaintiff did not seek a money judgment, and the court held that the action was local in character and did not discuss the question as to whether or not the cancellation of a note secured by a deed of trust was a transitory action.

In Robinson v. Williams, 12 Cal.App. 515, 107 P. 705, no money judgment was asked, and the court did not pass upon the question here involved. In the case of Strosnider v. Pomin, 32 Cal.App.2d 103, 89 P.2d 179, the first cause of action was one to quiet title to a right of way and easement over the land of defendant. The second cause of action incorporated, by reference, all the allegations of the first cause of action, and alleged that defendant falsely and fraudulently induced plaintiff to dismiss a quiet title action against defendant by promising plaintiff free and uninterrupted use of the right of way and easement. After plaintiff had dismissed his action the defendant obstructed the right of way. The court held that the second cause of action constituted in effect an injury to real property, and therefore there was no transitory action involved.

In support of the contention of appellant, and a case quite similar to the one here in question is that of Turlock Theatre Co. v. Laws et al., 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786. Three causes of action were pleaded: First, to recover unpaid rentals under a lease, and to cancel the lease and to restore the possession of the premises. Second, to recover damages for the wrongful withholding of the premises and for restoration of the possession of the premises. Third, to quiet title to the realty.

There a motion to change the place of trial to the residence of the defendant was denied by the trial court, but was reversed upon appeal. There, as here, plaintiff claimed the possession of real property was the primary object of the action, and the personal remedies sought were merely incidental to that primary object. The Supreme Court held that the action seeking unpaid rentals was not merely incidental but was distinctly a primary object of the complaint.

In Smith v. Smith, 88 Cal. 572, 26 P. 356, it was held that an action must be wholly local in its nature to entitle it to be tried in a county other than that of the residence of the defendant, and if real and personal actions are joined in the same complaint the case falls within section 395 of the Code of Civil Procedure, and must be tried in the county of the residence of the defendant.

This rule has been reaffirmed in Howe v. Tucker, 219 Cal. 193, 25 P.2d 832, and in Bardwell v. Turner, 219 Cal. 228, 25 P.2d 978, where it is held that it is only where land or an interest therein is the exclusive subject-matter of the action that section 392 of the Code of Civil Procedure controls, and if in one complaint there have been joined actions both local and transitory, the defendants are entitled to have the cause heard in the county of their residence. Here, unquestionably, the second cause of action, and perhaps the first cause are transitory in nature. The motion for the change of venue should have been granted.

The order is reversed.

I concur: THOMPSON, J.

40 Cal.App.2d 796

UNIVERSAL CREDIT CO. v. M. C. GALE, Inc., et al.

Civ. 11135.

District Court of Appeal, First District, Division 1, California.

Sept. 30, 1940.

1. Automobiles 🔑19
Chattel mortgages 🔑6

Where automobile manufacturing company, from which automobile finance company purchased automobiles for dealer corporation's president, delivered them to dealer's place of business and received finance company's check in payment therefor, after which such president registered them with state motor vehicle department in name of finance company as legal owner, title thereto passed from manufacturer to finance company, not to dealer's president, so that finance company's contract for conditional sale of vehicles to such president was not purely chattel mortgage void as against dealer's attachment creditor because it covered merchant's stock in trade and was not acknowledged or recorded. Code Civ.Proc. § 689; Civ.Code, §§ 2955, subd. 3, 2957; Vehicle Code, §§ 195–198, St.1935, pp. 118–119.

2. Sales 🔑52(5)

An "invoice," standing alone, is not evidence of title to goods sold, is neither bill of sale nor evidence of sale, does not transfer title, and is as appropriate to bailment as to sale.

See Words and Phrases, Permanent Edition, for all other definitions of "Invoice".

3. Chattel mortgages 🔑9

An automobile finance company, selling to corporate automobile dealer's president, under conditional sale contracts, automobiles purchased by seller from manufacturer for such president, would have been protected under Uniform Trust Receipts Law from attachment of vehicles by dealer's creditor, even if title thereto passed from manufacturer to dealer's president, thus nullifying effect of such contracts, as finance company was not in business of selling goods for profit. Civ.Code, §§ 3012–3016.-16, 3013, subd. 3, and 3014.

Appeal from Superior Court, Alameda County; Peter J. Crosby, Judge.

Action by the Universal Credit Company against M. C. Gale, Inc., and others for money had and received, in which plaintiff attached three automobiles and the Fidelity Acceptance Company filed a third party claim. From a judgment for third party claimant, plaintiff appeals.

Affirmed.

Robert G. Partridge and Wallace O'Connell, both of San Francisco, for appellant.

Clark, Nichols & Eltse, of Berkeley, for respondent.

KNIGHT, Justice.

This is an appeal by an attaching creditor from a judgment entered in favor of a third party claimant, in a proceeding had under the provisions of section 689 of the Code of Civil Procedure to determine title to three new Ford automobiles which had been attached by the Universal Credit Company in an action brought against M. C. Gale, Inc., an authorized Ford dealer, M. C. Gale as an individual, and several fictitious defendants, on a common count for money had and received.

The Fidelity Acceptance Company was the third party claimant, and at the time the automobiles were attached they were on display in the salesroom of the Gale corporation in Oakland. The Acceptance company had financed the purchase thereof from the Ford company at Richmond for M. C. Gale personally, and thereupon sold them to him on conditional sales contracts which were executed prior to the delivery of the cars to Gale, whereunder as seller the Acceptance company retained title until full payment therefor was made; and at the time the attachment was levied the cars stood registered with the state motor vehicle department in the name of the Acceptance company as legal owner. It was principally upon the foregoing facts, which are not disputed, that the trial court awarded judgment in favor of the Acceptance company that at the time of the attachment it was the legal owner of said cars and entitled to the possession thereof.

[1] In effect the ground of appeal is an attack upon the validity of the conditional sales contracts. In this behalf it is contended that at the time of the purchase of the cars from the Ford company, title thereto passed to Gale and not to the respondent Acceptance company, and that in the absence of a valid title "Respondent's interest in the vehicles involved was purely

a chattel mortgage, void as against appellant" for the reason that it covered stock in trade of a merchant (Civ.Code, sec. 2955, subd. 3) and was not acknowledged or recorded (Civ.Code, sec. 2957; Vehicle Code, secs. 195–198 St. 1935, pp. 118–119).

We agree with the trial court's conclusion that title passed from the Ford company to respondent. Among the facts established by the evidence relating to this issue are the following: The Ford company operated under a business rule of selling cars to its dealers for cash, which it required to be paid prior to or at the time of the delivery of the cars purchased. Neither the Gale corporation nor Gale had the cash or credit standing to obtain the necessary amount to comply with the Ford company's business rule; whereupon Gale, the president and manager of the Gale corporation, made arrangements with the respondent Acceptance company whereby respondent would purchase the cars from the Ford company and then as owner thereof sell them to Gale personally on conditional sales contracts, retaining title until the amounts due thereunder were fully paid. The reason this arrangement was made by respondent with Gale personally was that some two years prior to this transaction respondent had engaged in certain business dealings with the corporation, at which time the corporation was found to be in an unsatisfactory financial condition. After having completed the arrangements with respondent, Gale phoned the Ford company at its plant in Richmond, and notified a Mr. Lutz, the executive in charge of this particular department of the company's business, that respondent was to be the buyer of the cars and was putting up the money to pay for them. Gale's testimony in this regard was in part as follows: "I told them that the Fidelity Acceptance Corporation was going to buy the cars for me and would send their check out. * * *

"Q. Did you tell them that the Fidelity Company was putting up the money? A. Yes.

"Q. And buying them for you? A. Yes, I told Mr. Lutz. * * *

"The Court: Is Mr. Lutz the car distributor? A. He is the Chief Clerk and he has to obey the method of payment."

Thereupon Gale placed the order for the cars and obtained the motor numbers of the particular ones to be delivered. Immediately following Gale's phone conversation with Lutz, conditional sales contracts were prepared and executed by respondent and Gale, wherein respondent as "seller" sold to Gale as "buyer" the automobiles bearing the motor numbers so obtained by Gale from Lutz, and which in terms, among other things, provided: "Title to said property shall remain in seller or his assigns until all payments herein provided for are made. * * *" Respondent then drew its checks for the payment of the cars, which were made payable to the Ford company; and the Ford company then delivered the cars to the place of business of M. C. Gale, Inc., and received in payment respondent's checks. The cars were invoiced to Gale, who upon delivery of each car registered the same with the department of motor vehicles in respondent's name as legal owner. Two of the registration certificates so designating it as legal owner were received prior to the attachment. The third certificate was received in the same form, shortly after the attachment was levied.

It would seem from the foregoing that respondent adopted every course available to take and retain title in itself to said cars. As was said in Pacific Finance Corporation v. Bank of Yolo, 215 Cal. 357, 10 P.2d 68, 69, it "meticulously followed a system designed to vest in it directly from the shipper the title to the goods; the object of this conduct, being to prevent the claim that it held them merely as security". And Gale's good faith in the transaction was shown by having registered the cars with the motor vehicle department immediately after delivery in respondent's name as legal owner. Moreover, there is nothing in the evidence to indicate that the manner in which the transaction was conducted in any way misled appellant, for the reason that its demand against Gale was founded on a pre-existing indebtedness.

[2] In furtherance of its contention that title passed from the Ford company to Gale rather than to respondent, appellant calls attention to the fact that the cars were invoiced to Gale. But no significance of title can be attached thereto, for it is well settled that standing alone an invoice is not regarded as evidence of title. It is neither a bill of sale nor evidence of a sale, and does not transfer the title, and it is as appropriate to a bailment as to a sale. 33 Cor.Jur., p. 811. Appellant also points out that no bills of sale or other documents

of title were given by the Ford company to respondent; but neither were any given to Gale. In this regard the record shows that it was contrary to the business rules of the Ford company to give any documents of title on sale of its cars. As a matter of fact, the evidence discloses that appellant itself had financed the purchase of many cars from the Ford company at different times and that the transactions were conducted in precisely the same manner as the one here.

Appellant has cited several cases in support of its contention that title passed from the manufacturer direct to the dealer, rather than to respondent; but we do not deem any of them here controlling for the reason that they involved different factual situations. They were cases where the borrower was the owner and in possession of the property which was the subject matter of the conditional sales contract at the time the money was lent and the contract executed.

[3] Even considering the situation from appellant's viewpoint that title passed from the Ford company to Gale rather than to respondent, and that therefore the effect of the conditional sales contracts as such were nullified, we are not prepared to say that the judgment would have been any different for the reason that the legal status of the parties and the circumstances of the transaction were such that apparently respondent would have been protected under the doctrine of the Uniform Trust Receipts Law (Civ.Code, secs. 3012–3016.16) wherein it is declared among other things (Civ. Code, sec. 3014), "* * * The security interest of the entruster [which in the present case would be respondent] may be derived from the trustee [which would be Gale] or from any other person, and by pledge or by transfer of title or otherwise. * * *" Respondent would not come within the exclusionary provision of the second sentence of section 3013, subdivision 3, for the reason that it was not a "person in the business of selling goods * * * for profit", but admittedly was a finance company. Nor would the cases cited and relied upon by appellant herein take the case out of the operation of the Uniform Trust Receipts Law because they were decided prior to 1935, the effective date of the operation of said law.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

JENTICK et al. v. PACIFIC GAS & ELECTRIC CO. *

Civ. 11363.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1940.

Rehearing Denied Oct. 30, 1940.

Hearing Granted Nov. 28, 1940.

1. Master and servant ⚷333

While both a principal and an agent may be sued in a single action, a verdict exonerating the agent must necessarily exonerate the principal, since the verdict exonerating the agent is a declaration that he has committed no wrong, and the principal cannot be responsible for the agent if the agent has committed no tort.

2. Indemnity ⚷13(1)

While no right of contribution exists between joint tort-feasors, whether sued separately or collectively, yet a principal who has been obliged to pay for the unauthorized negligent act of his agent resulting in injury may indemnify himself to the full amount against his agent.

3. Gas ⚷20(2)

Master and servant ⚷333

In action against gas company and its employees for injuries suffered in a gas explosion occurring when steam shovel, being used by contractor for road work, bent a gas pipe under surface of street, wherein jury returned verdict in favor of employees of gas company and against gas company, evidence *held* not to establish any want of care on part of any person employed by gas company except employees who were by jury's verdict acquitted of negligence, and hence verdict in favor of employees exonerated gas company.

4. Gas ⚷9

Under municipal and county ordinance requiring persons having an interest in pipes under city streets to file maps drawn to a scale designated by city engineer showing location of pipes, if known, failure of gas company to file map showing location of gas pipe did not constitute violation of ordinance, where date of installation of pipe was not shown or that it was originally installed by gas company or by its predecessor, or that location of pipe was known and where city engineer failed to designate a scale for such maps.

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* Subsequent opinion 114 P.2d 343.

5. Gas 🔑9

A municipal and county ordinance requiring persons having an interest in pipes under surface of public streets to file in office of city engineer a map drawn to a scale designated by city engineer showing location, size, description, and date of installation, if known, of such pipes, would not authorize gas company owning pipes under streets to draw maps to any scale, since ordinance was clear and there was no room for construction.

6. Statutes 🔑206

Significance and effect will, if possible, be accorded to every section, clause, word, or part of an act.

7. Statutes 🔑185

Where general purport of a statute is declared, the details provided for its accomplishment will be regarded as necessary incidents.

8. Gas 🔑9

Under city and county ordinance requiring persons or corporations having an interest in pipes under surface of any public street to file in office of city engineer maps drawn to a scale to be designated by city engineer, showing location of such pipes, on city engineer's failure to designate the scale of the maps to be filed with him, the contingency on which gas company owning pipes under city streets was required to file such maps never happened, and gas company never incurred any obligation under the ordinance.

9. Gas 🔑18

In action against gas company and its employees for injuries caused by gas explosion occurring when steam shovel used by contractor for road work bent gas pipe under surface of street, failure of gas company to file with city engineer map showing location of gas pipe, as required by city and county ordinance, did not constitute a "proximate cause" of accident, where contractor never sought to inspect map or to obtain a copy of a map of location of pipes under the street.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

10. Appeal and error 🔑882(12)

In negligence action against a corporation and its employees wherein court instructed that exoneration of employees would exonerate corporation and then at request of corporation instructed that jury need not return a verdict against either of the personal defendants in order to return a verdict against corporation, giving of such instruction did not "estop" corporation from claiming that, jury having exonerated personal defendants, corporation was exonerated, where record did not show that corporation asked trial court to make statement in words used by trial court and instruction did not conflict with complete instructions which trial court had given.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

11. Appeal and error 🔑930(2)

Reviewing court was required to assume that jury followed instruction not to select a single instruction or a portion of an instruction alone, but to consider all instructions in determining any issue.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action by Joseph Jentick and Malcolm Osgood Austin against the Pacific Gas & Electric Company, and others, to recover for injuries suffered in a gas explosion. From a judgment against named defendant and in favor of the other defendants, named defendant appeals.

Reversed, and judgment ordered in favor of named defendant notwithstanding the verdict.

Thomas J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, for appellant.

Francis Gill, John Langer, and Glikbarg, Wolf & Selig, all of San Francisco, for respondents.

STURTEVANT, Justice.

The defendant has appealed from a judgment awarding damages to the plaintiffs for injuries suffered in a gas explosion.

The accident happened on September 19, 1938. At that time the City and County of San Francisco was engaged in widening Nineteenth avenue. That avenue extends southly from the southerly line of Golden Gate Park. The project in hand commenced at Lincoln way and extended across Irving, Judah and Kirkham streets to Lawton street. A contract was let to Charles Harney. The contractor operated through

Joseph D. Cooney and his assistants. The Pacific Gas and Electric Company maintains pipes and conduits in said avenue and supplies the residences on each side with gas. E. Floyd was division superintendent at the time of the accident. Frank English was superintendent of construction and was present at the scene of the accident directing the employees of the Pacific Gas and Electric Company. Among those employees were Alvin Parkhurst and John McGrath.

The plaintiffs Jentick and Austin, the injured persons, filed an action against Charles Harney, Pacific Gas and Electric Company, and John McGrath, Frank English and Alvin Parkhurst. The charging portion of the complaint was as follows: "On said day Charles Harney and Chas. L. Harney, Inc., a corporation, by their servants, agents and employees, negligently and carelessly operated their machinery and equipment at the place designated, and the defendant Pacific Gas and Electric Company negligently and carelessly constructed, operated, managed and controlled its illuminating gas distributing system, and as a proximate result of said negligence and carelessness on the part of said defendants, and each of them, inflammable gas then and there being conducted and transported through said distributing system escaped and exploded with great force and violence precipitating the plaintiff Joseph Jentick from the sidewalk on said Nineteenth avenue into the pavement thereof, injuring said plaintiff as hereinafter described". In a separate count the plaintiff Austin set forth a charge similarly worded. The defendants, Pacific Gas and Electric Company, Alvin Parkhurst, John McGrath and Frank English, filed a joint answer denying said allegations pertinent to them. Charles Harney filed a separate answer alleging he personally was the contractor and denying the allegations of negligence of the contractor.

A motion for a directed verdict in favor of John McGrath was granted by the trial court. The jury returned verdicts in favor of Charles Harney, Frank English and Alvin Parkhurst. A verdict was rendered against Pacific Gas and Electric Company. Motions on behalf of said company for a directed verdict, judgment notwithstanding the verdict, and for a new trial were denied. From the judgment entered against that company it appealed. No appeal was taken from the judgment in favor of any of the other defendants.

The contractor commenced his work by scarifying the surface. He followed up that work by using a steam shovel to pick up and load the broken pavement. In the beginning it was planned to finish the west side of the two blocks between Lincoln way and Judah street, then the east side of the next two blocks from Judah to Lawton street, then to return to Lincoln way and proceed southerly doing the east side to Judah street, and lastly the west side from Judah to Lawton street. However, on Friday the 16th of September, 1938, the contractor notified the Pacific Gas and Electric Company that on Monday, the 19th, it would proceed to work on the west side of Nineteenth avenue between Kirkham and Lawton. On the west side of Nineteenth avenue are located the premises known as No. 1563. The house on those premises was supplied by a pipe leading from the east side to the west side of Nineteenth avenue. From the time the contractor commenced his work the employees of the Pacific Gas and Electric Company attended the project. They marked on the surface where pipes rested underneath the surface of the avenue, excavated some pipes, laid other pipes, and made connections or disconnections as necessity required. At about 4 p.m. on Monday afternoon, the scarifying of the surface of the avenue in front of No. 1563 had been completed and the steam shovel proceeded to pick up the broken pavement. While that work was in progress the plaintiffs were standing on the sidewalk in front of No. 1563. In making an attempt to fill the scoop of the shovel the scoop caught and bent the gas pipe serving No. 1563. An examination was immediately made by defendant's agents and no leak or break in the pipe was discovered. However, a few moments later the explosion occurred which caused the injuries. A subsequent examination disclosed the catching and bending of the pipe had foreshortened it and broken it loose from the riser serving No. 1563. From the break in the pipe the gas escaped which caused the explosion.

[1, 2] The defendant claims the plaintiffs contended (1) that defendants Parkhurst and English should have discovered the break in the service pipe and either repaired it or shut the gas off in time to prevent the explosion; (2) that the defendant's employees, on September 19, 1938, should have immediately shut off the gas serving No. 1563 before the contractor started to do his work; and (3) that the defendant's employees should have removed

the service pipes serving the residences on the west side of Nineteenth avenue. To those contentions the defendant replies that each contention was put in issue at the time of the trial and that the jury by its verdicts found the said employees of the defendant were not negligent. Continuing, the defendant contends the finding on said issues in favor of said employees exonerated the defendant corporation. A similar question was before the court in Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171. On page 423 of 154 Cal., on page 876 of 97 P., 129 Am.St.Rep. 171 the court said: "The employee's responsibility is primary. He is responsible because he committed the wrongful or negligent act. The employer's responsibility is secondary, in the sense that he has committed no moral wrong, but under the law is held accountable for his agent's conduct. While both may be sued in a single action, a verdict exonerating the agent must necessarily exonerate the principal, since the verdict exonerating the agent is a declaration that he has committed no wrong, and the principal cannot be responsible for the agent if the agent has committed no tort. While no right of contribution exists between joint tort-feasors, whether sued separately or collectively, there exists, in the kind of case here presented, much more than the mere right of contribution. The principal who has been obliged thus to pay for the unauthorized negligent act of his agent resulting in injury may indemnify himself to the full amount against his agent." Thompson v. Southern Pacific Co., 31 Cal. App. 567, 161 P. 21; Fimple v. Southern Pacific Co., 38 Cal.App. 727, 177 P. 871; and Brobston v. Borough of Darby, 290 Pa. 331, 138 A. 849, 54 A.L.R. 1285, are to the same effect. In the latter case, 290 Pa. 331, 138 A. 849, 54 A.L.R. at page 1290, the supreme court of Pennsylvania has listed a long line of cases each of which supports the rule.

[3] We do not understand that the plaintiffs dispute the rule of law just stated. However they contend there was evidence of the negligence of others for whose acts the defendant was responsible. They claim that Cooney, on Friday, notified Phlueger, one of the assistants of English, that the contractor would proceed with the work in front of No. 1563 on Monday and that Phlueger was negligent in relaying the notice to English. The first answer to that proposition is that there was no evidence of delay. The uncontradicted evidence was to the effect that English received the notice on the same day it was given. They also contend that "Other P. G. & E. employees may have been guilty in ordering the necessary precautions to prevent injury to the public". But all of those duties were imposed on defendant English and were involved in the issues which were heard and determined by the jury. Again the plaintiffs contend the service pipe above mentioned was negligently installed and maintained. In this connection they rely on the evidence that said pipe was but a few inches beneath the pavement of the street. There was no evidence that such installation or maintenance was negligent. However its position might be, the care and protection of it at the time the work was proceeding rested on the defendant English and his assistants. The plaintiffs further contend the threads of the riser pipe were broken off and the pipe at that point was very rusty. That statement is too broad. The evidence shows the riser pipe was not broken but that the service pipe was broken. Whether the latter pipe was rusty or otherwise, the evidence was that it did not break of its own weight but was broken by the shovel. It will not be contended that the defendant should have installed service pipes or maintained them so they would withstand the force of being jerked by a steam shovel. A most careful examination of the latter contentions of the plaintiffs does not disclose any want of care on the part of any person employed by the defendant except the individuals who were in charge of the job and who were by the verdict of the jury acquitted of negligence. In this connection the plaintiffs cite and rely on Waltemath v. Western States R. Co., 9 Cal.App.2d 583, 50 P.2d 451; Stefanuto v. Market St. Ry., 24 Cal.App.2d 565, 75 P.2d 1089; and Ellis v. Owen Roofing Co., 6 Cal.App.2d 25, 43 P.2d 558. They are not helpful. Each involved the negligent acts of an agent not a party to the action and as to whom the jury had rendered no verdict. No one of those cases purports to modify or overrule the doctrine stated in Bradley v. Rosenthal, supra.

The plaintiffs introduced in evidence section 14 of Ordinance 2201, N.S. (approved March 3, 1913) of the City and County of San Francisco. It is as follows:

"It is hereby made the duty of every person, firm or corporation owning, using, controlling or having an interest in pipes, conduits, ducts or tunnels under the surface of any public street, alley, sidewalk or other public place for supplying or conveying gas, electricity, water, steam, ammonia, or oil in, to or from the City and County of San Francisco, or to or from its inhabitants, or for any other purpose, within ninety (90) days after March 3, 1913, to file in the office of the City Engineer a map or a set of maps, each drawn to a scale to be designated by the City Engineer, which said map or set of maps shall show in detail the exact location, size, description and date of installation, *if known,* of all mains, laterals, services and service pipes, manholes, handholes, transformer chambers or other appliances installed beneath the surfact of the public streets, alleys, sidewalks or other public places in the City and County of San Francisco, belonging to, used by or under the control of such person, firm or corporation, or in which such person, firm or corporation has any interest. It shall also be the duty of every such person, firm or corporation to file, within fifteen (15) days after the first day of January of each and every year, a corrected map or set of maps each drawn to scale to be designated by the City Engineer showing the complete installation of all such pipes and other appliances, including all installations made during the previous year, to and including the last day of each year. Each such map shall be accompanied by an affidavit endorsed thereon, subscribed and sworn to by such person, or by a member of such firm or by the President or Secretary of such corporation, to the effect that the same correctly exhibits the details required by this Article to be shown thereon. * * *

[4-9] "It shall be unlawful for any person, firm or corporation to fail, refuse, or neglect to file any map or set of maps at the time, and in all respects as required by this section." (Italics ours.) The trial court read said section to the jury and instructed the jury, in effect, that a violation of its terms, if there was a violation, would be negligence per se. The defendant contends it did not violate the ordinance and that if it did such violation was not a proximate cause of the accident. Both contentions we think must be sustained. As to when any gas pipe was installed in Nineteenth avenue the record is silent. The first part of section 14 of the ordinance applies to pipes installed prior to the enactment of the ordinance, March 3, 1913. By its express terms it applies to the location of pipes, "if known". There was no evidence that the pipes were originally installed by the defendant, by a predecessor in interest, or by whom. There was no evidence that the vertical location of any one of the pipes *was known.* English stated to Cooney that the location of the depth of the pipes was not known. The second part of the section is addressed to pipes located subsequent to March 3, 1913. There is no evidence that the pipes in Nineteenth avenue were installed subsequent to that date. There is evidence that whenever an application is filed to excavate or to install a service, a plat and location of that is filed in one of the departments There is no evidence of the contents of such plats, or whether they complied with section 14, supra, or otherwise. Furthermore, by the terms of said section the defendant was required to file in the office of the city engineer certain maps. But said maps were to be drawn to scale. That scale was to be designated by the city engineer. Until it was designated no map in conformance therewith could be prepared and filed. The plaintiff asserts the defendant could have drawn the maps to any scale. That statement is too broad. Maps not substantially drawn to a scale designated by the city engineer would not have been a compliance with the provisions of the ordinance. The ordinance is entirely clear and there is no room for construction. Davis v. Hart, 123 Cal. 384, 386, 387, 55 P. 1060. Furthermore, "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every section, clause, word or part of the act." 25 R.C.L. 1004, "Statutes", sec. 246. The general purport of a statute being declared, the details provided for its accomplishment will be regarded as necessary incidents. Estate of Wellings, 192 Cal. 506, 519, 221 P. 628. Applying the foregoing rules it is apparent that the city engineer not having designated "the scale of said maps", the contingency on which the defendant was required to file said maps has never happened and the defendant has incurred no obligation thereunder. 59 C.J. 1156, "Statutes", sec. 688, subd. 10; State v. Liedtke, 9 Neb. 490, 4 N.W. 75, 80; Barto v. Himrod, 8 N.Y. 483, 489, 59 Am.Dec. 506; Ex parte Wall, 48 Cal. 279, 314, 315, 17 Am.Rep. 425; The Aurora v. United States, 7 Cranch, 382, 3 L.Ed. 378; Wheeler v. Herbert, 152 Cal. 224, 234,

92 P. 353; Chicago v. Stratton, 162 Ill. 494, 44 N.E. 853, 35 L.R.A. 84, 53 Am.St. Rep. 325, 329. Hence it does not appear that the defendant violated any of the provisions of said ordinance. There is no evidence that at any time the contractor, either personally or by agent, applied to the city engineer or any other officer or employee in the city government to be allowed to inspect a map or to obtain a copy of a map of the location of the pipes in Nineteenth avenue. It follows the filing or non-filing of said maps was not a proximate cause of the accident. Rauch v. Southern California Gas Co., 96 Cal.App. 250, 273 P. 1111, states nothing to the contrary. The facts in that case were materially different.

[10, 11] However the plaintiffs contend the exoneration of Parkhurst and English did not exonerate the Pacific Gas and Electric Company. They base that contention on an isolated remark of the trial court. That remark occurred as follows. After the testimony was taken and the arguments had closed, the trial court gave a set of instructions that is full and complete in all respects. The jury retired to deliberate on its verdict. In about an hour it returned into court presenting certain verdicts. The trial court pointed out that the verdicts were inconsistent. In doing so it gave an instruction that is full and complete, setting forth the rule hereinabove mentioned regarding the effect of exonerating the agents of the defendant Pacific Gas and Electric Company. That instruction is not questioned. In a very few minutes a colloquy followed between court and counsel. That colloquy was as follows:

"Mr. Briare (attorney for defendant): Now, before the jury is sent back, I would like to ask the Court to instruct the jury that it is not necessary to find a verdict against the individuals Parkhurst and English in order to render a verdict against the defendant Pacific Gas and Electric Company.

"Mr. Selig: I think they have been so instructed.

"Mr. Briare: Well, I want that particular instruction given, if the Court please.

"The Court: I will so instruct the jury at the request of Mr. Briare, that they need not return a verdict against either of the personal defendants in order to return a verdict against the Pacific Gas and Electric Company. You have no objection to that?

"Mr. Selig: Yes, I have an objection to it; I take an exception.

"The Court: All right, take the jury out".

The plaintiffs now contend the last remark "fails to take into consideration the doctrine of exoneration of a principal by exoneration of an agent, and second, that if such instruction had been requested by respondents, the giving of it might have constituted error, but the request for the instruction having come from the party to be bound thereby, it is submitted that the giving of this instruction acts to estop appellant from now claiming that the jury, having exonerated the defendants Parkhurst and English, employees of appellant corporation, such exoneration operates to exonerate appellant corporation." That contention is not well founded. In the first place the record does not show that defendant asked the trial court to make the statement in the words used by the trial court. In the second place said statement did not conflict with the full and complete instructions which the trial court had just given. The trial court had instructed the jury, "* * * not to select a single instruction, or a portion of an instruction alone, but to consider all of the instructions in determining any issue * * *." We must assume the jury followed that instruction. In doing so it certainly was not confused in hearing and applying the instructions. They did not conflict. Miner v. Dabney-Johnson Oil Corp., 219 Cal. 580, 583, 28 P.2d 23. One was merely more complete than the other. As so construed we think it is clear the remark complained of did not in any manner affect the correct instruction which the trial court had given as to the effect of exonerating Parkhurst and English.

It follows that the trial court should have granted the motion of the defendant for judgment in its favor notwithstanding the verdict.

The judgment is reversed and judgment is ordered in favor of the defendant notwithstanding the verdict.

I concur: NOURSE, P. J.

PELLERITO v. DRAGNA et al.

Civ. 6400.

District Court of Appeal, Third District, California.

Oct. 8, 1940.

Rehearing Denied Nov. 7, 1940.

Hearing Denied Dec. 5, 1940.

1. Appeal and error ⚷1050(1)

In grantor's suit against grantor's daughter and daughter's husband to set aside joint tenancy deeds on ground that they were procured by fraud, admitting evidence of oral agreement between grantor and daughter leading up to execution of deeds over objection that agreement was within statute of frauds was harmless, where agreement had been fully executed and joint tenancy was evidenced by deeds. Civ.Code, § 1624.

2. Deeds ⚷203

In grantor's suit against grantor's daughter and daughter's husband to set aside joint tenancy deeds on ground that they were procured by fraud where grantor's second wife, to whom grantor attempted to convey property after commencement of suit, was substituted as plaintiff after grantor's death, and daughter and husband filed cross-complaint to set aside deed to substituted plaintiff, evidence of oral agreement between grantor, grantor's first wife and daughter leading up to execution of joint tenancy deeds was admissible to rebut plaintiff's evidence of fraud in procurement of deeds.

3. Frauds, statute of ⚷74(1)

An oral agreement by one joint tenant not to alienate his interest, in order that it may pass, upon his death, to the other joint tenant, is an "agreement for the sale of an interest in real estate" within statute of frauds where joint tenant making promise not to alienate his interest receives a valuable consideration for such promise. Civ. Code, § 1624.

See Words and Phrases, Permanent Edition, for all other definitions of "Agreement for the Sale of an Interest in Real Estate".

4. Deeds ⚷212

In grantor's suit against grantor's daughter and daughter's husband to set aside joint tenancy deeds on ground that they were procured by fraud where grantor's second wife, to whom grantor attempted to convey property after commencement of suit, was substituted as plaintiff after grantor's death and daughter and husband filed cross-complaint to set aside deed to substituted plaintiff, evidence sustained finding that daughter and husband had fully performed their part of oral agreement with grantor whereby grantor had agreed not to alienate his interest in property, which grantor had held as joint tenant with his first wife, so that upon grantor's death daughter would become sole owner.

5. Trusts ⚷110

In grantor's suit against grantor's daughter and daughter's husband to set aside joint tenancy deeds, where daughter and husband filed cross-complaint against grantor's second wife, who was substituted as plaintiff after grantor's death, to set aside grantor's deed to substituted plaintiff, evidence of defendants' complete performance of oral agreement with grantor, who agreed not to convey his interest in land which he held as a joint tenant with codefendant, was sufficient, when accompanied by conveyance to substituted plaintiff, to support implied finding raising a "constructive trust" for defendants' benefit, regardless of whether defendants' performance of oral agreement with grantor relieved such agreement from effect of statute of frauds. Civ.Code, § 1624.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

6. Trusts ⚷105

Where defendants, in return for paying off mortgage on land and supplying funds for improvements thereon, received oral promise by grantor not to convey remaining joint interest held by grantor so that codefendant, who was a joint tenant with grantor, would become sole owner at grantor's death, and defendants were entitled to rely upon grantor's promise, equity would intervene to impose a "constructive trust" for defendants' benefit after grantor attempted to convey land to his second wife, who did not part with consideration for deed, and whether second wife had knowledge of grantor's promise to defendants and of the supplying of funds by defendants was immaterial.

7. Frauds, statute of ⚷119(2)

The statute of frauds is not a bar to introduction of evidence which is admitted for purpose of disclosing fraud. Civ.Code, § 1624.

8. Vendor and purchaser ⚷240

In grantor's suit against grantor's daughter and daughter's husband to set aside joint tenancy deeds where cross-complaint against grantor's second wife, who was substituted as plaintiff after grantor's death, to set aside grantor's deed to second wife showed on its face that daughter and husband were holders of legal title to a half interest in property, as to such interest burden was upon grantor's second wife to plead and prove that she was a bona fide purchaser.

9. Vendor and purchaser ⚷240

In grantor's suit against grantor's daughter and daughter's husband to set aside joint tenancy deeds where cross-complaint against grantor's second wife, who was substituted as plaintiff after grantor's death, to set aside grantor's deed to second wife showed on its face that second wife was holder of legal title as to a half interest in land, and that claim of daughter and husband thereto was of an equitable character, burden of pleading and proof that daughter and husband were bona fide purchasers as to such interest was upon daughter and husband.

10. Deeds ⚷188

In grantor's suit against grantor's daughter and daughter's husband to set aside joint tenancy deeds, a cross-complaint by daughter and husband against grantor's second wife, who was substituted as plaintiff after grantor's death, to set aside grantor's deed to such wife alleging that without cross-complainants' consent grantor executed deed conveying property to second wife after cross-complainants had performed their part of oral agreement with grantor whereby grantor agreed not to convey his joint interest in property stated a cause of action.

11. Deeds ⚷210

In grantor's suit against grantor's daughter and daughter's husband to set aside joint tenancy deeds where daughter and husband filed cross-complaint against grantor's second wife, who was substituted as plaintiff after grantor's death, to set aside grantor's deed to second wife, the introduction in evidence of deed to second wife reciting that actual consideration paid for deed did not exceed $50, was sufficient to support implied finding that second wife had taken property as a gift.

Appeal from Supreme Court, Los Angeles County; Thurmond Clarke, Judge.

Suit by Giorgio Pellerito, also known as George Pellerito, against Catarina Dragna, also known as Katherine Dragna, and Joe Dragna, husband and wife, to set aside joint tenancy deeds upon ground that they had been procured by fraud, wherein Regina Pellerito was substituted as plaintiff after the death of Giorgio Pellerito, also known as George Pellerito, and defendants filed a cross-complaint. From an adverse judgment, Regina Pellerito appeals.

Judgment modified and, as modified, affirmed.

Michael Motta and Kellogg & Matlin, all of Los Angeles, for appellant.

Courtney Lacey, of Los Angeles, for respondents.

PAULSEN, Justice pro tem., delivered the opinion of the court.

The essential facts of this case, as disclosed by the findings, may be stated as follows:

On May 3, 1926, Giorgio Pellerito and his wife, Anni, became the owners, in joint tenancy, of a lot improved with a double-dwelling. The property was heavily mortgaged and the Pelleritos were not financially able to pay the full purchase price, satisfy the mortgage and maintain the property without assistance. Such assistance was furnished by their daughter, Catarina Dragna, and in consideration thereof her parents agreed that upon the death of Anni, who was in ill health, Anni's interest in the property should pass to Catarina.

At that time, apparently, none of the parties understood the nature or legal effect of the joint tenancy and in order to carry out the terms of the agreement Anni made a will by which she attempted to devise her interest in the property to Catarina. Anni died July 27, 1931, and Giorgio and his daughter thereupon assumed that Catarina had succeeded to her mother's interest. Giorgio occupied one part of the double dwelling while Catarina and her husband, Joe Dragna, took possession of the other part.

By this time Giorgio was growing old and it was becoming increasingly difficult for him to support himself and meet his engagements with reference to the property, and Catarina continued to render such aid as was necessary.

About November 21, 1932, Giorgio and Catarina called at a bank for the purpose of transacting some business in connection with the mortgage. The bank officials had occasion to examine the title to the property and after doing so they informed Giorgio and Catarina that the latter had no interest in the property and that upon Anni's death Giorgio had become the sole owner. After this explanation had been made it was decided to take appropriate measures to carry out the terms of the original agreement and Giorgio therefore conveyed the property to Catherine Verga, a clerk in the bank, and she in turn conveyed to Giorgio and Catarina as joint tenants. These conveyances will be referred to hereafter as the joint tenancy deeds.

Shortly after these occurrences Catarina agreed to pay in full a balance of $1,450 due on the mortgage, to pay taxes and other maintenance charges, to make certain valuable improvements on the property and to give her father whatever assistance he might require for his support, over and above what he would be able to provide for himself. In consideration of these promises Giorgio agreed not to alienate his interest in the property so that upon his death his daughter would become the sole owner by virtue of the fact that she would then be the surviving joint tenant. This agreement was entirely oral.

On December 17, 1932, Giorgio married the present plaintiff and cross-defendant, Regina Pellerito.

The record further shows that on December 31, 1936, Giorgio instituted the present action against Catarina and her husband to set aside the joint tenancy deeds upon the ground that they had been procured by fraud. Defendants answered, denying the allegations of fraud and setting up the facts leading up to the execution of the deeds as stated above. On January 16, 1937, Giorgio executed a deed by which he attempted to convey the property to Regina. On April 2, 1937, Giorgio died and Regina was substituted as plaintiff in the action. On July 8, 1937, Catarina and her husband filed a cross-complaint by which they sought to set aside the deed from Giorgio to Regina and to quiet their title. The trial court found that the joint tenancy deeds were not procured by fraud; that Giorgio had fraudulently conveyed his interest in the property and that the deed to appellant should be set aside. Judgment was rendered, declaring Catarina to be the owner in fee of the property. Plaintiff and cross-defendant has appealed from the judgment.

[1, 2] In connection with the issues raised by the complaint and answer thereto evidence was admitted, over the objections of appellant, of the oral agreement of Giorgio, Anni and Catarina leading up to the execution of the joint tenancy deeds, the ground of the objection being that such agreement was within the statute of frauds. There was no error in these rulings. If admitted for the purpose of showing that Giorgio and Catarina had become joint tenants it was harmless because such agreement had been fully executed and the joint tenancy was evidenced by the deeds themselves. Moreover, such evidence was clearly admissible to rebut appellant's evidence of fraud in the procurement of the deeds.

Upon the same ground objection was made to evidence admitted to prove Giorgio's agreement not to alienate his interest.

[3, 4] It has been held in at least one other jurisdiction that an oral agreement restricting the right of the owner of land to alienate it is an agreement affecting one's title to real estate and within the statute of frauds. *27 C.J. 226.* So far as we are advised this exact question has not been decided in this state, but we are of the opinion that the contention of appellant is correct. Section 1624 of the Civil Code provides, among other things, that a contract "for the sale of real property, or of an interest therein" is invalid unless the same is in writing, etc., and it seems obvious that an oral agreement by one joint tenant not to alienate his interest, in order that it may pass, upon his death, to the other joint tenant, is an agreement for the sale of an interest in real estate where, as here, he receives a valuable consideration for such promise. Such an agreement, if valid and binding, would result in diminishing the present interest of one party and to a corresponding degree increasing the present interest of the other. For all practical purposes it is much the same as an agreement by which one promises to execute a deed reserving only a life estate in himself. However, the court found that respondents had fully performed their part of the oral agreement. We do not understand that appellant seriously questions the correctness of this finding and, indeed, she could not successfully do so, for there is abundant evidence to support it, even evidence of provision made for Giorgio's funeral.

[5-7] There is adequate evidence to support the finding of the court that the respondents fully performed their part of the agreement. Regardless of whether their performance had the effect of relieving the transaction of the statute of frauds, upon the theory that there was sufficient part performance of an oral contract concerning the disposal of an interest in real property, the performance on the part of respondents which was tendered and accepted pursuant to the promise on the part of Mr. Pellerito was sufficient when accompanied with Mr. Pellerito's subsequent conveyance to Regina, to support an implied finding in this judgment quieting title, to raise a constructive trust for the benefit of respondents. Respondents performed on their part by paying off the mortgage and supplying funds for improvements on the property. In return they received a promise from Pellerito not to convey the remaining joint interest held by himself. This promise if performed would have resulted in respondents acquiring title to the entire property upon the death of Pellerito, as a legal result of the death of one joint tenant. Respondents had the right to rely upon the happening of such an event. Consequently, equity will lend aid to bring about such a result. The conveyance to Regina was a mere gift and does not affect the intervention of equity in the present case as she did not part with consideration. The fact as to whether or not she had knowledge of the supplying of funds by respondents and of the accompanying promise of Pellerito is immaterial. The evidence and circumstances in this case present a sufficient showing to raise a constructive trust for the benefit of respondents. The statute of frauds is not a bar to the introduction of evidence which is admitted for the purpose of disclosing fraud, which in this case constituted the raising of a constructive trust in Regina for the benefit of respondents. Regina should be required to execute a reconveyance to respondents, or her deed should be cancelled.

Finally, appellant contends that the cross-complaint fails to state a cause of action. The facts as shown above, from the acquisition of the property by Giorgio and Anni to the time of the conveyance to appellant, are alleged in great detail, including the execution of the joint tenancy deeds and the facts connected with the oral agreements. It is then alleged: "That on or about January 16, 1937, without the consent or knowledge of cross-complainants, or either of them, the said Giorgio Pellerito executed a deed conveying the above described real property unto Regina Pellerito, his wife, which said deed was recorded April 2, 1937, in book 14909, page 24, official records of Los Angeles county. That said Giorgio Pellerito died intestate at the hour of 4:00 o'clock A. M. on April 2, 1937."

[8, 9] The pleading shows on its face that respondents were the holders of the legal title to a half interest in the property, and as to this interest the burden was upon appellant to plead and prove that she was a bona fide purchaser. Bell v. Pleasant, 145 Cal. 410, 78 P. 957, 104 Am.St.Rep. 61; James v. James, 80 Cal.App. 185, 251 P. 666. But as to the other half interest the pleading shows on its face that appellant was the holder of the legal title; that respondents' claim was of an equitable character, and the burden of pleading and proof, as to such interest, rested upon respondents. Bell v. Pleasant, supra; Kowalsky v. Kimberlin, 173 Cal. 506, 160 P. 673; Warnock v. Harlow, 96 Cal. 298, 31 P. 166, 31 Am.St.Rep. 209; Wyrick v. Weck, 68 Cal. 8, 8 P. 522; Hawke v. California Realty, etc., Co., 28 Cal.App. 377, 152 P. 959.

[10, 11] We are of the opinion, however, that appellant has not been prejudiced by the condition of the pleadings and that there has been no miscarriage of justice on that account or otherwise. Appellant voluntarily produced evidence showing that Giorgio had conveyed to her because "he wanted to give his property to his wife because she had been good to him during his lifetime and that she had become obligated with him to pay a woman $600.00 which he had borrowed". Appellant then destroyed the implication that there might have been a consideration of $600 by introducing the deed which recited that "the actual consideration paid for this deed does not exceed $50.00". This was sufficient to support the implied finding of the court that appellant had taken the property as a gift.

The judgment is modified by adding thereto the following: "The deed from Giorgio Pellerito to Regina Pellerito is vacated and set aside." As so modified the judgment is affirmed, respondents to recover costs.

We concur: TUTTLE, J.; THOMPSON, Acting P. J.

40 Cal.App.2d 801

HALES v. SNOWDEN et al.

Civ. 11305.

District Court of Appeal, First District, Division 1, California.

Sept. 30, 1940.

1. Judgment ⚷583

Upon the rendition and entry of decree of foreclosure, provisions of the mortgage become merged in the judgment, following which terms of the decree govern rights of parties.

2. Mortgages ⚷581(1)

Where allowance was made for attorney's fees in foreclosure decree which was affirmed on appeal, trial court could not subsequent to the filing therein of a remittitur allow additional attorney's fees for services rendered in resisting appeal and thereupon enter a supplemental judgment whereby the additional amount allowed was incorporated in and became part of original decree, since provisions of mortgage became merged in decree which governed rights of parties, and decree containing no provision for additional attorney's fees, additional fees could not be allowed.

3. Judgment ⚷297

Once a decree has become final it may not be amended, modified, or supplemented except where otherwise authorized by statute or where there has been a clerical error or misprision due to inadvertence.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Clarence L. Kincaid, Judges.

Foreclosure action by Fannie Hales against Earl S. Snowden and others. From an adverse order, Curtis C. Colyear and wife appeal.

Judgment in accordance with opinion.

Henry O. Wackerbarth, of Los Angeles, for appellants.

Austin & Austin and Irving P. Austin, all of Compton, and Doyle, Clark & Thomas, of Long Beach, for respondent.

KNIGHT, Justice.

The defendants Curtis C. and Florence E. Colyear appealed from an order made after final judgment and from the final judgment as amended and supplemented by said order. The question presented for determination may be stated as follows: Where an appeal has been taken by two of four mortgagors of real property from a decree rendered in the foreclosure action wherein is included an allowance for attorneys' fees and the decree is affirmed, may the trial court subsequent to the filing therein of the remittitur, allow additional attorneys' fees for services rendered in resisting the appeal and thereupon enter a supplemental judgment whereby the additional amount allowed is incorporated in and becomes part of the original decree. It is our conclusion that the question must be answered in the negative, and therefore that the "order and supplemental judgment" made herein by the trial court allowing such additional fees and supplementing the original judgment cannot be sustained.

The proceedings leading up to the making of said order and supplemental judgment were these: The respondent, Fannie Hales, brought an action to foreclose three mortgages on real property given to secure the payment of promissory notes, the principal sums of which totaled $21,000. The notes and mortgages were executed by appellants and two codefendants, namely, Earl F. and Constance H. Snowden. The notes contained no provision for the payment of attorneys' fees, but each mortgage provided that it was given for the purpose of securing first the payment of the indebtedness evidenced by the promissory note; "Second: Payment of attorney's fees, in a reasonable sum to be fixed by the Court and all costs and expenses in any action brought to foreclose this mortgage or any action or proceeding affecting the rights either of Mortgagor or Mortgagee in said real property, whether such action or proceeding progress to judgment or not; * * *." Among the relief prayed for in the foreclosure complaint was that respondent have judgment and execution against the parties above named for any deficiency that might remain after applying all the proceeds of the sale of the premises properly applicable to the satisfaction of the judgment. The Snowdens defaulted, but appellants filed an answer wherein they interposed several special defenses, among them being that the mortgages sought to be foreclosed were purchase price mortgages and that therefore the mortgagee "was not entitled to a personal or deficiency judgment" against them. The trial court decided that issue and all others raised by the answer against appellants, and a decree in the usual form was entered, awarding a money judgment against the four parties above named in the sum of $21,816.84, together with the sum of $795.22 attorneys' fees and costs, and directing the sheriff to sell the property at foreclosure sale. The decree also directed the entry of a deficiency judgment against said parties in the event the proceeds of the sale were insufficient to satisfy the amounts due under the decree. The Colyears appealed to the Supreme Court, urging as one of the main grounds for reversal that the court erroneously directed the entry of a deficiency judgment. The appeal was transferred for hearing and determination to the District Court of Appeal and the decree was affirmed. Hales v. Snowden, 19 Cal.App.2d 366, 65 P.2d 847. Subsequently a petition for hearing by the Supreme Court was denied; and appellants then petitioned the Supreme Court of the United States, Colyear v. Hales, 302 U.S. 715, 58 S.Ct. 34, 82 L.Ed. 552, for a writ of certiorari, which petition likewise was denied. Upon the filing of the remittitur issued by the District Court of Appeal respondent served notice, supported by affidavits, that she would present a motion to the trial court "for an order and supplemental judgment fixing and determining attorneys' fees to be allowed to the plaintiff for the defense of the appeal * * * [taken] by defendants to the District Court of Appeal and Supreme Court of the state of California and to the Supreme Court of the United States * * *". Appellants filed written objections to said motion, supported by counteraffidavits, and after a hearing the trial court on November 12, 1937, granted the motion. The order made in this behalf was entitled "Order and Supplemental Judgment Fixing Attorneys' Fees". It contained findings to the effect that all of the facts set forth in the affidavits filed in support of the motion were true; that each of the mortgages mentioned in the complaint provided for the "payment of attorneys' fees, in a reasonable sum to be fixed by the court and all costs and expenses in any action brought to foreclose this mortgage or any action or proceeding affecting the rights either of mortgagor or mortgagee in said real property"; and that plaintiff was "entitled under the terms of said mortgage to a reasonable sum for attorneys' fees for the defense against the appeal of the said defendants to the District Court of Appeal and Supreme Court of the state of California and against the petition of said defendants for a writ of certiorari to the United States Supreme Court", and that the reasonable value of said services was $1,000; whereupon it was "ordered, adjudged and decreed that the plaintiff, Fannie Hales, have judgment against the defendants for the sum of one thousand ($1000.00) dollars and that said sum be apportioned" as specified therein against the three causes of action "and become a part of the amount due thereunder to the same force as [and] effect as though included in the original judgment * * *", together with interest thereon from the date of the entry of said order.

The parties are agreed that a provision in a mortgage relating to the allowance of attorneys' fees constitutes the measure of the trial court's authority to make such allowance, and in their briefs they have argued to some extent the disputed point as to whether the provision contained in each of the mortgages here was in any event broad enough in its terms to justify an allowance for services rendered on an appeal which might be taken from the decree of foreclosure. In this regard appellants cite authorities to the effect that such a provision must be strictly construed against the party foreclosing (Jones on Mortgages, 7th ed., vol. 3, p. 186, and 19 R.C.L. 567, cited approvingly in Gralynn Laundry v. Virginia Bond & Mortgage Corp., 121 Fla. 312, 163 So. 706; Booker v. Booker, 220 Ala. 367, 125 So. 212; Lampkin v. Irwin, 202 Ala. 14, 79 So. 300); and applying such rule of construction to the mortgage provisions here under consideration, they contend that the latter portion thereof upon which respondent seems to rely, reading: "* * * or any action or proceeding affecting the rights either of mortgagor or mortgagee in said real property, whether such action or proceeding progress to judgment or not", referred to attacks made by third persons against the rights of the mortgagor or the mortgagee or both, in the mortgaged property; whereas respondent contends that said provision was intended to apply as well to any proceeding between the parties to the mortgage, growing out of the foreclosure action, such as an appeal from the decree entered therein.

[1, 2] Irrespective, however, of the merits of either of the arguments so advanced, it is a well-settled legal doctrine that upon the rendition and entry of the decree of foreclosure the provisions of the mortgage become merged therein (18 Cal.Jur., p. 471), following which the terms of the decree govern the rights of the parties; and here admittedly the decree contains no provision which directly or by implication, by way of reservation or otherwise, would authorize the allowance of attorneys' fees for any services rendered subsequent to the rendition and entry thereof. Therefore, since the decree for all purposes became final upon its affirmance on appeal, which was prior to the presentation of respondent's motion, it was clearly beyond the power of the trial court thereafter to amend, modify or supplement the same by increasing the amount of money the mortgagors were called upon thereunder to pay. That such would be the plain effect of the "order and supplemental judgment" is beyond question, for in case either of a redemption of the property or satisfaction of the deficiency judgment, the additional allowance of attorneys' fees would be added to and included in the amount the mortgagors would be required to pay.

[3] Respondent does not question the doctrine that once a decree has become final it may not be amended, modified or supplemented, except, of course, where otherwise authorized by statute or in some cases to correct clerical error or misprision, due to inadvertence; but she points out that the cases cited in California Jurisprudence in support of the merger rule do not involve the matter of allowance of attorney's fees. It may be so conceded; nevertheless those cases declare the law to be as stated in California Jurisprudence that: "The mortgage is merged in the judgment or decree rendered in the foreclosure suit, whether the property is sold under foreclosure in an action in which the mortgagee was plaintiff or one in which, as defendant, he prayed foreclosure under a cross-complaint." Furthermore, respondent cites certain cases to show that the merger rule does not apply to a new cause of action accruing since the rendition of the decree, such, for example, as where the matter could not have been provided for in the original decree. But those cases are not in point here, because if the provisions of the mortgage so justified, reservation in the decree could have been made for the future allowance of fees in case of appeal.

As supporting her position generally that it was within the power of the trial court, after the judgment had become final, to make additional allowance for attorneys' fees, respondent cites Beckman v. Skaggs, 61 Cal. 362; Schallert-Ganahl Lumber Co. v. Neal, 94 Cal. 192, 29 P. 622, and Williams v. Gaston, 127 Cal. 641, 60 P. 427. But an analysis of those cases demonstrates that they are not here controlling. In Beckman v. Skaggs, supra, there was no judgment, final or otherwise, before the trial court at the time application was made for additional attorneys' fees. As shown by the facts set forth in the opinion therein, the judgment had been reversed. And Schallert-Ganahl Lumber Co. v. Neal, supra [94 Cal. 192, 29 P. 623] did not involve a mortgage but was an action to foreclose a materialman's lien. It was therefore governed by a special statute (sec. 1195, Code Civ.Proc.) which as stated in the opinion contains the following provision: "The court (meaning the superior court) must also allow, as a part of the costs, the money paid for filing and recording the lien, and reasonable attorneys' fees in the superior and *supreme courts* * * *", etc. (italics ours); and on a former appeal the judgment while affirmed was ordered modified. It was held, therefore, that when the cause again came before the superior court it was proper for that court under the provisions of the statute to allow additional attorneys' fees for services rendered in the Supreme Court. The allowance of the additional fees in Williams v. Gaston, supra was also governed by the provisions of section 1195, Code of Civil Procedure, a mechanic's lien being there involved; and the court merely followed the ruling in the Schallert-Ganahl Lumber Co. case. The remaining cases cited by respondent, being less in point than those above discussed, do not require special attention.

For the reasons and upon the grounds above set forth, it is ordered that the "Order and Supplemental Judgment Fixing Attorneys' Fees" filed on November 12, 1937, be and the same is hereby reversed. The original judgment, which the foregoing order purported to supplement and from which as so supplemented an appeal was also taken, will therefore stand as affirmed in Hales v. Snowden, supra, and the appeal so taken therefrom, having become moot by reason of the reversal of said order of November 12, 1937, is dismissed.

We concur: PETERS, P. J.; WARD, J.

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41 Cal.App.2d 58

BAKER et al. v. RODRIGUEZ et al.

Civ. 2440.

District Court of Appeal, Fourth District, California.

Oct. 7, 1940.

1. Trial 🔑335

In action for injuries received in automobile accident, where separate forms of verdicts were submitted to jury bearing upon liability and damages and jury returned verdict against defendants, evidence did not sustain defendants' contention that jury indicated desire to exonerate defendant driver and award damages to plaintiffs by reason of fact that there was confusion in reference to return of verdicts by jury.

2. Appeal and error 🔑1060(1)

In action for injuries received in collision with truck, reference by plaintiffs' witness, on direct examination, to fact that adjuster for insurance company told witness that truck was being driven by defendant driver at time of accident, even if "misconduct," was not so prejudicial against defendants as to justify reversal of judgment, especially where no motion was made by defendants to strike witness' answers, with one exception, and part of witness' testimony concerning adjuster was elicited by defendants on cross-examination.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

3. Appeal and error 🔑110

An appeal does not lie from an order denying a motion for new trial.

Appeal from Superior Court, Orange County; Ben R. Ragain, Judge.

Action by Harold Baker and Alberta Baker, husband and wife, and Marion Baker, by and through his guardian ad litem, C. H. Baker, against Rosendo Rodriguez and another for personal injuries and property damage resulting from an automobile accident. From a judgment against defendants for $5,000 in favor of Harold Baker and Alberta Baker and for $50 in favor of Marion Baker defendants appeal.

Affirmed.

Stephen Tighe, of Los Angeles, and N. D. Meyer, of Santa Ana, for appellants.

James L. Davis, of Santa Ana, for respondents.

GRIFFIN, Justice.

Plaintiffs and respondents brought this action to recover for personal injuries and property damage resulting from an automobile accident which happened in the city of Fullerton about 6:45 in the evening of February 24, 1939, when a passenger car driven by the respondent Harold Baker, in which the other respondents were riding, was in collision with an automobile truck driven by the appellant Socorro Gonzales, which truck was owned by the other appellant, Rosendo Rodriguez, who was not present when the accident occurred.

Upon the trial of the action before a jury, a verdict and judgment were rendered against the appellants for $5,000 in favor of respondents Harold Baker and Alberta Baker, and for $50 in favor of respondent Marion Baker. Appellants appeal from the judgment and order denying the motion for new trial.

Respondents were riding northerly on South Spadra street in the second lane of traffic from the center on their right-hand side of a six-lane highway. Appellant truck driver was traveling southerly in the first lane from the center of the street. He suddenly turned to his left into the pathway of respondents' car to enter a filling station located near the corner of the intersection which respondents had just passed. The evidence is conflicting as to whether the driver of the truck gave a signal indicating his intention to turn. Glass was driven into the face and right eye of Alberta Baker. The eye-ball was "cut through", the pupil was severed and part of it is now gone. Eighty per cent of the vision of the right eye was destroyed. She was 22 years of age at the time.

Appellants contend, as grounds for a reversal of the judgment, that (1) the evidence on negligence was so closely balanced that in the absence of prejudicial matter either plaintiff or defendant might have prevailed; (2) the inadmissible testimony of plaintiffs' witness Thoele indicating defendants had insurance coverage was so prejudicial the error could not have been cured by an order to strike it or an instruction to disregard it; (3) the circumstances under which this prejudicial matter was produced were such that the judgment is not saved by section 4½ of article VI of the Constitution.

Appellants do not urge that the amount of damages awarded was excessive in proportion to the injuries sustained. In support of the first claim it is argued that the evidence clearly discloses the fact that the jury indicated a desire to exonerate appellant driver and still award damages to respondents by reason of the fact that there was certain confusion in reference to the return of certain verdicts by the jury, and that when this was considered in connection with certain statements made by one of the witnesses for respondents it was strong evidence of the fact that the jury were informed that the owner of the truck was insured. The confusion existing in the minds of the jurors in reference to the various forms of the verdicts submitted becomes quite apparent upon an examination of the record and clarifies and explains the conduct of the jury in reference thereto, and becomes of value in dispelling appellants' contention.

Separate forms of verdicts were submitted to the jury bearing upon the liability and damages. One was submitted in favor of Harold and Alberta Baker against the defendant Rosendo Rodriguez only, and a space was left to provide for the amount of damages to be awarded. Another was submitted in the same form against the defendant Socorro Gonzales. No form of verdict was submitted in their cause of action finding in favor of Harold Baker and Alberta Baker against both of the defendants jointly. As to the other plaintiff, the court did submit a verdict against both defendants jointly and the jury used that form. The following excerpt from the record clearly accounts for the form of the verdicts as returned: "We the jury find in favor of Marion Baker and against the defendants Rosendo Rodriguez and Socorro Gonzales for the sum of $50." Another verdict was rendered in favor of plaintiffs Harold Baker and Alberta Baker against the defendant Rosendo Rodriguez in the sum of $5,000. The court thereupon ordered the jury to return and make a finding as to the other defendant Socorro Gonzales. Thereafter the jury returned a verdict in favor of plaintiffs Harold Baker and Alberta Baker against the defendant Socorro Gonzales in the sum of $1. The following colloquy then took place:

"The Court: As a matter of law that verdict cannot be rendered.

"The Foreman: We didn't have such instruction.

"The Court: Will it be stipulated the court state the law as to what may be done in a case of this kind?

"Mr. Tighe: Yes, Your Honor. * * *

"The Court: * * * Mr. Rodriguez is the owner of the truck, and his liability is limited to the liability of the driver. * * *

"The (Jury) Foreman: If we should place $5000 against the driver, which we found against the owner of the truck, would that necessarily mean that we were awarding $10,000?

"The Court: It would not, as a matter of law.

"The Foreman: We were confused by that and not having a legally trained mind we didn't know. * * * We were discussing that and we were undecided and were of the concensus of opinion that $1 would cover it and that is why we put it that way."

[1] We do not believe the facts related support appellants' argument in this respect.

The main complaint of appellants so earnestly stressed, involves certain statements made by a witness for respondents in reply to questions propounded. The witness, Mr. Thoele, who was traveling immediately behind the truck driver, and who testified that the truck driver gave no signal of his intended turn, and that he never spoke to the truck driver after the accident, was examined in chief by respondents' counsel, and after the usual introductory questions the following occurred:

"Q. (By Mr. Davis): Which way was the truck traveling just prior to the time of the accident? A. Due south. * * *

"Q. Did you later learn who was driving the truck? A. Yes, sir.

"Q. And how was that secured? A. The adjuster from the Maryland Casualty people told me it was a man by the name of Gonzales."

No motion was made to strike the answer, nor further objections made at the time. Appellants on a motion for new trial first objected to this particular answer and assigned it as improper, as indicating to the jury that the appellants were insured. The excuse for failure to make such assignment at the time was given as failure of both counsel for appellants to hear the answer given at the time.

Subsequently, on cross-examination, counsel for appellants brought out the following answer from the witness:

"Q. Did you measure it (distance between cars)? A. Yes, sir, I did.

"Q. How did you measure it? A. Your adjuster came down and we measured it together."

Mr. Tighe moved that the answer be stricken and it was stricken.

"Q. What means did you use to measure it? * * * A. Your adjuster stepped it off and I observed him as he stepped it and I counted the steps."

No motion was made to strike the answer to the last question. It is therefore contended that by reason of this line of examination it was suggested to the jury that the appellants were indemnified against any judgment for damages against them, and was highly prejudicial to their rights, especially in view of the fact that it was a closely balanced case, citing Schellenberg v. Southern California Music Co., 139 Cal.App. 777, 35 P.2d 156; Rising v. Veatch, 117 Cal.App. 404, 3 P.2d 1023; Citti v. Bava, 204 Cal. 136, 266 P. 954; Sischo v. City of Los Banos, 26 Cal.App. 2d 642, 80 P.2d 116, 1020, and Nichols v. Smith, 136 Cal.App. 272, 28 P.2d 693.

We have read the record presented and believe the quoted statement made by the trial judge in denying the motion for new trial to be reasonable. "This court is of the opinion that considering the case as a whole the jury was very justified in returning a verdict for the plaintiff, and further that the verdict as returned was not disproportionate to the damages sustained. This court feels that it would be doing a grave injustice if the motion for a new trial was granted." From this statement it is immediately apparent that the evidence on negligence in the instant case was not so closely balanced that in the absence of a showing of misconduct either party might have prevailed. To bring it within the rule of the cited cases this fact appears to be an essential element.

[2] In Haverty v. Hartwell, 139 Cal. App. 265, 33 P.2d 883, the court said: "Similar questions have arisen in cases involving misconduct of counsel in referring to the fact that the liability of the defendant is covered by insurance. In reviewing those cases the courts have held that, where the verdict is not excessive and the question of defendant's liability is not close, the misconduct will not be deemed prejudicial." In view of the fact that no motion was made to strike the answers complained of, with the one exception, the fact that the answer to two of the questions was elicited by counsel for appellants, and in view of the conclusion reached as to the convincing evidence of appellant Socorro Gonzales' negligence and the admitted fact that the judgment is not excessive, we are impelled to hold that the reference to the adjuster, even if we assume it to be misconduct, was not so prejudicial as to justify a reversal. Packard v. Moore, 9 Cal. 2d 571, 71 P.2d 922; Weis v. Davis, 28 Cal.App.2d 240, 82 P.2d 487; Toomes v. Nunes, 24 Cal.App.2d 395, 75 P.2d 94; Moniz v. Bettencourt, 24 Cal.App.2d 718, 76 P.2d 535; Nagamatsu v. Roher, 10 Cal. App.2d 752, 53 P.2d 174; Hughes v. Quackenbush, 1 Cal.App.2d 349, 37 P.2d 99; McKay v. Hedger, 139 Cal.App. 266, 34 P.2d 221; Moffitt v. Ford Motor Company, 135 Cal.App. 7, 26 P.2d 661; Hodge v. Weinstock, Lubin & Co., 109 Cal.App. 393, 293 P. 80. The cases cited by appellants are clearly distinguishable.

[3] No appeal lies from an order denying a motion for new trial. Tucker v. Beneke, 180 Cal. 588, 182 P. 299. The attempted appeal therefrom is therefore dismissed.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

40 Cal.App.2d 786

PEOPLE v. RINESMITH et al.

Cr. 3367.

District Court of Appeal, Second District,
Division 1, California.

Sept. 30, 1940.

1. Criminal law 🔑1144(13)

On appeal from conviction, evidence was viewed in the light most favorable to the prosecution.

2. Criminal law 🔑1170½(5)

Cross-examination of alibi witness to test strength or weakness of witness' recollection concerning persons he met, places he visited, and dates when he claimed accused was in his company, particularly with reference to day on which theft of complaining witness' money occurred, was not prejudicial.

3. Criminal law 🔑1170½(5)
Witnesses 🔑277(4)

In grand theft prosecution where accused was not questioned on direct examination as to his occupation, cross-examination disclosing that accused made his money by betting on horse races was not prejudicial, since it was proper to elicit source of his income as well as that of money in his possession at time of arrest.

4. Criminal law 🔑662(3)
Depositions 🔑89

The right of a defendant in a criminal action to cross-examine witnesses against him is of the highest importance, and a witness' deposition can only be offered in strict conformity with the statute authorizing it to be introduced on satisfactory showing that witness is dead or insane or cannot with due diligence be found within the state. Pen.Code, § 686.

5. Criminal law 🔑542

Where accused refused to stipulate to introduction of deposition of complaining witness in robbery prosecution and court thereupon permitted police officer to testify that witness was too ill to attend trial and testify, reading to jury of testimony given by complaining witness at preliminary examination was error, since illness of a witness is not one of grounds under statute which will permit such a deposition to be read at trial. Pen.Code, § 686.

6. Robbery 🔑24(1)

Where only evidence against accused consisted of a deposition of a witness who was shown to be ill but not shown to have been dead, insane, or not with due diligence to be found in the state as required by statute to permit reading of deposition, evidence was insufficient to sustain conviction of robbery. Pen.Code, § 686.

7. Criminal law 🔑1159(2)

Where evidence is equally compatible with a conclusion of innocence as it is with one of guilt, reviewing court is powerless to disturb the finding of jury in adopting by their verdict the hypothesis of guilt and rejecting the hypothesis of innocence, unless there is no evidence to support the implied finding that the hypothesis of guilt is the more reasonable of the two hypotheses.

8. False pretenses 🔑49(1)

Evidence sustained conviction for grand theft.

9. Criminal law 🔑1171(1)

Where district attorney made remark objected to as misconduct and district attorney then stated that remark was invited by argument of accused's counsel and counsel for accused failed to challenge statement that remark was invited, remark did not constitute "prejudicial misconduct."

See Words and Phrases, Permanent Edition, for all other definitions of "Prejudicial Misconduct".

10. Criminal law 🔑1071

Where accused failed to comply with requirements of court rules in assigning error with respect to argument of district attorney, District Court of Appeal would have been justified in refusing to consider an assignment. Rules for the Supreme Court and the District Courts of Appeal, rule 2, § 7.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Donley M. Rinesmith and Robert E. Keech were convicted of the crimes of robbery and grand theft, and, from judgments of conviction and order denying their respective motions for new trial, they appeal.

Judgments of conviction and order denying new trial as to charges of robbery reversed and remanded, and judgments of conviction and order denying new trial as to charges of grand theft affirmed.

Franklin B. MacCarthy, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In two informations which were consolidated for trial defendants were accused of the crimes of robbery and grand theft. Following trial before a jury, defendants were convicted on both counts. From the judgments and the order denying their respective motions for a new trial this appeal is prosecuted.

As to the robbery charge, the facts may be thus summarized: On the afternoon of January 8, 1940, Joe Overman, 66 years of age, was in a toilet at 125 South San Pedro street in the city of Los Angeles, when, according to his testimony, the defendant Keech grabbed him around his arms and body, making his approach from behind, and while he was thus pinioned by Keech defendant Rinesmith took from the pocket of Overman, the prosecuting witness, a billfold containing $40. After admonishing the victim "not to squawk", the robbers made their escape, taking with them the billfold and money heretofore mentioned.

[1] Viewing the evidence as to the grand theft charge in the light most favorable to the prosecution, as we are required to do following a guilty verdict, it appears that one Frank Wisniewski, a retired railroad man 70 years of age, was walking down a street in the city of Glendale, county of Los Angeles, in the forenoon of January 3, 1940, when he was accosted by appellant Keech, who asked for directions to a show. Immediately after that meeting defendant Rinesmith came up and Keech, referring to the subject of his conversation with complainant, said, "Maybe you can help us out a little," and the three thereupon engaged in conversation. The group then went to the Globe restaurant in Glendale and sat in a booth, where they were very shortly thereafter joined by a woman. The conversation turned upon the amount of money each of the trio had, and Keech represented himself to be in possession of a large sum and displayed a large roll of bills, offering to wager $100 against $5 that neither of the other men had a bank account. The complainant apparently accepted the wager, and thereupon went to his home with defendant Keech and secured a bank book evidencing the sum of $2,500 to his credit in a savings account in a Glendale bank. After the complainant showed the defendants this bank book, the defendant Keech offered to bet $700 against $25 that the complainant would be unable to withdraw the money from his bank. Defendant Rinesmith finally agreed to put up the $25 for the victim against the $700 offered by Keech, and the money was thereupon turned over to their girl companion to act as stakeholder. After the bet was posted the complainant went to the bank and withdrew $2,500 in cash and returned to the restaurant where the two defendants and the woman were waiting. All of them sat down in a booth, and the victim showed the others the $2,500 in anticipation of winning the $700. The complainant testified that Mr. Rinesmith somehow got the $2,500 out of his hand upon the pretext of examining it more minutely, and that he thereupon took the $725 from the girl and apparently put both piles of money together and wrapped the same up in a napkin, which he placed under complainant's shirt. The quartet remained in the restaurant for about an hour, whereupon the victim started for home, secure in the thought that he had not only his $2,500 but the wager as well. Giving the package to his wife, appellant discovered upon her opening it that all he had was a one-dollar bill wrapped around blank paper.

[2, 3] For their first ground of appeal appellants assert prejudicial error on the part of the trial court in refusing to limit the cross-examination of a defense witness, Don King, and appellant Rinesmith testifying as a witness in his own behalf. The witness King was called to establish an alibi for defendant Keech. While the cross-examination of this witness was minute and thorough, we perceive no resultant prejudice to defendant Keech therefrom. The cross-interrogatories in the main were such as to test the strength or weakness of the witness' recollection concerning persons he met, places he visited, and dates when he claimed defendant Keech was in his company, particularly with reference to the day the theft of Wisniewski's money occurred. The cross-examination did no violence to defendant Keech's substantial rights. Equally without merit is the claim

of appellant Rinesmith that prejudice resulted from his cross-examination by the district attorney. On direct examination this appellant was not interrogated as to his occupation, but on cross-examination he was asked where he was working at about the time when the charged offenses were committed, in response to which questions he testified that he was not working but made his money by betting on horse races. Appellant Rinesmith now contends that he was prejudiced by being compelled to admit that he made his money on the races. The complaint is trivial. Appellant was charged with robbery and theft. He denied on cross-examination that he took any money from either of the victims. It was proper cross-examination to elicit the source of his income as well as that of money in his possession. On cross-examination any fact may be elicited which the jury might deem inconsistent with the direct testimony of a witness, and the defendant testifying in his own behalf is in this respect put upon the same plane as other witnesses.

[4-6] We come now to a consideration of appellants' claim that the trial court erred in permitting the deposition of Joe Overman, the complaining and only witness in connection with the robbery charge set forth in count I of the information, to be read into evidence, when the only foundational showing was the testimony of a police officer that although the witness in question was within the county of Los Angeles, he was too ill to attend the trial and testify. Appellants' contention in this regard must be upheld. Upon the aforesaid showing the court permitted the evidence of the witness Overman taken at the preliminary examination to be read at the trial. Section 686 of the Penal Code provides that this kind of evidence may be introduced only "upon its being satisfactorily shown to the court that he" (the witness) "is dead or insane, or cannot with due diligence be found within the state". The right of a defendant in a criminal action to cross-examine the witnesses against him is of the highest importance, and the deposition of such a witness can only be offered in strict conformity with the statute. The fact that a witness, though within reach of process of subpoena, is too unwell to appear before the jury, is not one of the grounds which will permit such a deposition to be read at the trial. People v. Bojorquez, 55 Cal. 463; People v. Plyler, 126 Cal. 379, 58 P. 904. In the instant case the defendants refused to stipulate to the introduction of the "testimony". The court thereupon took testimony from the police officer as to the illness of the witness, and over defendants' protest ordered the testimony given by the complaining witness at the preliminary examination to be read to the jury at the trial. This was error. The deposition was incompetent, and as such deposition contained the testimony, the latter was also incompetent. The testimony contained in the deposition being the only testimony adduced against the defendants on the charge of robbery contained in count I, the judgment and order as to such count must be reversed.

[7,8] Appellants next urge that the evidence was insufficient to support the verdict rendered as to defendant Rinesmith on count II. As so often happens in cases of this type, the evidence is highly conflicting, especially as to defendant Rinesmith. But even though we concede that the evidence is equally compatible with a conclusion of innocence as it is with one of guilt, nevertheless we are powerless to disturb the finding of the jury in adopting by their verdict the hypothesis of guilt and rejecting the hypothesis of innocence, unless there is no evidence to support the implied finding of the jury that the hypothesis of guilt is the more reasonable of the two hypotheses. People v. Bresh, 33 Cal.App.2d 161, 163, 91 P.2d 193; People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389; People v. Newland, Cal.Sup., 104 P.2d 778. The complaining witness was positive in his identification of appellant Rinesmith and he had plenty of opportunity to observe such appellant upon the occasion when the money was lost. Other witnesses testified to circumstances which gave strength to the victim's identification of appellant Rinesmith as being one of the participants in the theft. If we assume, as we must, in favor of the verdict the existence of every fact which the jury could have reasonably deduced from such evidence, then the verdict is amply supported. When, as here, the circumstances are such as to reasonably justify the verdict of the jury, then, notwithstanding that this court might be of the opinion that those circumstances could also reasonably be reconciled with the innocence of the defendant, we are nevertheless without warrant to interfere with the determination of the jury thereon. That this is the law is directly and positively held by our Supreme Court in People v. Newland, supra.

Finally, appellants assert that in his closing argument to the jury the district attorney was guilty of prejudicial misconduct in what he said of and concerning Donald King, a witness called on behalf of defendant Keech. In that connection the record discloses the following:

"Mr. Barnes (Deputy District Attorney): * * * I am sure he does not want me to tell you anything outside of the record about this man King. I am sure he does not. And I will not go outside of the record, but I will say—

"Mr. MacCarthy (Defendants' Counsel): Just a moment, we object to that and assign that remark as misconduct.

"Mr. Barnes: Counsel invited it, when he made a remark of that kind in his argument of this case to the jury.

"The Court: The assignment will be denied."

[9, 10] The foregoing constitutes the only part of either the arguments of the defendants' counsel or of the district attorney to the jury that has been furnished to us on this appeal. True, defendants' counsel objected to the remarks of the district attorney, but the latter countered with the statement that what he said was prompted by a similar remark made by appellants' counsel in his address to the jury. While we do not commend the remarks made by the district attorney and have often reminded prosecuting officers of their duty to temper their remarks and to refrain from saying things or conducting themselves in a manner which may tend to prejudice the defendant, nevertheless in the state of the record before us it is entirely apparent that the district attorney was making the statement in question in response to the argument made on behalf of the defendants. Where, as here, the record indicates that the statement of the district attorney was invited, it is not prejudicial misconduct. People v. Kennedy, 21 Cal.App.2d 185, 206, 69 P.2d 224. Not only was it the duty of defendants' counsel to challenge the statement made by the district attorney that the former's argument to the jury prompted the latter's statement against which complaint is made; but appellants have failed to comply with the requirements of section 7 of rule II of the rules for the Supreme Court and the District Courts of Appeal, for which last-named reason this court might well refuse even to consider this assignment of error. However, having done so, we are compelled to say, under the state of the record before us, that we find in the comment made by the district attorney no misconduct sufficient to justify a reversal.

For the reasons herein stated, the judgments and the order denying defendants' motion for a new trial as to count I are, and each is, reversed, and the cause remanded for a new trial as to such count. The judgments and the order denying defendants' motion for a new trial as to count II are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.

41 Cal.App.2d 50

RIDGWAY v. SALRIN et al. (BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al., Interveners).

Civ. 6204.

District Court of Appeal, Third District, California.

Oct. 7, 1940.

1. Pleading 🔑**409(3)**

In mortgage foreclosure suit, plaintiff waived defective plea of statute of limitations by failure to demur to answer on such ground or otherwise raise objection to form of plea at trial. Code Civ.Proc. §§ 337, 339.

2. Limitation of actions 🔑**84(4), 85(5)**

Under statute authorizing commencement of action against person out of state when cause of action accrues within term therein limited after his return to state, and providing that if defendant leaves state after cause of action accrues, time of his absence is not part of time limited for commencement of action, time for commencing action in personam should be extended, if jurisdiction may not be acquired of absent person, but if action is in rem and complete jurisdiction of res is acquired, regardless of owner's absence, statute should not be tolled. Code Civ.Proc. § 351.

3. Limitation of actions 🔑**84(4)**

Where one to whom mortgagor conveyed mortgaged land took title subject to mortgage, but did not assume obligation thereof, nor become liable for payment of debt secured, time for commencing foreclosure action was not tolled by grantee's absence from state, as complete jurisdiction over land for purpose of foreclosure was acquired by publication of summons. Code Civ.Proc. §§ 337, 351.

4. Mortgages 🔑383, 440

Foreclosure of mortgage is proceeding in rem against mortgaged property, so that personal service of summons on owner thereof within state is not required to confer jurisdiction and summons on nonresident defendant in foreclosure suit may be served by publication.

5. Limitation of actions 🔑84(4)

The absence from state of owner of realty covered by mortgage, for payment of which owner is not obligated, does not prevent running of statute of limitations against mortgage lien. Code Civ.Proc. §§ 337, 351.

6. Limitation of actions 🔑84(4), 85(5)

The statute providing that action against person outside state when cause of action accrues may be commenced within term therein limited after his return to state and that if he departs therefrom after cause of action accrues, time of his absence is not part of time limited for commencement of action, does not suspend running of time within which mortgage foreclosure suit may be brought because of absence from state of mortgagor's grantee, who did not assume mortgage or become personally liable for any portion of debt secured. Code Civ.Proc. §§ 337, 351.

7. Mortgages 🔑421

In mortgage foreclosure suit, wherein court acquired jurisdiction of mortgagor, who was liable for entire debt secured and never absent from state, and also obtained jurisdiction against mortgagor's nonresident grantee, who did not assume mortgage or become liable for any portion of debt secured, by publication of summons, statute declaring conveyance of realty void as against subsequent bona fide purchaser or mortgagee, whose conveyance is first duly recorded, was inapplicable, though defendants failed to record such grantee's deed reconveying land to original owners. Civ. Code, § 1214.

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Action by A. L. Ridgway against Sarah S. Salrin and another to foreclose a mortgage, in which the Bank of America National Trust & Savings Association and another intervened. From a judgment against plaintiff, he appeals.

Affirmed.

Manwell & Manwell, of Marysville, for appellant.

Rich & Weis and Carlin & Fuidge, all of Marysville, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

In this proceeding to foreclose a mortgage the plaintiff has appealed from a judgment which was rendered against him to the effect that he take nothing in this suit for the reason that the action was barred by the provisions of section 337 of the Code of Civil Procedure.

It is contended the statute of limitations was tolled by the provisions of section 351 of the Code of Civil Procedure for the reason that the respondent, Sarah S. Salrin, the sister of plaintiff, to whom the mortgaged premises were conveyed by the mortgagor after the vesting of the mortgage lien, was at all times a resident of the state of Ohio. It is also asserted the defense of the statute of limitations was improperly pleaded in the answer by failure to designate the particular subdivision of section 337 of the Code of Civil Procedure upon which the respondents rely as a bar to the action.

The cause was determined on a written stipulation of facts. It appears that the defendants, Annie E. Ridgway and May E. Smith, were partners conducting a business in Sutter county, where they reside. They owned lots 51 and 52, subdivision 2, of Elmer tract in Sutter county, California. Mrs. Salrin and Annie E. Ridgway are sisters of the plaintiff. November 19, 1926, Annie E. Ridgway and May E. Smith, as partners, executed their promissory note for $315 to the plaintiff, A. L. Ridgway, payable in six months. On March 13, 1928, the partners also executed another promissory note to the plaintiff for the additional sum of $500, due in one year from the date thereof. On the last-mentioned date, May E. Smith conveyed her interest in the lots to her partner, Annie E. Ridgway, who executed a mortgage on the lots in favor of the plaintiff to secure both notes. The mortgage was duly recorded on that date. Two days later Annie E. Ridgway executed and recorded her deed to the lots to her sister, Sarah S. Salrin, who resides in Ohio. The grantee, Salrin, did not assume liability to pay the mortgage. May 19, 1931, Sarah S. Salrin and her husband reconveyed the lots to Annie E. Ridgway and May E. Smith as joint tenants. The reconveyance deed was delivered, but it was not recorded until September 30, 1937, after this suit of foreclosure was commenced. October 10, 1933, one Ivan B. Bean recovered judgment in San Francisco against Annie E. Ridgway and May E. Smith for the sum of $4,644.81, the abstract of which judgment was recorded in Sutter county. That judgment was assigned to the intervener in this case, Bank of America National Trust and Savings Association. The defendant, Salrin, never lived in California. The mortgagors were never absent from the state of California.

The suit to foreclose the mortgage was commenced September 29, 1937. The cause of action accrued March 13, 1929, when the $500 note became due and payable. The Bank of America, by leave of court, intervened in the action. The joint answer of all the defendants alleged that the foreclosure suit was barred "by reason of the provisions of sections 337 and 339 of the Code of Civil Procedure". No demurrer to the answer was filed. It was not contended at the trial that the statute of limitations was defectively pleaded. That question was raised for the first time on appeal. The court adopted findings in accordance with the foregoing statement of facts and determined that the foreclosure action was barred by the statute of limitations. A judgment was accordingly rendered against the plaintiff to the effect that he take nothing by his action. From that judgment this appeal was perfected.

[1] It is contended on the authority of Hart v. Slayman, 30 Cal.App.2d 556, 86 P.2d 861, that the defendants waived their right to the defense of the statute of limitations by failing to plead in their answer the particular subdivision of section 337 of the Code of Civil Procedure upon which they rely. The answer merely asserts that the action is barred by the "provisions of sections 337 and 339 of the Code of Civil Procedure". That allegation in the present case must be deemed to adequately raise the defense of the statute of limitations for the reason that no demurrer to the answer was filed. Churchill v. Woodworth, 148 Cal. 669, 676, 84 P. 155; Tofte v. Tofte, 12 Cal.App.2d 111, 54 P.2d 1137. In the Churchill case the court said in that regard [148 Cal. 669, 84 P. 158]: "No demurrer was interposed to the answer, which, for the purposes of the trial, was assumed to sufficiently present the defense, and the court made its findings thereon. Under these circumstances, we are satisfied that the attempt to plead subdivision 1 of section 339 should not be treated as a nullity, and that the objection to the manner of pleading it was waived by the failure of plaintiffs to urge such objection in the trial court."

In the Hart case, supra, upon which the appellant relies, we must assume that the plaintiff demurred to the defective plea of the statute of limitations contained in the answer or that the defective pleading was otherwise properly raised at the trial of the case. In the present case the plaintiff waived the defective plea of the statute by failure to demur to the answer on that ground, or to otherwise raise the objection to the form of the plea at the trial of the case.

[2, 3] Section 351 of the Code of Civil Procedure, upon which the appellant relies, reads: "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

The foregoing section was adopted for the benefit of creditors who possess causes of action, to preserve or extend their right of action as a matter of justice during the period following the accrual of the right of action during which the debtor or the party against whom the cause exists, is absent from the state of California so that the right of action may not be lost on that account. It follows that if the right of action is not barred or suspended by the absence of the person against whom it prevails, the running of the statute of limitations will not be thereby tolled.

It is claimed there is a conflict of authorities in various jurisdictions regarding the application of similar statutes. We are of the opinion these authorities may be readily reconciled. If the action is in personam and the jurisdiction of the court may not be acquired of the absent person of the creditor then the time for commencing the suit should be extended. If the action is in rem and complete jurisdiction of the res is acquired regardless of the absence of the owner thereof, on principle the statute should not be tolled. This is true whether the grantee be considered a necessary party to the suit or merely a proper party, for in a foreclosure proceeding jurisdiction may be acquired by publication of summons. The apparent confusion of authorities regarding the application of similar statutes arises in determining whether the causes of action are in personam or merely in rem. It is apparent that some suits partake of both characteristics. Hence the difficulty of applying the statutes extending the time for commencing the actions during the absence of parties against whom they exist.

This is a suit to foreclose a mortgage lien against land in California which was conveyed by the mortgagor and owner of the land to her sister in the state of Ohio after the mortgage was executed and recorded. The grantee took title to the land subject to the mortgage, but she did not assume the obligation of the mortgage nor did she become liable for the payment of the debt for which it was executed. Since, without personal service upon the absent grantee, a deficiency judgment could not be rendered against her in California, complete jurisdiction of the court over the land for the purpose of foreclosing the mortgage lien, was acquired by publication of the summons in spite of her absence from the state. We therefore conclude that, under the circumstances of this case, the provisions of section 351 of the Code of Civil Procedure has no application, and the time for commencing this action was not tolled by the absence of the grantee. The trial court therefore properly concluded that the suit was barred by the statute of limitations.

[4] It has been uniformly held in California that the foreclosure of a mortgage is, in its nature, a proceeding in rem against the mortgaged property, and that personal service of the owner thereof within the state is not required to confer jurisdiction. Summons upon a non-resident may be served in such a suit by publication. La Fetra v. Gleason, 101 Cal. 246, 35 P. 765; Blumberg v. Birch, 99 Cal. 416, 34 P. 102, 37 Am.St.Rep. 67; 18 Cal.Jur. 276, sec. 560.

Some statutes suspend the running of time during which an action may be commenced against an absent defendant conditioned upon his leaving no property within the state which would be subject to the payment of the particular claim. The California statute contains no such condition. Most statutes do not contain that condition. Nor does our statute specifically limit the suspension of the running of time within which the action must be commenced, to suits in personam. Construing similar statutes in other jurisdictions it has been held that the failure of the statute to limit the suspension of the time for commencing a suit against an absent defendant renders it applicable to both suits in rem and in personam, since the Legislature made no distinction between such classes of cases. These cases do not involve grantees who do not assume or become personally liable for the indebtedness. Many cases hold that the very purpose of the statute is to preserve the right of action against an absent defendant because jurisdiction to determine the cause could not be acquired while he was absent from the state and he might then defeat a just cause by deliberately absenting himself from the state; that while, in personal actions, jurisdiction cannot be acquired of one who is absent from the state by mere publication of summons, in suits which are strictly in rem the suspension of the statute should not apply because the remedy against the property within the state may be enforced without making the owner a party by personal service of process against him. (See headnote to brief and numerous cases cited on this subject in 119 A.L.R. at page 332.)

[5] In all of the cases relied upon by this appellant in support of his contention that the time for commencing this proceeding was suspended because the grantee lives in Ohio, either the original mortgagor who was liable for the debts was absent from the state or the subsequent grantees of the land assumed the mortgage and became personally liable for the debts secured thereby. In the present case the mortgagor was never absent from the state of California, and his absent grantee neither assumed the mortgage nor became liable for the debt secured thereby. The distinction above suggested is supported by many authorities. In Hogaboom v. Flower, 67 Kan. 41, 72 P. 547, the court said in that regard: "Having no

personal cause of action against any of the holders of the legal title, their presence or absence from the state was immaterial so far as her foreclosure proceedings were concerned. She had her proceedings in rem to enforce her mortgage lien."

The syllabus in that case correctly states the principle which was determined as follows: "The absence from the state of the owner of real estate upon which there exists a mortgage, but for the payment of which the owner is not obligated, will not prevent the statute of limitation from running against such mortgage lien."

It is true that if there is a personal liability against the owner and mortgagor of land within the state his absence will suspend the running of the statute of limitations. It is also true that even though the original owner of land conveys it to a grantee who is absent from the state and the grantee assumes the mortgage and becomes personally liable for the debt, even to the extent of a deficiency judgment, his absence from the state will have the effect of continuing the time within which the action must be brought.

In the case of Fielding v. Iler, 39 Cal. App. 559, 179 P. 519, in which it was held the statute of limitations did not bar the maintenance of a suit to foreclose a mortgage because it was suspended by the absence from the state of a grantee of the land, it definitely appears that the absent grantee by the terms of the deed specifically assumed and agreed to pay the mortgage debt and was primarily and personally liable to the mortgagee for the entire obligation.

In Redondo Imp. Co. v. O'Shaughnessy, 168 Cal. 323, 143 P. 538, a judgment of foreclosure of a mortgage was rendered in a suit which was brought more than four years after maturity of the note secured thereby, notwithstanding the fact that both the mortgagor and his subsequent grantee of the land were out of the state for a considerable period of time. It was there held that the absence of both the mortgagor and his grantee had the effect of suspending the limitation of time within which the action was required to be brought. Regardless of whether the grantee in that case assumed the mortgage and was personally liable for the debt, both he and the mortgagor were absent from the state. Of course the statute would be suspended under such circumstances because necessarily the person who was personally liable for the debt, whether it was the mortgagor or his grantee, was absent from the state.

In the case of San Diego Realty Co. v. Hill, 168 Cal. 637, 143 P. 1021, a mortgage on real property in California was foreclosed in a suit brought more than four years after the maturity of the note secured thereby. In accordance with the pleadings and facts of that case the court found that both the original mortgagor and his grantee were residents of another state, and that the mortgagor died subsequent to his conveyance of the property. It was held the original mortgagor was not a necessary party to the action, from which we conclude that the absent grantee assumed the mortgage and became personally liable for the debt secured thereby.

[6] In the case of Watt v. Wright, 66 Cal. 202, 5 P. 91, it was properly held in a suit for foreclosure of a mortgage that the statute of limitations was suspended by the absence from the state of the mortgagor of real property who was the sole person obligated to pay the debt. All other cases relied upon by the appellant in this case may be likewise distinguished. We find no authority in conflict with our conclusions that section 351 of the Code of Civil Procedure does not have the effect of suspending the statute of limitations within which time a suit may be brought on account of the absence from the state of a subsequent grantee of the land who does not assume the mortgage or become personally liable for any portion of the debt secured thereby.

[7] In view of our conclusion in that regard, it becomes unnecessary to determine the effect of the respondents' failure to record the deed of reconveyance, dated May 15, 1931, from Sarah S. Salrin to the original owners of the land until September 30, 1937, after the commencement of this suit of foreclosure. The court acquired jurisdiction of the mortgagor who was liable for the entire debt and who was never absent from the state. By publication of summons the court also obtained jurisdiction to foreclose the mortgaged land against the absent grantee who never assumed or became liable to pay any portion of the indebtedness, and against whom not even a deficiency judgment could be rendered. Section 1214 of the Civil Code therefore has no application to the issues of this case.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

MARTIN (CONTINENTAL CASUALTY CO., Intervener) v. CLINTON CONST. CO. et al.

Civ. 11222.

District Court of Appeal, First District, Division 2, California.

Oct. 3, 1940.

Rehearing Denied Nov. 2, 1940.

See 106 P.2d 629.

1. Automobiles 🔑244(3)

In action against contractor and its truck driver for injuries sustained by subcontractor's employee when he was run over by a truck, active negligence on the part of contractor and truck driver was established by evidence that subcontractor's employee was subject to call and directions of contractor, that an agent of the contractor called on subcontractor's employee to make certain adjustments on contractor's electrical vibrators, and that, while subcontractor's employee was on his way to do so, truck driver suddenly and without notice backed truck against the subcontractor's employee and ran over him.

2. Automobiles 🔑244(41)

In action against contractor and its truck driver by subcontractor's employee for injuries sustained when he was run over by truck, evidence sustained finding that subcontractor's employee did not assume the risk of injury.

3. Appeal and error 🔑1060(1)
Trial 🔑127

In action against contractor and its agent by subcontractor's employee for injuries, wherein insurance carrier of subcontractor intervened seeking reimbursement from defendants, and wherein plaintiff's witness on cross-examination testified that he spoke to attorney of subcontractor's employee, the eliciting from that witness on redirect examination that, when contractor's agent came to see the witness that morning, contractor's agent was accompanied by one whom the witness understood represented an insurance company, was error, but not prejudicial.

4. Automobiles 🔑243(4)

In action against contractor and its truck driver for injuries sustained by subcontractor's employee when he was run over by a truck, testimony of plaintiff's witness who was another truck driver on the same job, as to how truck drivers approached with a load of concrete and how they unloaded it, was admissible on the question of care and diligence exercised.

5. Appeal and error 🔑1053(3)

In personal injury action, judgment for plaintiff would not be reversed because of the admission of mortality tables, though prior to the date of the accident plaintiff had complained of certain ailments, where the trial court gave proper instructions as to the duty of the jury in determining the facts.

6. Workmen's compensation 🔑1789

In action against contractor and its agent by subcontractor's employee for personal injuries, wherein insurance carrier of subcontractor intervened, and wherein subcontractor's employee had introduced parts of award of Industrial Accident Commission in proceeding involving the same injuries, trial court properly sustained objection of subcontractor's insurance carrier to the balance of the award when offered by defendants, as against contention that entire award was "res judicata" and hence admissible, where the Industrial Accident Commission had no jurisdiction.

7. Trial 🔑296(3)

In personal injury action, instruction that, towards an invitee, those who have joined in the invitation, express or implied, are obliged to exercise ordinary care to keep the premises in a reasonably safe condition, "to give reasonable warning of known dangers" and to refrain from active negligence, was not objectionable in view of other instructions.

8. Negligence 🔑65

The fact that one voluntarily assumes a certain degree of risk is not conclusive of negligence.

9. Negligence 🔑105

Before it can be said that one has "assumed the risk" of a specified hazard, it must be shown that he had knowledge of the condition creating the hazard, since one does not assume the risks of danger which he has no reason to anticipate.

See Words and Phrases, Permanent Edition, for all other definitions of "Assumed the Risk".

10. Automobiles 🔑246(58)
Trial 🔑252(8)

In personal injury action for injuries sustained by plaintiff when run over by a truck, trial court did not err in refusing to give defendants' requested instructions applying to the case the doctrine of assumption of risk, where instructions were full and complete with respect to the ordinary risks, and there was no evidence of any knowledge on the part of plaintiff of any extraordinary risks.

11. Damages ⚷132(4)

$25,000 to one who was run over by a truck was not excessive, where he suffered a broken shoulder and crushed pelvis, and at the time of trial the pelvic cavity was deformed, one leg was an inch and a half shorter than the other, separation of the urinary organs had not been remedied, and the separation was considered permanent, and he had a fistula which would probably continue during his life, uncontradicted medical testimony was that injuries were permanent, expenses of treatment to date of trial were $3,722.23, and his loss in wages was in excess of $8,000.

12. United States ⚷3

A state cannot legislate effectively concerning matters beyond its jurisdiction and within territory subject to control by the United States.

13. Courts ⚷97(6)

The question whether the California Compensation Act was applicable in proceedings involving injuries sustained on Yerba Buena Island, the exclusive jurisdiction over which the State of California had ceded to the United States, was a "federal question" and the District Court of Appeal was bound to follow the decisions of the Supreme Court of the United States to the effect that the California Compensation Act was inapplicable. St.1897, p. 51; Pol.Code, § 33; St.1917, p. 831, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Federal Question".

14. United States ⚷3

The federal statute preserving right of "action" under state law for wrongful death occurring in place subject to exclusive jurisdiction of the United States did not extend the California Compensation Act to the Yerba Buena Island, exclusive jurisdiction over which the state had ceded to the federal government, and hence insurance carrier against whom an award had been made under the Compensation Act for injuries sustained by a claimant on that island was not entitled to subrogation in compensation claimant's action against third persons whose negligence caused the claimant's injuries. St.1897, p. 51; Pol.Code, § 33; St. 1917, p. 831, as amended, 16 U.S.C.A. § 457.

See Words and Phrases, Permanent Edition, for all other definitions of "Action".

15. Workmen's compensation ⚷1792

A decision of the Industrial Accident Commission in compensation proceeding did not, under the doctrine of "res judicata", conclusively establish the commission's jurisdiction over injuries sustained by a compensation claimant in territory under the jurisdiction of the federal government, in a subsequent action by the compensation claimant against third persons, where one of the third persons was not a party to the compensation proceeding. St.1917, p. 831, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

16. Appeal and error ⚷1170(12)

Where trial court's error in entering judgment in favor of plaintiff in intervention did not result in a miscarriage of justice, there would be no reversal. Const. art. 6, § 4½.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Dan W. Martin against the Clinton Construction Company and H. B. Gilman, for injuries sustained by the plaintiff when he was run over by a truck being operated by H. B. Gilman as agent of the Clinton Construction Company, wherein the Continental Casualty Company filed a complaint in intervention, alleging that it had paid, or had been obligated to pay, a certain sum to the plaintiff for such injuries as insurance carrier for the plaintiff's employer, and praying that it should be reimbursed by the defendants. The defendants answered the intervener's complaint in intervention, judgment was entered on a verdict in favor of the plaintiff, and the intervener and the defendants appeal.

Judgment affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Cooley, Crowley & Supple, of San Francisco, for respondent Dan W. Martin.

Keith & Creede, of San Francisco, for respondent Continental Casualty Co.

STURTEVANT, Justice.

Prior to the 1st of February, 1935, the state of California had commenced to construct a bridge leading from San Francisco to Oakland. The plan of that construction included the excavation of a tunnel through Yerba Buena Island and the construction of a roadway in said tunnel as a part of the bridge. Said island was ceded to the United States by the Mexican republic July 4, 1848. It is a naval reserve and has been since 1850. A contract was awarded to the Clinton Construction Company to put in place concrete structures from the eastern side of said island to the eastern portal of said tunnel. The latter company awarded a subcontract to Victor Lemoge to install certain electrical appliances. Lemoge sent one of his employees, Dan W. Martin, together with others, to do the work. In addition to the principal contract Victor Lemoge had another contract, an arrangement for doing extra and emergency electrical work on the job on a time, material and profit basis for the Clinton Construction Company. The intervener, Continental Casualty Company, executed policies as insurance carrier for Victor Lemoge. Martin had been in the employment of Lemoge for many years. Both Martin and Lemoge resided in, and Lemoge's principal place of business was in, and Martin's contract of employment was made in San Francisco. On February 21, 1935, the agents of the Clinton Construction Company were engaged in hauling wet concrete from the western side of said island to a point near the eastern portal. One of those agents was the defendant H. B. Gilman. The superintendent on the job for Clinton Construction Company was Harry McCloy. The individual specially in charge of placing the concrete was Antone Reginato. At about 1:30 p. m. the latter called upon Dan W. Martin to repair the connections to an electrical vibrator used in tamping the concrete. In company with McCloy he started to the place where the vibrator was located. On his way to that point he was struck, knocked down and run over by a truck being operated by the defendant Gilman. Later he filed an application with the Industrial Accident Commission to have his claim adjusted. The claim was brought against Victor Lemoge, Clinton Construction Company, and Continental Casualty Company. The Industrial Accident Commission on the 17th day of April, 1935, made an award in favor of Dan W. Martin against Continental Casualty Company and dismissing the claim as to Victor Lemoge and the Clinton Construction Company.

Some time prior to the 19th day of October, 1935, Dan W. Martin commenced this action. He named as defendants Clinton Construction Company and H. B. Gilman. He alleged that he was injured by the negligent operation of a truck being driven by H. B. Gilman in the business of the construction company. The date the original complaint was filed does not appear in the record, but an amended complaint was filed October 18, 1935. Still later an amendment was filed to the amended complaint. Both defendants answered, setting forth many denials and also pleading the contributory negligence of the plaintiff. The Continental Casualty Company filed a complaint in intervention, alleging that it "had paid or been obligated to pay" $17,222,23 and prayed to be reimbursed. The defendants answered the complaint in intervention. They pleaded many denials and the contributory negligence of the plaintiff. They further pleaded "* * * that the above named court has no jurisdiction of the subject-matter of the within action as to said defendant, or of the parties to said action, defendant Clinton Construction Company, plaintiff Dan W. Martin, and plaintiff in intervention Continental Casualty Company, a corporation, in that by reason of the employment relationship between plaintiff Dan W. Martin and defendant Clinton Construction Company jurisdiction thereof is vested solely in the Industrial Accident Commission of the State of California, pursuant to the provisions of the California Workmen's Compensation, Insurance and Safety Act of 1917, St.1917, p. 831, and amendments thereto."

The present trial was commenced on May 1, 1938, before the trial court sitting with a jury. At the conclusion of the case for plaintiff and plaintiff in intervention, defendants moved for a nonsuit upon the following grounds: "(1) Plaintiff was guilty of contributory negligence as a matter of law; (2) Plaintiff assumed the risk of injury; (3) Defendants were free from negligence; (4) Plaintiff in intervention had no standing in court as the accident occurred on federal territory and the state compensation act was therefore inapplicable; (5) Plaintiff in intervention had no right of subrogation as the accident occurred on federal territory; (6) The claim of plaintiff in intervention was barred by the statute of limitations; (7) Jurisdiction of the subject matter rested solely in the Industrial Accident Commission of the State of California; (8) Plaintiff in intervention was estopped from asserting any claim." The motion for nonsuit was denied as to all parties and on all grounds. Defendants urged the same grounds on motion for a directed verdict at the conclusion of the entire case. The motion was denied. Verdict of the jury was in favor of plaintiff and plaintiff in intervention and against both defendants in the sum of $25,000. Following denial of a motion for judgment notwithstanding the verdict on the grounds above stated, judgment was entered on the verdict. Other facts will be recited as and when it becomes necessary.

The Plaintiff's Case.

[1] The defendants contend the plaintiff did not prove the charge and that they were not negligent. They say the plaintiff's status was "either that of an employee of the defendant construction company or of a business invitee on premises under its control." Continuing they contend that if Martin was an employee his remedy was an application to the Industrial Accident Commission. But, as will hereinafter appear, said commission had no jurisdiction. Therefore our inquiry is limited to the plaintiff's claim as an invitee. The defendants assert there was no evidence that there was a latent or concealed defect in the premises. Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 560, 561, 296 P. 76. The plaintiff replies that he makes no claim to the contrary; but he says the evidence was sufficient to support his claim that the defendants were guilty of active negligence. Lucas v. Walker, 22 Cal.App. 296, 134 P. 374, 379. That claim we think is clearly sustained by the evidence. The specific facts are these. The plaintiff was in the Lemoge shop, a place of safety, but, subject to the call and directions of the defendant construction company. McCloy, the agent of the latter, called on him to go adjust the circuit serving one of defendants' electrical vibrators. McCloy said, "Follow me." The plaintiff did. While doing so he was led to the spot where the accident happened. Near by stood a pole on which the wires were supported which served the vibrators. As he passed that pole the plaintiff paused to inspect conditions at that point. However, McCloy walked on. While the plaintiff was inspecting said pole, the defendants suddenly and without notice backed their truck against him, knocked him down, and ran over him, causing the injuries complained of. These facts, we think, clearly bring the present case within the doctrine stated in Lucas v. Walker, supra.

The defendants next contend the plaintiff was guilty of contributory negligence which was a proximate cause of his injuries. The defendants point to the fact that the plaintiff did not follow immediately behind and in the footsteps of McCloy. But it was his duty to locate the break in the circuit. In pausing to look up at the top of the pole above mentioned we must assume he was performing one of the functions of the employment in which he was engaged. That it was his duty to exercise reasonable care to listen and look for dangerous conditions the plaintiff does not deny. However, he testified he did so and that no truck entered the cut or backed toward him until he had resumed his course in following McCloy, and shortly thereafter he heard it, but when he looked the truck was so close to him he did not have time to protect himself. In other words, the record does not show a set of facts showing that to look was to see, but plaintiff did not look. He said he did look and the truck was not in a position of potential danger to him at the time he looked.

[2] Closely allied to the last point is the contention that the plaintiff assumed the risk. As shown above that contention involves the application of that doctrine when the status of the claimant is that of an invitee. As so presented the subject was carefully considered in the recent case entitled DeGraf v. Anglo California Nat. Bank, 14 Cal.2d 87, 99–101, 92 P.2d 899. On the authority of that case it may not be said the verdict of the jury, holding in favor of the plaintiff on said issue, was not sustained by the evidence.

[3] The plaintiff called as a witness George B. Branch, one of the truck drivers for the defendant. On cross-examination he testified that before he went into court he spoke to Mr. Supple, one of the attorneys for the plaintiff. On redirect examination the following occurred:

"Mr. Supple: Q. Just one question: Did Mr. Gilman come down to see you this morning at the Standard station on Kearny Street? A. Yes, he did.

"Q. And who was with him? A. Mr. Johnson.

"Q. Who is Mr. Johnson? A. Well, I understand that he is—represents an insurance company.

"Mr. Alexander: Just a minute, your Honor, I assign this conduct on the part of plaintiff as misconduct, and with regret, because of the misconduct, I ask that the jury be discharged. * * *

"The Court: Motion denied."

The defendants, at this time, press the point claiming prejudicial error. That it was error we concede. But we are not inclined to hold the error prejudicial. The answer of Mr. Branch, "Well, I understand that he is—represents an insurance company", was no statement that any party to this action carried insurance; nor, if it did, that Mr. Johnson represented such insurance company. The mere possibility that such was the fact, as intimated in the attack of the defendants, is not sufficient to support a holding that the incident in question constituted prejudicial error.

[4] Over the objection of the defendants the plaintiff's witness Lyon, another one of the truck drivers on the job, testified as to how the drivers approached with a load of concrete and how they unloaded it. The defendants claim such evidence was erroneously received. Boone v. Bank of America N. T. & S. Ass'n, 220 Cal. 93, 29 P.2d 409. That case involved the habit of the decedent of driving his motorcycle at excessive speeds. The evidence objected to in the instant case involved a concise description of the work being done at the time of the accident. The evidence was clearly admissible "* * * on the question of care and diligence exercised by those charged with a lack thereof in the instant case." Perumean v. Wills, 8 Cal.2d 578, 583, 67 P.2d 96, 98.

[5] On the offer of the plaintiff the trial court admitted in evidence mortality tables. The defendants quote portions of the record which recite certain facts to the effect that the plaintiff had, prior to the date of the accident, complained of certain ailments. The defendants assert the plaintiff was not, therefore, at the time of the accident, a normal person of average good health and that the tables were not admissible. Morrow v. Mendleson, 15 Cal.App.2d 15, 21, 22, 58 P.2d 1302. But, in the present case, the trial court received the pertinent evidence as to the facts and gave a proper instruction as to the duty of the jury in determining the facts. No such instruction was given in Morrow v. Mendleson, supra.

[6] After the plaintiff had introduced parts of the award of the Industrial Accident Commission, the defendants offered the balance thereof, but the trial court sustained the objection of the intervener thereto. The defendants claim the entire award was res adjudicata and should have been admitted. But, as we have hereinafter shown, the Industrial Accident Commission had no jurisdiction and its award was not res adjudicata. The ruling of the trial court was correct.

[7] Acting on the request of the plaintiff, the trial court gave the following instruction: "Toward an invitee those who have joined in the invitation, express or implied, are obliged to exercise ordinary care to keep the premises in a reasonably safe condition, *to give reasonable warning of known dangers,* and to refrain from active negligence." The defendants have italicized the above words and assert the true rule is correctly stated in Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 560, 296 P. 76. They assert the instruction imposed on the construction company the duty of warning Martin of dangers that were obvious. If the above were the only instruction given on the subject treated therein, the objection might have merit. But the trial court gave several other instructions. One stated: "The law imposes upon everybody the duty of using ordinary care to see and observe that which is open and visible. * * *" Another stated: "The law required Mr. Martin, of course, to use his eyes and other faculties to protect himself from injury. If you find that he could have observed the approaching truck by the use of ordinary care on his part, but that he failed to use ordinary care * * *," he cannot recover. And again: "If you find that prior to the accident Mr. Martin observed the situation and the operations that were being carried on there, then I instruct you that he is charged with knowledge of the existing conditions." In other instructions the jury was told that the defendants were bound to exercise ordinary care and that expression was carefully

defined. Moreover, the jury was instructed: "You are cautioned not to select a single instruction or a portion of an instruction alone, but to consider all of the instructions in determining any issue in this case." Bearing in mind all of these matters, we think the instruction complained of could not have misled the jury.

[8-10] The defendants requested and the court refused to give several different instructions applying to the case the doctrine of assumption of risk. As to the ordinary risks of the work which the plaintiff was called upon to do in the particular place at the time of the accident, the instructions given were full and complete. As to any extraordinary risks there is no evidence the plaintiff had any knowledge thereof before going into the cut. "The fact that one voluntarily assumes a certain degree of risk is not conclusive of negligence." Rasic v. Schultheiss, 121 Cal.App. 560, 9 P.2d 550, 555. "And before it can be said that one has 'assumed the risk' of a specified hazard, it must be shown that he had knowledge of the condition creating the hazard. One does not assume the risks of danger which he has no reason to anticipate." DeGraf v. Anglo California Nat. Bank, 14 Cal.2d 87, 100, 92 P.2d 899, 905. Under the facts of this case we think the court did not err in refusing to give the said instructions.

[11] Finally the defendants contend that $25,000, the damage allowed by the jury, was excessive as a matter of law. That contention may not be sustained under the facts. In the accident the plaintiff suffered a broken shoulder and a crushed pelvis. The latter was an extreme condition. It included not only the breaking of pelvic bones but the tearing of many tissues. At the time of the trial the pelvic cavity was deformed, one leg was an inch and a half shorter than the other. At the time of the accident the urinary organs were so torn as to be separated. That separation has not been remedied and the plaintiff's doctors consider the condition permanent. The plaintiff has a fistula which will probably continue during his life. The uncontradicted medical testimony was to the effect that said injuries were permanent. The expenses of treatment down to date of the trial were $3,722.23. The plaintiff's loss in wages was in excess of $8,000. The award of the jury of $13,000 to cover the pain and suffering and permanent disability of the plaintiff may not, we think, be said to be excessive as a matter of law.

The Case of the Intervener.

[12, 13] As noted above the plaintiff was injured in an accident which occurred on Yerba Buena Island. That island was a part of the territory ceded to the United States by the treaty of Guadalupe Hidalgo, May 26, 1848. Out of a part of the territory so ceded the state of California was organized. The boundaries of the state were delineated in its constitution adopted in 1849. Sec. 1, Art. XII. That constitution was approved by the congress on September 9, 1850, by "An Act for the Admission of the State of California to the Union." 9 U.S. Statutes at Large, 452. That statute contains no reservation of rights in the federal government; but, commencing as early as November 6, 1850, the federal government took certain proceedings looking to the creation of a federal naval reserve. Then by Chapter LVI, Statutes of 1897, p. 51, the state ceded to the United States "exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, * * * provided * * * this State reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands." Having recited the foregoing facts, the defendants contend the Industrial Accident Commission had no jurisdiction to make an award and therefore the plaintiff in intervention had no right of subrogation and that the judgment in its favor should be reversed. Allen v. Industrial Acc. Comm., 3 Cal.2d 214, 215, 43 P.2d 787. The intervener controverts that proposition and claims the State Compensation Law applies to injuries suffered on federal territory where the contract is made on state territory. Lynch's Case, 281 Mass. 454, 183 N.E. 834, 86 A.L.R. 285. We concede at once that there are some expressions of the supreme court of Massachusetts in the case last cited tending to support the claim of the intervener. We concede also that there are other decisions of state courts that are more or less to the same effect. See note 86 A.L.R. 289. However, the point involves a federal question. It was clearly presented in the case of Murray v. Joe Gerrick & Co., 172

Wash. 365, 20 P.2d 591. The supreme court of Washington held that, in the absence of a federal law extending it, the Industrial Insurance Act of Washington did not extend over Puget Sound Navy Yard which is subject to the federal government's exclusive jurisdiction. The plaintiff applied to the Supreme Court of the United States for a writ of certiorari. The latter court carefully considered the facts and all of the justices concurred in a judgment affirming the decision of the supreme court of Washington. Murray v. Joe Gerrick & Co., 291 U.S. 315, 54 S.Ct. 432, 78 L.Ed. 821, 92 A.L.R. 1259. In 291 U.S. at page 318, 54 S. Ct. at page 433, 78 L.Ed. 821, 92 A.L. R. 1259, the court said: "The state Supreme Court held that the compensation act does not apply to territory beyond the authority of the state Legislature. *But it also held that act could not have any force in the navy yard, since it was adopted many years after the cession of jurisdiction by the state* and the consequent acquisition of the tract by the United States. In this the court was clearly right. After the effective date of the state's cession the jurisdiction of the federal government was exclusive (citing cases), and laws subsequently enacted by the state were ineffective in the navy yard (citing cases)." (Italics ours.) In Standard Oil Co. v. California, 291 U.S. 242, at page 245, 54 S.Ct. 381, 383, 78 L. Ed. 775, the court said: "A state cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject to control by the United States." The same rule is set forth in section 33 of the Political Code. This being a federal question the state courts are bound to follow the decisions of the Supreme Court of the United States. It will serve no purpose therefore to discuss the decisions of the state courts.

[14] On February 1, 1928, the congress enacted a statute regarding actions for death or personal injury within national parks or other place under jurisdiction of the United States. U.S.C.A., title 16, sec. 457. The intervener quotes it and contends that its rights to subrogation were confirmed thereby. The same contention was made in Murray v. Joe Gerrick & Co., supra. The Supreme Court of the United States also carefully considered that contention. Among other things it said: "This argument overlooks the fact that the federal statute referred only to actions at law, whereas the state act abolished all actions at law for negligence and substituted a system by which employers contributed to a fund to which injured workmen must look for compensation."

[15] The intervener further contends that under the doctrine of res adjudicata the decision of the Industrial Accident Commission in the case of Dan W. Martin v. Victor Lemoge and Clinton Construction Company conclusively established the jurisdiction of the Industrial Accident Commission of California over Dan Martin's injuries. We think the contention is without merit. The defendant H. B. Gilman was not a party to the proceeding before the commission and was not in any manner bound by its award. Furthermore, as shown above, the accident occurred on Yerba Buena Island, a reservation of the United States, over which the jurisdiction of the congress is exclusive, and over which the state of California had no jurisdiction. All of these facts appearing in the record it is clear said award was not res adjudicata.

[16] It follows that the trial court erred in ordering a judgment entered in favor of the plaintiff in intervention. But the defendants have not shown, and we cannot see any basis for holding that the error, under all the facts contained in this particular record, has resulted in a miscarriage of justice. Before this court orders a reversal that showing must be present. Const., art. VI, sec. 4½; Tupman v. Haberkern, 208 Cal. 256, 280 P. 970. In the cited case, at page 263, of 208 Cal., at page 973 of 280 P., Mr. Justice Shenk, speaking for the court, quoted with approval: "The trial court decides as to the facts, the court of review (in this state) as to questions of law only." Then, speaking of section 4½, he said: "The theory of that section is based upon the assumption that the reviewing court may find error in the record as a matter of law, and the effect of the section was to release the reviewing court from the rigid rule that prejudice was presumed from error and to enjoin upon the reviewing court the duty to declare, when confronted in the record with any one or more of the enumerated errors, whether the error found to exist has resulted in a miscarriage of justice, and not to reverse the

judgment unless such error be prejudicial." The plaintiff is not complaining of the error and we think the defendants are not prejudiced.

The judgment is affirmed.

I concur: NOURSE, P. J.

I concur in the judgment: SPENCE, J.

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FATJO et al. v. O'CONNELL et al.

Civ. 11262.

District Court of Appeal, First District, Division 2, California.

Oct. 8, 1940.

Rehearing Denied Nov. 7, 1940.

Hearing Denied Dec. 5, 1940.

1. Landlord and tenant 🔑231(3)

In suit for additional rentals under lease of land used for pasturing cattle, where lease called for minimum annual rental with stipulation for additional payment in event average sales price for any one year of "good grade grass slaughter steer cattle" exceeded 6 cents per pound and provided that average sales price was to be determined from printed daily market livestock summary, or in event such was unavailable parties could use records of sellers and buyers of cattle from demised premises, trial court properly admitted records taken from books of sellers and buyers, where it appeared that market service became unavailable because printed summary failed to contain entries regarding grade of cattle specified in lease.

2. Landlord and tenant 🔑231(8)

In suit for additional rentals under lease of land used for pasturing cattle, which provided for annual rental with stipulation for additional payment in event average sales price for any one year of "good grade grass slaughter steer cattle" exceeded 6 cents per pound, evidence supported finding that lessors failed to prove that they were entitled to additional rentals.

◆

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Suit by Luis Fatjo and others against Frank O'Connell and others, for rentals allegedly due under a lease, wherein defendants filed a cross-complaint to recover what they claimed they had overpaid on account of rentals. From a judgment denying a recovery to both plaintiffs and defendants, the plaintiffs appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Sullivan, Roche & Johnson, of San Francisco, for appellants.

Maurice J. Rankin and C. C. Coolidge, both of San Jose, for respondents.

NOURSE, Presiding Justice.

The plaintiffs appeal from a judgment adverse to them in a suit involving rentals under a lease tried before the court without a jury.

The lease in question was executed on June 1, 1936, for a term of five years commencing November 1, 1936, covering approximately 45,000 acres of land used for the pasturing of cattle. It called for a minimum annual rental of $32,000 with a stipulation for additional payment by the lessee in the event that the average sales price for any one year of "good grade grass slaughter steer cattle (900-1100 lbs.)" exceeded six cents per pound.

The controversy between the parties centers on the average sale price of such cattle in the years 1937 and 1938, the plaintiffs alleging that such price was 9.48 cents per pound for the year 1937 and 8.171 cents per pound for the year 1938. The defendants, on the other hand, contend that the average sales price of such cattle was not in excess of 8.545 cents per pound for the year 1937 and not in excess of 7.03 cents per pound for the year 1938. On the basis of what the defendants then believed these factors to be they paid for the year 1937 in excess of the $32,000 stipulated rent the sum of $4,320, and on the same basis they paid for the year 1938 an additional rental of $1,875. They now claim that they paid too much. The plaintiffs disputed both of these items and upon the basis of their estimate of the average sales price of such cattle claimed the sum of $900 to be due in excess of the additional sum paid by the defendants for the year 1937, and the sum of $1,381.50, in addition to the sum paid by the defendants for the year 1938. Plaintiffs brought the action to recover these two additional sums, and the defendants filed a cross-complaint to recover what they claimed they had over-paid on account of rentals for these two years.

The lease provided that for the purpose of determining the average sales price of such "good grade grass slaughter steer cattle (900-1100 lbs.) for any of said years, the records of the Federal State Market News Service as published in the daily livestock market summary of the United States Department of Agriculture issued at San Francisco shall be used, taking the average daily sales at South San Francisco Market for good grade grass slaughter steer cattle (900-1100 lbs.) for the months of May, June, July, and August of each of such years". A specimen copy of one of such market summaries was attached to the lease and identified by appropriate markings showing the sales price of such cattle for the particular day for which the summary was issued. The lease then provided: "In the event that the above market service is not available then the parties of the first part shall have the right to use the records taken from the books of the sellers and buyers of slaughter steer cattle sold from said ranch during the months of May, June, July and August of each of such years."

The plaintiffs introduced in evidence the printed daily market livestock summary issued at San Francisco for the months of May, June, July, and August of the years 1937 and 1938. The defendants introduced in evidence sales books and records showing sales of cattle from the demised premises for the same months. The printed summaries offered by the plaintiffs show only thirty-nine quotations for the year 1937—twenty in the month of May, nineteen in the month of June and none in July or August. They show only sixteen quotations in the year 1938—fifteen in May, none in June, one in July and none in August. The sales books and records of buyers and sellers of cattle from the demised premises offered in evidence by the defendants show sales of grades of cattle many of which were not in contemplation of the lease.

[1, 2] Upon this evidence the trial court found that the plaintiffs had failed to prove a case for any recovery under their complaint, and that the defendants had failed to prove a case for any recovery under their cross-complaint. In appealing from this judgment the plaintiffs ask us for a reversal upon the grounds that the trial court misconstrued the lease "as to permit reference to data other than such quotations for the purpose of determining such average price". We do not understand that such question is of any importance on this appeal. There is nothing here but the simple question whether, when the trial court finds upon conflicting evidence that the plaintiffs have failed to prove the allegations of their complaint, the appellate court will substitute its own judgment and make a contrary finding. Here the terms of the lease are plain and call for no intricate interpretation. The parties agreed that the additional rentals would be paid on the basis of an increased average sales price of such cattle "for any of said years". To determine this factor they agreed that the average sales "for the months of May, June, July and August of each of such years" should be the basis of computation. They did not agree that the average sales shown for any one or any two or any three of the four months named should be accepted as determining the average sales "price" for the entire year. To avoid the possibility that the market summaries which had been taken for the purpose of determining this average price might be incomplete, they expressly provided that if such "market service is not available" then the parties might use the records of the sellers and buyers of such cattle from the demised premises. Now such service would become unavailable, if the plaintiffs were unable to procure printed copies of the reports, or if the service suspended publication altogether, or if the printed summaries failed to contain entries regarding the grade of cattle specified in the lease. The trial court properly concluded that the market service became unavailable because of the latter contingency, and therefore admitted evidence of sales from the demised premises. There was no error in admitting these records in evidence in the first instance since the parties stipulated that "these records taken from the books of the sellers and buyers of slaughter steer cattle sold from said ranch" should be resorted to for the purpose of determining the average sales price for any one year of the grade of cattle mentioned in the lease. It may be that some of the entries in some of these records relating to the sale of cattle of a grade other than that covered by the lease were not pertinent to the issues involved, but if so this evidence was not prejudicial to the appellants' case as no recovery was allowed to the respondents on the basis of

these sales. It should be borne in mind that the trial court was confronted with the problem of determining the average sales price throughout the year for the particular grade of cattle mentioned in the lease; that for this purpose it sought to find the average sales price for such cattle for the months of May, June, July and August as indicative of the average sales price throughout the year; that if the market reports did not show this fact, the court was to resort to the records of the sales off the ranch during a similar period. In this respect the able trial judge filed with the judgment above noted a written opinion detailing the difficulties arising from the want of competent and substantial proof. A portion of that opinion we quote with our full approval:

"The average sales price throughout the year of these good grade grass slaughter steer cattle (900-1100 lbs.) by the terms of the lease, as above noted, may be established by showing the average sales price through the months of May, June, July and August of such years. This is so because the contracting parties agreed to this. But the contracting parties did not agree that the average sales price of such cattle throughout the year should be determined by the average sales price for the months of May and June only of one year, nor of the months of May and July only of one year; and this is all that the plaintiffs have attempted to prove, even if full effect were given to all of the market reports claimed to show any such sales.

"But the proof of the plaintiffs is, in fact, much less than that; for an examination of the reports for the thirty-nine days in 1937 and the sixteen days in 1938, which they offer for that purpose, shows that the majority of the quotations relied upon were not for sales of grass cattle. The other quotation for July of 1938 was for a load of 'fed cattle', and, apparently, no grass cattle were sold that day of any kind. Therefore, the plaintiffs' proof for the year 1938 would be limited to fifteen sales during the month of May only, with no sales shown for three-fourths of the period. The court made some attempt to check up the separate reports for the several years relied upon by the plaintiffs, to ascertain how many of those reports would show any actual sales of good grade grass slaughter steer cattle (900-1100 lbs.); and the data supplied by these market reports was so vague as to afford satisfactory evidence of such sales on only a very few days—not enough, indeed, to be statistically significant.

"The Court made an effort to reach some conclusion as to what was the average sales price upon which to base the rental value under all of the terms of this lease, and it has been unable to do so from the evidence introduced before it. There seems to be but one solution to the problem and that is on the principle that the burden of proof rests upon the plaintiffs. It is the duty of the plaintiffs to show by a preponderance of evidence that there is rental due under the lease, and unpaid. It is conceded that the minimum rental of thirty-two thousand dollars ($32,000.00) per annum has been fully paid. The plaintiffs contend that the basic price of cattle for the two years in question exceeded the sum of six cents (6c) per pound. They have not proven that alleged fact to the satisfaction of the court.

"On the other hand, it is admitted that the defendants have paid considerable additional sums as rental over the minimum price of thirty-two thousand dollars ($32,000.00) during each year. It is their contention that they have paid in excess of the amount due. Upon that basis they have asked for affirmative relief in the return of such alleged excess payments. They have failed to convince the court that they have paid in excess of what was due. In any event, it would appear to the court that such payment was a voluntary payment, being made in possession of full knowledge of all the facts and, accordingly, they are not entitled to recover. And because the plaintiffs have failed to prove their case by a preponderance of the evidence, or by evidence satisfactory to the court, they are not entitled to recover."

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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16 Cal.2d 369

E. H. RENZEL CO. v. WAREHOUSEMEN'S UNION I. L. A. 38–44 et al.

S. F. 15923.

Supreme Court of California.

Oct. 14, 1940.

1. Injunction ⇨144

Where injunctive relief is sought by a verified complaint, the complaint takes the place of an affidavit, and the facts stated therein must stand the same test as oral testimony.

2. Injunction ⇨144

The averments in a verified complaint upon which an injunction is sought which are but conclusions of law are not competent testimony, though they might be sufficient as matter of pleading.

3. Injunction ⇨144

A verified complaint is insufficient to sustain an application for injunction, unless conclusions of law alleged therein are supported by allegations of fact.

4. Injunction ⇨147

Where neither verified complaint of employer, seeking to restrain trade union from picketing employer's place of business and from interfering with conduct of its business by means of boycott, secondary boycott, and similar activities, nor oral testimony, included facts showing that employer had or would suffer any damages as result of trade union's acts, the granting of a temporary injunction was improper.

5. Injunction ⇨126, 128

Plaintiff has burden of proving actual or threatened injury to be entitled to injunctive relief, and court cannot infer harm from mere proof of acts intended to harm.

6. Injunction ⇨144

The general statements in verified complaint "that great and irreparable injury will result" from acts described by plaintiff, standing alone, had no probative force, and could not be made basis for temporary injunctive relief.

7. Injunction ⇨118(2)

Facts concerning irreparable injury which, it is asserted, will result to complainant unless protection is extended to him, must be pleaded in order that court can consider whether his apprehensions are well founded, and a mere allegation that such injury will result is not sufficient.

8. Injunction ⇨118(1)

The complaint for an injunction which alleges only general conclusions, not warranted by any pleading of facts, does not state a cause of action to enjoin the acts complained of.

CURTIS and SHENK, JJ., and MARKS, Justice pro tem., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; Charles W. Davison, Judge.

Suit by E. H. Renzel Company against Warehousemen's Union I. L. A. 38–44, an unincorporated association, and others, to restrain defendants from picketing plaintiff's place of business, and from interfering with conduct of its business by means of boycott, secondary boycott, and similar activities. From an order granting a temporary injunction, defendants appeal.

Reversed.

For prior opinion, see 89 P.2d 435.

Richard Gladstein, Aubrey Grossman, and Gladstein, Grossman & Margolis, all of San Francisco, for appellants.

Henry B. Lister, of San Francisco, and Nathaniel H. Jones, Jerome R. Hellerstein, Carol King, and Osmond K. Fraenkel, all of New York City, amici curiae.

H. A. Gabriel, of San Jose, and I. M. Peckham, of San Francisco, for respondent.

EDMONDS, Justice.

At the suit of the respondent, a corporation engaged in the wholesale grocery business, the appellants were enjoined from picketing its place of business, and, also from conducting a secondary boycott by representing to its customers that it "is unfair to organized labor".

[1-3] Upon the filing of the verified complaint, a temporary restraining order issued and when the matter came on for hearing in response to an order to show cause, testimony was offered and received from both sides. This procedure was apparently by agreement that the facts determinative of the right to an injunction pendente lite should be presented in this way rather than by affidavit. The complaint was also considered as part of the respondent's evidence, but it is settled law that where this practice is followed, the pleading "takes the place of an affidavit and must be treated as such; and the facts so stated must stand the test to which oral testimony would be subjected. Averments which are but conclusions of law are not competent testimony, though they might stand as matter of pleading. Unless the statement in the nature of a conclusion is supported by the facts or circumstances on which it rests, it is insufficient to sustain an application for injunction". Willis v. Lauridson, 161 Cal. 106, 108, 118 P. 530, 531.

Briefly stated, the following facts were shown by the complaint and the testimony introduced at the hearing.

At the time the controversy between the parties arose, the respondent maintained warehouses for the storage of merchandise and had about 45 employees, 23 of whom were warehousemen and teamsters and the remainder executives, clerical workers and salesmen. Their average wage was about $29 for a 45-hour week, plus a yearly bonus equal to about three weeks' salary. There was no dispute between respondent and its employees concerning wages or working conditions.

The warehousemen had union shop contracts in force with two wholesale grocers in San Jose. The minimum wage in that locality under the union scale was over $30 for a 44-hour week of work substantially the same as that performed in respondent's warehouse. Six of the respondent's employees applied for membership in the Warehousemen's Union, and through the appellant Montes it solicited the grocery company to sign a union shop contract. This the company refused to do, but Montes was told at the same time that he was free to persuade the men to join the union. Thereupon the appellants caused pickets to be placed at the respondent's places of business. These pickets "merely walked up and down", carrying banners bearing the inscription "Renzel's Grocery Company unfair to Organized Labor". However, upon several occasions the pickets followed the respondent's truck to customers' places of business and told them that the grocery company was unfair to organized labor.

The complaint includes two letters, which it is alleged, were sent by the appellants to the respondent's customers. These letters which purport to have been signed by Montes state that two other wholesale grocery firms "have been organized and have agreements with the Teamsters' Union and the Warehousemen's Union and have been paying the union scale for the past three months", but respondent "refused to sign an agreement to pay the scale of both unions" and that the Labor Council has placed plaintiff on the "Unfair" and "We Don't Patronize" lists. The letters also requested the addressees to refrain from patronizing the respondent, and stated "we don't like to use our boycott against your merchandise" and "we are going to extend our campaign and take further action against Renzel Grocery Company and all stores and markets that continue to buy merchandise from this unfair firm".

From the testimony it appears that after the temporary restraining order was granted and prior to the hearing upon the order to show cause, 19 or 20 of the grocery company's employees made application to join the Teamsters' Union, an affiliate of the A. F. of L. Although the Warehousemen's Union is a C. I. O. affiliate, it is evident from the letters set forth in the complaint that it acted in cooperation with the Teamsters' Union, and the present case is not one in which a C. I. O. union picketed a shop already organized by A. F. of L. So far as this controversy is concerned, the jurisdictional lines between the teamsters and warehousemen seem to have been agreed upon by them, and the briefs argue the case as one in which a union is attempting to unionize a nonunion shop.

[4] However, aside from other questions, there is a fatal omission in the proof in this case which requires a reversal of

the judgment. Neither the complaint nor the oral testimony includes facts showing that the respondent has or will suffer any damage as a result of the appellants' acts.

The complaint alleges that the appellants "caused pickets to be placed in front of plaintiff's warehouse and said pickets carried signs and banners with the inscription painted thereon, 'Renzel Grocery Co. is unfair to organized labor' and * * * [the appellants] have ever since and do now maintain said pickets during business hours, in front of plaintiff's place of business". Other allegations are that the appellants, "with the intent and desire to damage" the grocery company, sent letters which were pleaded in full, but there is no showing of the effect, if any, of these acts upon the appellants' operations. Testimony offered on behalf of the respondent substantiated these allegations, but goes no further than to prove that the acts charged to have been committed by the appellants took place. There is no evidence whatever that the respondent suffered any damage or even had reason to believe it would suffer damage because of any act of the appellants.

[5-8] It is not enough to prove that one did certain acts with intent to injure another. To entitle a plaintiff to injunctive relief the burden is upon him to prove actual or threatened injury, and a court may not infer harm from mere proof of acts intended to harm. This omission is not cured by the general statements of the respondent's complaint "that great and irreparable injury will result" from the acts described by the pleader. It has always been the rule in this state that such averments standing alone, have no probative force and cannot be made the basis for injunctive relief. Facts concerning the irreparable injury which, it is asserted, will result to the complainant unless protection is extended to him must be pleaded in order that the court may consider whether his apprehensions are well founded. A mere allegation that such injury will result is not sufficient. Willis v. Lauridson, supra, 161 Cal. at page 117, 118 P. 530; California Nav. Co. v. Union Transp. Co., 122 Cal. 641, 55 P. 591; Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 P. 703; Golden Gate S. T., Inc., v. San Francisco, 21 Cal.App.2d 582, 585, 69 P.2d 899; Martin v. Danziger, 21 Cal.App. 563, 132 P. 284. A complaint for an injunction which alleges only general conclusions, not warranted by any pleading of facts, does not state a cause of action to enjoin the acts complained of. Davitt v. American Bakers' Union, 124 Cal. 99, 56 P. 775; People v. Seccombe, 103 Cal.App. 306, 284 P. 725.

The order appealed from is reversed.

We concur: GIBSON, C. J.; CARTER, J.; MOORE, Justice pro tem.

We dissent: CURTIS, J.; SHENK, J.; MARKS, Justice pro tem.

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16 Cal.2d 309

Ex parte PUTER.

Cr. 4302.

Supreme Court of California.

Oct. 7, 1940.

1. Habeas corpus 🔑53

A petition filed in Supreme Court to vacate and set aside judgment and legal restoration to sanity could be treated only as a petition for writ of habeas corpus, since there was no provision of law authorizing the filing in the court of a petition to vacate and set aside judgment and legal restoration to sanity.

2. Habeas corpus 🔑62

Where matters set forth in so-called petition to vacate and set aside judgment and legal restoration to sanity, which was filed in Supreme Court and which could be treated only as a petition for writ of habeas corpus, had been fully, thoroughly and correctly disposed of by District Court of Appeal in proceedings involving petitioner, petition would be dismissed, and writ of habeas corpus discharged and petitioner remanded.

In Bank.

Proceeding in the matter of the application of Robert C. Puter for a writ of habeas corpus. On petition to vacate and set aside judgment and legal restoration to sanity.

Petition dismissed, writ discharged and petitioner remanded.

Robert C. Puter, in pro. per.

F. Walter French, of San Francisco, for respondent.

PER CURIAM.

[1] The above application can be treated only as a petition for a writ of habeas corpus, as there is no provision of law which authorizes the filing in this court of a petition "to vacate and set aside judgment and legal restoration to sanity".

[2] All the matters set forth in the above-entitled application were fully, thoroughly and correctly disposed of by the District Court of Appeal for the First Appellate District, Division One, on March 23, 1940, in the matter of People of the State of California, Plaintiff and Respondent v. H. A. Cowan, true name Robert C. Puter, defendant and appellant, in an opinion written by Mr. Justice Ward and concurred in by Mr. Presiding Justice Peters and Mr. Justice Knight of that court, appearing in 38 Cal. App.2d 144, 100 P.2d 1079, which decision has become final.

The so-called petition "to vacate and set aside judgment and legal restoration to sanity" is dismissed; the writ is discharged and petitioner is remanded.

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16 Cal.2d 296

SHIVERS v. LIBERTY BUILDING-LOAN ASS'N et al.

L. A. 16834.

Supreme Court of California.

Oct. 4, 1940.

1. Evidence 🔑397(2)

Where the parties to an agreement adopt a writing as the final and complete expression of that agreement, an integration results, and the act of embodying those terms in the writing becomes the contract, so that extrinsic evidence to vary the terms of the written instrument is inadmissible.

2. Evidence 🔑397(1)

The rule that extrinsic evidence is inadmissible to vary terms of a written instrument applies when there is a writing which has been accepted as the final memorial of the agreement of the parties.

3. Evidence 🔑442(1)

In suit to restrain foreclosure sale under second deed of trust given to mortgagee by mortgagor together with Home Owners' Loan Corporation bond and to have the deed and note secured thereby declared void, parol evidence was admissible to prove that mortgagor agreed to give mortgagee a note secured by second deed of trust as part of consideration for mortgagee's release of senior lien, where there was no integration intended by the parties to the consent to take bond and it was only one of several instruments sent to the escrow holder as the basis for refinancing the property.

4. Contracts 🔑123(1)

A note and deed of trust required by a creditor in addition to bonds of Home Owners' Loan Corporation for release of creditor's first lien, if executed with knowledge and consent of such corporation, are valid and enforceable, but, where such instruments are secretly or fraudulently exacted by the creditor, they are void.

5. Contracts 🔑123(1)

Where creditor disclosed to Home Owners' Loan Corporation that creditor would not agree to proposed refinancing and release first lien unless creditor received a note secured by second trust deed, and the refinancing arrangement was consummated notwithstanding such disclosure, the note and second trust deed were valid.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Shedrick E. Shivers against the Liberty Building-Loan Association and others to restrain foreclosure sale, to have note and trust deed declared void, and to quiet title. From an adverse judgment, plaintiff appeals.

Affirmed.

For prior opinion, see 101 P.2d 493.

Charles S. Darden, of Los Angeles, for appellant.

M. J. Rankin, Milo V. Olson, and Walter S. Home, all of Los Angeles, for respondents.

EDMONDS, Justice.

The decisive question in this case concerns the validity of a $300 note secured by a second deed of trust exacted of the appellant by the respondent Liberty Building-Loan Assn. as a condition of its assent to the refinancing of a mortgage debt by the Home Owners' Loan Corporation.

The record shows that in 1934 the appellant sought the help of the Home Owners' Loan Corporation. He then owed the building and loan association a balance of $2,228 upon a note secured by a deed of trust upon his home. This obligation was finally refinanced. The appellant executed a deed of trust to the government agency to secure a note, the proceeds of which was paid to the association in the form of bonds. The association also received a note for $300 executed by the appellant and secured by a second deed of trust upon the property.

The appellant thereafter defaulted in making payments upon the $300 note and upon the institution of proceedings to foreclose the deed of trust securing it, he filed the present action asking that the sale of the property be restrained, that the $300 note and second trust deed be declared void, and that his title to the property be quieted against that encumbrance.

Upon trial of the cause the appellant testified that although his signature appeared on the note and trust deed, he had no remembrance of signing either of them and had refused at all times during the refinancing negotiations to agree to give the building and loan association any consideration in addition to the bonds. In conflict with this testimony was evidence offered on behalf of the association indicating that it had always insisted upon a second deed of trust as a condition of its assent to the refunding and that it had never made any attempt to conceal its demand. The secretary and manager of the association testified to several conversations with the appellant in which he stated that it would not agree to the proposed refinancing unless it received a secured note for $300. He also said that he had discussed the matter with the Home Owners' Loan Corporation. "I made an effort," he said, "to find out whether it was agreeable to them or not. I was in the office of the Home Owners' and discussed it with the individual that was handling it at the time, and he said: 'Send in your instructions to escrow, providing for a second trust deed of $300.00.' I have no letters. That was just a conversation with one of the officials or clerks in the Home Loan office handling the matter at that time. That was the manner in which they handled those things at that time—they gave me certain papers to sign and in reference to the second trust deeds, you had to put your instruction into the escrow company, and it was understood with one of the officers in the Home Owners' Loan Corporation that we would sign those papers and then put our instructions in the escrow company regarding the second."

According to his testimony, some time later the association received from a title company escrow instructions with the request that they be executed and returned, together with the papers necessary to consummate the refinancing. There was enclosed what is termed a "consent to take bonds" in the form of a letter addressed to Home Owners' Loan Corporation. This letter, which was signed by the association and returned to the escrow holder with other instruments, recites that if the indebtedness of the appellant was refinanced by the corporation, it would accept "in full settlement * * * the sum of $1,579 face value of the bonds of Home Owners' Loan Corporation, to be adjusted with not exceeding $25 cash and thereupon * * * release all * * * claim * * * against said property". However, the escrow instructions show a demand for the note and deed of trust now in controversy as part payment of the note it then held.

No express approval of these instructions by the Home Owners' Loan Corporation appears, but a representative testified that its files contain nothing to indicate it had refused to permit a second deed of trust on the property. He explained also that under some circumstances the corporation consented to a requirement by the creditor for a second trust deed.

Upon this evidence the trial court found that prior to the date of the "consent to take bonds", the association "agreed to accept the bonds of the Home Owners' Loan Corporation at face value and cash not to exceed $24.99 and a note for $300 * * * to be secured by a deed of trust on said real property, in full satisfaction of the indebtedness then due and owing * * *." It also found that no unfair advantage had been taken of the appellant by the association and that he was not induced to sign the note for $300 because of any false or fraudulent representations made by it. A further finding was that the note and deed of trust were not delivered without the consent of the Home Owners' Loan Corporation.

The principal contention of the appellant is that the written consent of the association to take bonds constitutes an accord and satisfaction, a release and a novation. On the other hand, the association insists that the instrument relied upon by the appellant does not express the whole contract and that, as found by the trial court, this was to accept bonds, $25 in cash, and a secured note for $300 in satisfaction of the original indebtedness to it.

[1-3] As a matter of substantive law, where the parties to an agreement adopt a writing as the final and complete expression of that agreement an integration results; the act of embodying those terms in the writing becomes the contract. Under such circumstances, extrinsic evidence to vary the terms of the written instrument is excluded, because the writing is the contract itself. This rule applies when there is a writing which has been accepted as the final memorial of the agreement of the parties. In re Estate of Gaines, Cal.Sup., 100 P.2d 1055; Rest., Contracts, sec. 230. But in the present case there was no integration intended by the parties to the "consent to take bonds". It was only one of several instruments sent to the escrow holder as the basis for refinancing the property. Also, when it was necessary for the escrow holder to secure the consent of the association to take bonds bearing interest at a rate different from that originally offered by the Home Owners' Loan Corporation, the association agreed to the reduction but with the statement "it is understood that this does not change the instructions covering the second deed of trust". Parol evidence was therefore admissible to prove that the appellant agreed to give the association a note secured by a second deed of trust as a part of the consideration for its release of the indebtedness owed by him.

These conclusions and the decision in McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800, are not inconsistent if the facts of each case are kept clearly in mind. In the McAllister case, which concerned a similar written consent executed by a creditor, the trial court found that the execution and delivery of the note secured by a second deed of trust was made "under threat of foreclosure". It also found that the Home Owners' Loan Corporation had no knowledge that these instruments had been required by the creditor and executed by the debtor. Under these circumstances the holding that the consent to take bonds was an accord and satisfaction is somewhat inconsistent with the trial court's finding that the note sued upon had been executed under duress. But the further finding that the creditor did not inform the Home Owners' Loan Corporation that it was requiring the debtor to execute a note secured by a deed of trust compelled the affirmance of the judgment in favor of the debtor.

[4] As stated in the McAllister case, a note and deed of trust required by a creditor in addition to bonds of the Home Owners' Loan Corporation, if executed with its knowledge or consent, are valid and enforceable. However, where such instruments are secretly or fraudulently exacted by the creditor, they are void. This holding follows the weight of authority. 28 Cal.Law Rev. 232; 13 S.C.L.R. 162; 52 Harvard Law Rev. 842; note 110 A.L.R. 250 and 121 A.L.R. 119. The Home Owners' Loan Corporation, under its regulations, will refuse as a matter of policy to refund a first mortgage in any case where the creditor demands a second, unless it appears that the financial arrangements and the financial ability of the debtor are such that he will have a reasonable opportunity to pay off both encumbrances. It is essential, therefore, in order that the corporation may ascertain the facts in a given case, that a full disclosure be made to it of the amount and terms of a proposed second lien, and whether it is reasonably probable that the home owner will be able to fulfill his obligations.

[5] According to the findings of the trial court in the present case the creditor made this disclosure and the rule applied in the McAllister case is not available to the appellant.

The judgment is affirmed.

We concur: SHENK, J.; YORK, Justice pro tem.; SPENCE, Justice pro tem.

CARTER, Justice (dissenting).

I dissent.

The question presented for determination on this appeal is whether a lienholder who executes to the Home Owners' Loan Corporation a written consent to accept the bonds of said corporation and cash in a certain amount in full settlement of its lien and release all claim it has against the property covered thereby, can thereafter require the property owner to execute a note secured by a second trust deed on said property to cover the difference between the amount of the lien and the value of such bonds and cash without obtaining from said Home Owners' Loan Corporation its consent in writing to the execution of such note and second trust deed.

The majority opinion concedes that there is no evidence in the record that the Home Owners' Loan Corporation consented to the execution of the note and second trust deed for $300 except the testimony of the secretary of the defendant that he discussed the matter with the individual in the office of said corporation who was handling it at the time, and he authorized the inclusion in the escrow instructions of the second trust deed. The evidence does not show that anyone connected with the Home Owners' Loan Corporation saw the escrow instructions in question or approved the same, and it is admitted that the Home Owners' Loan Corporation did not execute any document modifying the terms of the consent and release executed by the defendant which, among other things, declared that the defendant "hereby consents, if said refunding can be consummated, to accept in full settlement of the claim of the undersigned the sum of $1,579.00 face value of the bonds of Home Owners' Loan Corporation to be adjusted with not exceeding $25.00 cash and thereupon to release all claims of the undersigned against said property".

The majority opinion holds that notwithstanding this declaration in writing, the defendant had the right to demand and receive from the property owner a promissory note secured by a trust deed on said property for $300 in addition to the bonds and cash which the defendant received from the Home Owners' Loan Corporation. This holding is predicated upon the erroneous assumption that parol evidence was admissible to prove that the consideration mentioned in the agreement between the Liberty Building-Loan Association and Home Owners' Loan Corporation was not the true consideration which the former agreed to accept for a release of its claim against the plaintiff's property. It is my view that the instant case comes within the well-recognized limitation upon the right of a party to vary by parol evidence the terms of a contract and prove the true consideration, which rule was declared in the case of Harding v. Robinson, 175 Cal. 534, at page 542, 166 P. 808, at page 811, as follows: "Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration, and is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part, for the party has the right to make the consideration of his agreement of the essence of the contract, and when this is done the provision as to the consideration for the contract must stand upon the same plane as the other provisions of the contract with reference to conclusiveness and immunity from attack by parol or extrinsic evidence." Clearly there can be no doubt that the essence of the contract here under consideration was the amount of consideration which would be required by the defendant Liberty Building-Loan Association to grant a release of all its claim against the plaintiff debtor's property and that the case comes within the rule expressed in Harding v. Robinson, supra. The above rule is quoted with approval in the case of Koeberle v. Hotchkiss, 4 Cal. App.2d 252, at page 256, 40 P.2d 911, at page 913, where the court further states: "'While the recitals of consideration in written instruments are not conclusive as to the amount or character, or payment of the consideration, when these latter matters are the subject of litigation, evidence of want of consideration, or of a different consideration, is not admissible for the purpose of varying, contradicting, and defeating covenants by which rights are expressly vested.' Arnold v. Arnold, 137 Cal. 291, 70 P. 23, 24; Leonard v. Miner, 120 Cal. 403, 52 P. 655. Where such an alleged parol agreement changes the terms of a written contract and reduces it from an absolute to a conditional or contingent obligation, 'it makes for the parties another and different agreement' (First National Bank v. Fickert, 51 Cal.

App. 99, 196 P. 112, 114), and it is not admissible for that purpose." It must necessarily follow that if parol evidence was not admissible to alter or vary the terms of the agreement between the Liberty Building-Loan Association and the Home Owners' Loan Corporation, there is no competent evidence in the record to support the finding of the trial court that the Home Owners' Loan Corporation consented to the execution by plaintiff of the note and trust deed for $300, and this finding must necessarily fall.

In my opinion, the conclusion reached in the majority opinion is not only unsound and contrary to settled principles of law, but opens the door for fraud and unconscionable conduct of lienholders in cases of this character.

This court has held that a contract entered into between the property owner and the lienholder for the payment to the lienholder of a sum in addition to the amount which the latter receives from the Home Owners' Loan Corporation in satisfaction of his indebtedness without the consent of such corporation is void as against public policy. When contracts of a particular class or character are declared to be void as against public policy, the fact that an individual contract may be free from actual fraud or oppression will not save it. The law considers the general nature, effect and tendency of contracts that come within the inhibited class and condemns them all.

In McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 915, 125 A.L.R. 800, wherein this court affirmed a judgment canceling a secret second trust deed executed by the debtor upon insistence of the creditor, it is declared: "It is obvious, from a reading of the statute and the rules and regulations above quoted, that the main and controlling purpose of the act was to assist small home owners who, because of the then existing financial conditions, faced loss of their homes through inability to meet the charges due on mortgages on their home property. It is to be noted that the act places no compulsion, direct or indirect, on the creditor. The creditor had complete liberty of action. If he refused to accept the offer of the H. O. L. C. as to the amount of bonds and cash it would advance to refund the debt, there was nothing the H. O. L. C. or the debtor could do about it. It was contemplated, however, that many creditors would, and experience under the act proved that many did, accept a reduction in the amount of the existing loan in order to secure liquid assets such as bonds of the H. O. L. C. rather than foreclose on the property and have to hold it until conditions in the real estate market improved. The act provides that such reduction should be passed on to the home owner, the debtor. The rules and regulations contemplated that under some circumstances it would be to the interest of the home owner to give a second mortgage to the creditor to secure a part of the refunded debt, *but such rules and regulations provided that the H. O. L. C. would not refund the first mortgage if the creditor demanded a second unless the financial ability of the debtor and the financial arrangements were such that the debtor would have a reasonable opportunity to pay off both mortgages. Obviously, before these facts could be ascertained, a full disclosure of the amount and the terms of the proposed second lien would have to be made to the H. O. L. C. The securing of a second lien by the creditor without such disclosure is clearly in violation of the letter and spirit of the statute and regulations.*"

While it may be true that the same degree of "secrecy" was not here employed by the creditor in exacting the second trust deed, the fact still remains that there is a dearth of evidence to establish "full disclosure to the Home Owners' Loan Corporation of the amount and the terms of the proposed second lien", as contemplated and required by the decision in McAllister v. Drapeau, supra, in order to permit the Home Owners' Loan Corporation before granting its loan to determine whether the debtor upon refinancing could carry the two loans. True, one of the officers of the creditor testified that he had a conversation with respect thereto "with one of the officials or clerks" in the Home Loan office but nowhere is there any showing that said individual, whoever he may have been, had any authority or power to consent on behalf of the Home Owners' Loan Corporation to the then contemplated second lien. In Council v. Cohen, Mass., 21 N.E.2d 967, 968, wherein a lien second to a Home Owners' Loan Corporation lien was declared void, it is stated that: "There was some evidence * * * offered that the attorney communicated with some one connected with the corporation [Home Owners' Loan Corporation] with respect to the second mortgage, but I do not find that it was authorized or even known to the proper officers of the corporation [Home Owners' Loan Corporation] although the attorney doubtless acted in good faith."

In the case now before us the trial judge declared at the conclusion of the evidence that "There is no evidence in this record that the Home Owners' Loan Corporation consented to the execution of the second trust deed. They handed in certain (escrow) instructions but there is no evidence in this record that they were familiar with the contents of the escrow." It is true that the trial judge apparently later changed his mind and found: "That is not true that the said plaintiff made, executed and delivered the promissory note and (second) trust deed for the sum of $300.00 above described, without the consent of said Home Owners' Loan Corporation," but this finding may not rely for support upon the fact that the Home Owners' Loan Corporation, along with the parties, offered certain escrow instructions for, as stated by the trial court at the conclusion of the trial, "there is no evidence in this record that they (Home Owners' Loan Corporation) were familiar with the contents of the escrow". In addition, one of the Home Owners' Loan Corporation officers testified that there was "no instrument in the files in the form of a request by the creditor to place a second trust deed on the real property * * * or of any consent on the part of the Home Owners' Loan Corporation to the debtor or to the creditor to place a second trust deed for $300.00 on said property". In other words, the evidence in this case is far from satisfactory in establishing notice to and consent of the Home Owners' Loan Corporation to a second lien, as contemplated in McAllister v. Drapeau, supra, which decision came down subsequent to the trial and judgment herein and was not therefore available for the guidance of the court below. Under the circumstances, a reversal of the judgment in this case should be ordered to permit of a full and clear showing on this issue.

Moreover, McAllister v. Drapeau, supra, announces a second and distinct ground of decision which would appear to require a reversal, rather than an affirmance, of the judgment in the case at bar. It definitely appears from the record herein, as in McAllister v. Drapeau, supra, that the creditor signed the usual consent and release required by the Home Owners' Loan Corporation which, among other things, declared that the creditor "hereby consents, if said refunding can be consummated, to accept in *full settlement of the claim* of the undersigned the sum of $1,579.00 face value of the bonds of Home Owners' Loan Corporation, to be adjusted with ***not exceeding*** $25 cash and thereupon to release all the claim of the undersigned against said property". The express mention by the creditor in said consent and release of a *$25 cash* adjustment to accompany the Home Owners' Loan Corporation bonds, and its complete silence as to the additional note for $300 and accompanying second lien, definitely tends to indicate an attempt to conceal the note and second lien from the Home Owners' Loan Corporation. But aside from this, in McAllister v. Drapeau, supra, 14 Cal.2d page 111, 92 P.2d page 916, 125 A.L.R. 800, it is held that where, as here, the creditor agrees to accept the bonds in "full settlement", without any mention of a second lien, an accord and satisfaction, novation or release results. In this connection the cited case declares that: "Several of the courts to which the problem here involved has been presented, in addition to holding the secret second mortgage illegal, have held that in signing the 'Mortgagee's Consent to Take Bonds', above quoted, the creditor agreed to accept such bonds 'in full settlement' of his claim, and that such agreement constitutes an accord and satisfaction, a release or a novation. Cook v. Donner, supra [145 Kan. 674, 66 P.2d 587, 110 A.L.R. 244]; Chaves County Building & Loan Ass'n v. Hodges, supra [40 N.M. 326, 59 P.2d 671]. The holding of these courts is sound. The agreement signed by the creditor was to accept the bonds 'in full settlement of the claim of the undersigned * * * and thereupon to release all the claim of the undersigned against said property'. The argument of amici curiæ that this broad language only constitutes an agreement by the creditor to release his security and does not constitute an agreement to release the debt secured is unsound. In the instant case, at the time California Security Loan Corporation signed the consent, the debtor owed it but one debt, which was secured by the recorded first mortgage, and partially secured by the secret unrecorded second mortgage. By signing the consent, that company agreed to release its entire 'claim'. This could have no reasonable meaning other than that it was an unqualified agreement in writing to release the existing debt for the amount of bonds offered. This constitutes a valid release, and an accord and satisfaction. Sections 1524, 1541, Civ. Code."

This latter ground would appear equally applicable here, for the creditor, as in the cited case, agreed in writing to accept $25 in cash and the Home Owners' Loan Corporation bonds "In full settlement of (its) claim", without any reference being made to the $300 note and the second lien to secure the same. It is also interesting to note that McAllister v. Drapeau, supra, 14 Cal.2d page 112, 92 P.2d page 917, 125 A.L.R. 800, expressly declares: "That this illegality argument [i. e., the first ground of the decision therein having to do with the secrecy of the second lien] has no application to the second ground set forth in this opinion, namely, that the 'Mortgagee's Consent' constituted a release, and an accord and satisfaction." In other words, regardless of any secrecy in the execution of a second lien, such second lien is void and unenforceable where, as here, the creditor accepts the Home Owners' Loan Corporation bonds "in full settlement" of his claim. A satisfaction and release of the claim thereupon results.

In a supplemental brief defendant advances the argument that the escrow holder was the agent of Home Owners' Loan Corporation, that the agent's knowledge of the defendant's deed of trust was imputed to the principal, that Home Owners' Loan Corporation having been thus informed of the deed of trust the execution of the same was not kept secret from that corporation, and further that paragraph 7 of the latter's escrow instructions contemplated and required the escrow holder to inform Home Owners' Loan Corporation of the deed of trust. In support of these contentions defendant relies on the case of Blackburn v. McCoy, 1 Cal.App.2d 648, 37 P.2d 153, 155, but this case does not hold that an escrow holder is the general agent for all parties to the escrow, but holds that if escrow instructions create an agency in the escrow holder it can not be a general agency for each one of the parties, and that if an agency is so created it is one "limiting the obligations of the escrow holder to each party to the escrow in accordance with the instructions given by such party".

It has been held that a corporation is not chargeable with knowledge of an agent who has no authority to bind the corporation. Bourne v. Root, 125 Cal.App. 461, 13 P.2d 1066. There is nothing in the record which indicates that the escrow holder in this transaction was empowered to bind Home Owners' Loan Corporation in any particular except as stated in the latter's escrow instructions, and the instructions pleaded do not authorize the approval or acceptance by the escrow holder of defendant's deed of trust. In Markowitz v. Berg, 125 N.J.Eq. 56, 4 A.2d 410, the fee attorney for Home Owners' Loan Corporation had knowledge that the mortgagor's creditor demanded in settlement a second mortgage in addition to the Home Owners' Loan Corporation bonds. The duties of the fee attorney were to pass on the title, as required of the escrow holder here, and to assist in the negotiations. The plaintiff there contended, as does defendant here, that the fee attorney was the agent of Home Owners' Loan Corporation and that his knowledge of the second mortgage was the knowledge of the corporation. The court held that his authority was limited to examining the title, to delivering bond authorizations to encumbrancers, and to receiving the mortgagor's first lien mortgage in favor of Home Owners' Loan Corporation, that he was a special agent of the corporation without authority to approve of or to permit plaintiff to take the second mortgage, that the execution of the second mortgage without the knowledge of Home Owners' Loan Corporation was in contravention of the statute and the regulations made thereunder, and that the second mortgage was void as against public policy.

It frequently happens that an escrow holder acts for several parties in the same transaction, or in interconnected transactions relating to the same property, amounting to two or more separate escrows in one portfolio. In such case an escrow holder is a special agent for each party in so far and only as far as such party's interest or instructions is not deemed to be imputed or imparted to all others who have given instructions in the same escrow. Unless the instructions of two or more parties are so interrelated as to require each to be informed of the requirements of the other, no duty rests on the escrow holder to communicate to one party any item in the other's instructions. It would be a gross breach of confidence on the part of the escrow holder to permit one party to read or to obtain knowledge of the directions given by any other party to the escrow instructions relating to the second deed of trust,—only plaintiff and defendant were parties thereto.

Paragraph 7 of Home Owners' Loan Corporation's escrow instructions has reference solely to such documents as relate to its own loan and not to any mortgage or deed of trust that might be placed of record following the corporation's first mortgage. The language is explicit in requiring the delivery of such documents as would enable Home Owners' Loan Corporation to "pass on the eligibility of our loan". The defendant's deed of trust did not affect the eligibility of that loan because the mortgage securing the same was required to be a first lien on the property.

No obligation rested on defendant to discharge plaintiff's former liability except on payment of the full amount in cash according to the terms of their contract. It was not required to accept Home Owners' Loan Corporation bonds, but saving voluntarily agreed, upon valid and valuable consideration, so to do it was bound by its contract, "to release all claims" against plaintiff's property upon receipt of the bonds. This contract was made by it directly with Home Owners' Loan Corporation and for the benefit of plaintiff, and constituted a part, at least, of the consideration and inducement to Home Owners' Loan Corporation to make its loan.

A review of the authorities relative to the validity of a secret second encumbrance when the first mortgage is held by the Home Owners' Loan Corporation, and a discussion of the principles of law contained in these authorities is contained in the January, 1940, issue of the California Law Review, volume 28, pages 232, 235, inclusive. It appears from this article that second trust deeds on mortgages executed under the circumstances as disclosed by the record in the case at bar have been uniformly held invalid and canceled by the courts.

For the foregoing reasons, I cannot join in the majority opinion in the instant case as I am persuaded that the ends of justice, as well as the weight of authority, requires a reversal of the judgment.

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16 Cal.2d 276

ALAMEDA COUNTY v. JANSSEN, Chairman of Board of Sup'rs.

S. F. 16435.

Supreme Court of California.

Oct. 2, 1940.

1. States 🔑119

In determining whether an appropriation of public funds or property is to be considered a "gift" within constitutional provision prohibiting Legislature from making a gift, the primary question is whether the funds are to be used for a public or private purpose, and if they are for a public purpose they are not a "gift". Const.Cal. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

2. States 🔑119

The benefit to the state from an expenditure of public funds for a public purpose is in the nature of consideration, and the funds expended are therefore not a "gift" within constitutional provision prohibiting Legislature from making a gift even though private persons are benefited therefrom. Const.Cal. art. 4, § 31.

3. Constitutional law 🔑70(1)

Within rule that an appropriation of public funds for public purpose is not a "gift" within constitutional provision prohibiting Legislature from making a gift, the determination of what constitutes a public purpose is primarily a matter for legislative discretion, which will not be disturbed by court so long as it has a reasonable basis. Const.Cal. art. 4, § 31.

4. States 🔑119

An increase in the benefits to indigent recipients of public aid after the right to them has vested is not a "gift" within constitutional provision prohibiting Legislature from making a gift. Const.Cal. art. 4, § 31.

5. States 🔑119

The statute providing for the release of liens held against the property of indigent recipients of public aid does not violate constitutional provision prohibiting Legislature from making a "gift"; but, when the county board of supervisors has determined in accordance with statute that the purpose of the statute is served by the release of lien upon the property of a recipient of aid, the release becomes a "grant of aid" within constitutional provision authorizing the granting of aid to indigent aged. St.1939, p. 2245, § 2227; Const.Cal. art. 4, §§ 22, 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Grant of Aid".

6. Paupers 🔑40

In absence of special statute, no liability rests upon an aged person to reimburse the state and county for aid legitimately obtained and granted.

7. States 🔑114

The Legislature has the power to grant aid to indigent aged without imposing any lien upon their property, and whenever it does so it supplements direct aid with the benefits which attend freedom from such an incumbrance. Const.Cal. art. 4, § 22.

8. Constitutional law 🔑121(2), 161
Paupers 🔑40

The statute canceling old age security property agreements by which recipients of public aid agreed not to transfer their real property without consent of county boards of supervisors does not violate provisions of State and Federal Constitutions prohibiting the passage of any law impairing the obligation of contracts. St.1939, pp. 2245, 2246, §§ 2226, 2229; St.1940, c. 11, § 5; Const.Cal. art. 1, § 16; U.S.C.A.Const. art. 1, § 10, cl. 1.

9. Constitutional law 🔑113

The provisions of the Federal and California Constitutions prohibiting passage of any law impairing obligation of contracts do not prevent the Legislature from changing the contractual rights of its political subdivisions acting in a governmental capacity. Const.Cal. art. 1, § 16; U.S.C.A.Const. art. 1, § 10, cl. 1.

10. Constitutional law 🔑63(3)
Paupers 🔑40

The statute authorizing county boards of supervisors to release liens held against property of indigent recipients of public aid or to subordinate the liens to incumbrances executed by the recipients is not an unlawful delegation of legislative authority, since the statute was passed to serve the purpose of the Old Age Security Act which provides adequate standards for regulating the authority of the boards to grant old age relief. St.1939, p. 2245, § 2227.

11. Statutes 🔑82

The statute authorizing county boards of supervisors to release liens held against property of indigent recipients of public aid or to subordinate the liens to incumbrances executed by the recipients does not violate constitutional provision prohibiting the Legislature from passing any "local law" or "special law" authorizing the creation, extension, or impairment of liens, since the classification of indigent aged as a group is based upon a clear distinction between them and other individuals and applies equally to all persons embraced in the class. St. 1939, p. 2245, § 2227; Const. art. 4, § 25 .

See Words and Phrases, Permanent Edition, for all other definitions of "Local Law" and "Special Law".

12. Paupers 🔑40

The statute authorizing counties to release liens held against property of indigent recipients of public aid upon payment to county of such amount as in the opinion of the board of supervisors equals the net amount which would be realized in event lien was foreclosed is not unconstitutional. St.1939, p. 2245, § 2227.

13. Constitutional law 🔑48

Where statute authorized county to release county liens held against property of indigent recipients of public aid upon payment to county of such amount as in opinion of board equaled the net amount which would be realized in event lien was foreclosed, presumption exists that in carrying out the statute board of supervisors would not abuse the power conferred upon it of ascertaining value. St.1939, p. 2245, § 2227.

In Bank.

Mandamus proceeding by the County of Alameda against George A. Janssen, as Chairman of the Board of Supervisors of Alameda County, to compel the Chairman to sign and execute certain releases of liens and cancellation of a restrictive agreement.

Peremptory writ of mandate granted.

Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., Robert H. McCreary, Asst. Dist. Atty., and Lawrence S. Fletcher, Deputy Dist. Atty., all of Oakland, for petitioner.

J. H. O'Connor, Co. Counsel, L. K. Vobayda, Deputy Co. Counsel, and Gerald G. Kelly, Deputy Co. Counsel, all of Los Angeles, amici curiae.

Landels, Weigel & Crocker, of San Francisco, for respondent.

TRAYNOR, Justice.

By this proceeding in mandamus the petitioner seeks to compel the respondent, as chairman of the Board of Supervisors of the County of Alameda, to sign and execute certain releases of liens and cancellation of a restrictive agreement with respect to the real properties of the recipients of financial aid granted under the provisions of the Old Age Security Act. Respondent has generally demurred.

In 1929 the legislature enacted the Old Age Security Act (Stats.1929, chap. 530, p. 914) which provided for financial assistance to the needy aged who met certain requirements and whose property did not exceed specified values. In 1935 section 4 of the act was amended (Stats.1935, p. 1769) to provide for a lien against the real property of a recipient as security for the aid which he received. In 1937, St.1937, p. 1094, the legislature amended sections 2224 and 2225 of the Welfare and Institutions Code, into which section 4 of the Old Age Security Act had been incorporated, to eliminate the provisions for such liens as well as the provisions making the aid a debt of the recipient to the state and county.

At the same time section 2225 was amended to provide that "all liens and mortgages heretofore created under the provisions of this chapter are hereby released and the board of supervisors of each county is hereby directed and authorized to execute and record appropriate instruments of release". In County of Los Angeles v. Jessup, 11 Cal.2d 273, 78 P.2d 1131, 1133, this provision was held unconstitutional as authorizing a gift of "public money or thing of value" in violation of section 31 of article IV of the Constitution.

Thereupon the legislature in 1939, adopted section 2227 of the Welfare and Institutions Code (Stats.1939, p. 2245, ch. 719), which provides in part: "Any lien created by the recording of a notice of aid pursuant to the provisions of Chapter 530 of the Statutes of 1929 as amended by Statutes of 1935, page 1769, may be released by the board of supervisors of the county granting the aid upon payment to the county of the amount of aid repayment of which is thereby secured or upon payment to the county of such amount as in the opinion of the board of supervisors equals the net amount which would be realized in the event that said lien was foreclosed, and any such lien may be subordinated by the board of supervisors of the county granting the aid to the lien of any mortgage or deed of trust given to renew or refinance any mortgage, deed of trust or other encumbrance, the lien or charge of which had priority over such lien. In any case in which the board of supervisors determines, after investigation, that the purposes of this chapter will be served by releasing any such lien in whole or in part or by subordinating the same to any encumbrance and determines that the property affected by such lien is at the time owned by the recipient of aid the board of supervisors may after approval by the Department of Social Welfare release such lien in whole or in part or may subordinate the same to one or more designated encumbrances executed by the recipient of aid without consideration or for such consideration as the board shall determine."

At the same time the legislature added to the code section 2226 which provided in part as follows: "If the recipient of aid under this chapter owns or acquires real property or any estate or interest therein the board of supervisors may require him to enter into a written agreement that he will not, during his lifetime, without the consent of the board of supervisors, transfer or encumber such property, which agreement shall specifically describe such property, be acknowledged by the recipient in the same manner as a grant of real property and be recorded in the office of the county recorder of each county wherein such real property or some part thereof lies." and added section 2229 which gave the county not only a claim against the estate of any deceased recipient for reimbursement of aid but also "all the rights of an unsecured creditor against the entire estate of the recipient". Stats.1939, pp. 2245, 2246, chap. 719. Legislation which became effective February 23, 1940 (Stats. 1940, chap. XI, sec. 5), repealed the provisions for agreements by recipients of aid not to convey or encumber their property, all such agreements being "hereby cancelled and declared to be hereafter of no force and effect". The boards of supervisors were directed to "authorize" by resolution, upon application, the execution and recordation of appropriate instruments of cancellation of any or all of the agreements canceled by this section.

Pursuant to section 2227, the Board of Supervisors of Alameda County adopted a resolution releasing without consideration a statutory lien previously acquired on certain real property of a recipient of aid, which he still owned, when it found after investigation that the purposes of the Old Age Security Law would be served by giving the release. At the same time the board, pursuant to section 5 of chapter XI of the 1940 Statutes, adopted a resolution canceling and releasing without consideration an agreement not to convey or encumber real property. It likewise adopted a resolution, pursuant to section 2227 of the Welfare and Institutions Code, releasing its lien against certain real property of a recipient of aid held by a third party upon payment to the county of an amount which in the opinion of the board equaled the net amount which would be realized in the event the lien were foreclosed.

Respondent Geo. A. Janssen, as chairman of the Board of Supervisors of Alameda County, refuses to sign and execute the above-described releases and cancellation on the grounds that section 2227 of the Welfare and Institutions Code violates section 31 of article IV of the California Constitution prohibiting the legislature from making or authorizing any gift of public money or thing of value to any individual, as well as section 25 of article IV of the Constitution prohibiting the passage of any special or local law authorizing the creation, extension or impairment of liens, and constitutes an unconstitutional delegation of legislative authority. He further contends that chapter XI of Statutes of 1940 violates the prohibitions in the United States and California Constitutions against the passage of any law impairing the obligation of contracts. Const.Cal. art. 1, § 16; Const.U.S. art. 1, § 10, cl. 1.

Section 31 of article IV of the California Constitution prohibits the legislature from making or authorizing a gift of public money or thing of value to any individual or corporation. The next clause, however, provides that nothing in this section shall prevent the legislature from granting aid pursuant to section 22 of article IV which authorizes the granting of aid to indigent aged. Therefore the release of a lien by a county pursuant to section 2227 of the Welfare Code does not constitute a violation of section 31, article IV if (1) it is not a gift of public money or thing of value, or (2) it is a grant of aid to indigent aged under section 22 of article IV.

[1, 2] It is well settled that, in determining whether an appropriation of public funds or property is to be considered a gift, the primary question is whether the funds are to be used for a "public" or a "private" purpose. If they are for a "public purpose", they are not a gift within the meaning of section 31 of article IV. County of San Diego v. Hammond, 6 Cal.2d 709, 59 P.2d 478, 105 A.L.R. 1155; City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433; Allied Architects' Association v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029; Veterans' Welfare Board v. Riley, 188 Cal. 607, 206 P. 631. The benefit to the state from an expenditure for a "public purpose" is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom. Allied Architects' Association v. Payne, supra.

[3] The determination of what constitutes a public purpose is primarily a matter for legislative discretion (Veterans' Welfare Board v. Riley, supra; Allied Architects' Association v. Payne, supra; Daggett v. Colgan, 92 Cal. 53, 28 P. 51, 14 L.R.A. 474, 27 Am.St.Rep. 95), which is not disturbed by the courts so long as it has a reasonable basis. Nebbra v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; Powell v. Pennsylvania, 127 U.S. 678, 8 S.Ct. 992, 32 L.Ed. 253. This court has frequently upheld the expenditure of funds by the state or its subdivisions for the benefit of individuals as for a "public purpose" and, hence, not within section 31 of article IV. MacMillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A.L.R. 288 [free school text books]; Veterans' Welfare Board v. Riley, supra [transportation, tuition and living expenses for education of veterans]; Allied Architects' Association v. Payne, supra [erection of memorial hall for war veterans]; City of Oakland v. Garrison, supra [street improvements]; Patrick v. Riley, 209 Cal. 350, 287 P. 455 [payments for destruction of diseased cattle]; Sacramento & San Joaquin Drainage District v. Riley, 199 Cal. 668, 251 P. 207 [flood control]; City and County of San Francisco v. Collins, 216 Cal. 187, 13 P.2d 912 [bond issue for relief of indigent sick and poor]; Los Angeles Housing Authority v. Dockweiler, 14 Cal. 2d 437, 94 P.2d 794 [slum clearance]; City of San Diego v. Hammond, supra [use of county funds to pay delinquent assessments on overburdened property]; Goodall v. Brite, 11 Cal.App.2d 540, 54 P.2d 510

[free treatment in county hospital only for those unable to pay]. See 9 Cal.Law Rev. 431; 18 Cal.Law Rev. 697.

[4, 5] In the present case the legislature seems clearly justified in its belief that the release of liens held against the property of indigent recipients of aid is for the general public welfare. A person may be indigent even though he is the legal owner of real property and an increase in the benefits to indigent recipients of aid after the right to them has vested is not a gift within the meaning of article IV, section 31. Home v. Souden, 199 Cal. 508, 250 P. 162; O'Dea v. Cooke, 176 Cal. 659, 169 P. 366. The release of a lien which facilitates the sale of property or loans thereon serves the same public purpose of aiding the indigent aged as a direct grant of money. It may remove the necessity for additional direct aid to the owner. The county could not in any event enforce the lien until the death of the recipient and might gain less at that time than it would lose in direct aid to the recipient during his lifetime. By releasing the lien from the recipient's property, the county may relieve the public treasury to the extent that it relieves the recipient.

[6, 7] Once the board of supervisors has determined, after investigation as required by section 2227 of the Welfare and Institutions Code, that the purpose of the Old Age Security Act is served by the release of a lien upon the property of a recipient of aid, such a release becomes a grant of aid pursuant to section 22 of article IV for the support of indigent aged and therefore within the exception in section 31 of article IV. In the absence of a special statute no liability rests upon an aged person to reimburse the state and county for aid legitimately obtained and granted (Bremer County v. Curtis, 54 Iowa 72, 6 N.W. 135; Montgomery County v. Gupton, 139 Mo. 303, 39 S.W. 447, 40 S.W. 1094; Peabody v. Town of Holland, 107 Vt. 237, 178 A. 888, 98 A.L.R. 866; Chester v. Underhill, 16 N.H. 64; Stow v. Sawyer, 3 Allen 515, 85 Mass. 515; In re Dufek's Estate, 164 Minn. 55, 204 N.W. 469; Spokane County v. Arvin, 169 Wash. 349, 13 P.2d 1089) and there is no provision in section 22 of article IV requiring such liability. The legislature thus has the power to grant aid to indigent aged without imposing any lien upon their property and whenever it does so it supplements direct aid with the benefits which attend freedom from such an encumbrance. If instead it imposes a lien upon the property of recipients of aid which it subsequently releases it merely defers the benefits supplementary to direct aid which it might have conferred at the outset. In either case the benefits serve the same public purpose of aiding the indigent aged.

The legislation in question differs materially from section 2225 of the Welfare and Institutions Code, held unconstitutional in County of Los Angeles v. Jessup, 11 Cal. 2d 273, 78 P.2d 1131, 1134; 12 So.Cal.Law Rev. 310. Section 2225 authorized the release of statutory liens on property which had passed from the recipient of aid to an heir or grantee and on property of recipients of aid not qualified to receive it. As the section purported to apply to all liens, and its provisions were not separable, it was held invalid as a whole, but the court expressly refrained from passing on the question whether "legislation may constitutionally be framed looking to the release of such statutory liens as may exist under other classes of 'typical' cases alleged in the petition". The legislation in this case authorizes the release of liens only if the property is still owned by a qualified recipient of aid or, in the event it has passed to another, if the county receives an amount equal to the value which may be realized upon foreclosure of the lien.

[8, 9] Since the legislature may extend aid to indigent aged by authorizing the release of liens previously acquired upon their property, it may for the same reasons cancel Old Age Security Property Agreements by which recipients of aid agreed not to transfer their real property without consent of local boards of supervisors. Such cancellations in no way violate the provisions of the United States and California Constitutions prohibiting the passage of any law impairing the obligation of contracts. These provisions do not prevent the legislature from changing the contractual rights of its political subdivisions acting in a governmental capacity. County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983; City of Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937, 29 A.L.R. 1471; City of Worcester v. Worcester Consol. Street Railway Co., 196 U.S. 539, 25 S.Ct. 237, 49 L.Ed. 591. As the county boards of supervisors are acting as agents for the state in dispensing old

age relief (County of Sacramento v. Chambers, 33 Cal.App. 142, 164 P. 613; City and County of San Francisco v. Collins, 216 Cal. 187, 13 P.2d 912), there can be no impairment of contracts upon a voluntary relinquishment by the state of any contractual rights it may have acquired. The passing statement in County of Los Angeles v. Jessup that the legislation there in question was "also constitutionally objectionable because of its impairment of the obligation of contract" was unnecessary to the decision of the case, and upon fuller consideration appears to be without support in the authorities. It must, therefore, be deemed disapproved by our decision herein.

[10] Respondent's contention that section 2227 is an unlawful delegation of legislative authority to the boards of supervisors is untenable, for that section was passed to serve the purpose of the Old Age Security Act which provides adequate standards for regulating the authority of the boards of supervisors to grant old age relief. An essentially similar contention was adversely answered in Hecke v. Riley, 209 Cal. 767, 290 P. 451.

[11] Nor does such legislation violate section 25 of article IV prohibiting the legislature from passing any local or special law authorizing the creation, extension or impairment of liens, for the classification of the indigent aged as a group is based upon a clear distinction between them and other individuals in the state, and applies equally to all persons embraced in this class. See People v. Central Pacific R. R. Co., 105 Cal. 576, 38 P. 905; City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604; Darcy v. City of San Jose, 104 Cal. 642, 38 P. 500; Chitwood v. Hicks, 219 Cal. 175, 25 P.2d 406.

[12, 13] Finally, there can be no constitutional objection to the county's release of its lien upon payment to the county of such amount as is in the opinion of the board of supervisors equals the net amount which would be realized in the event the lien were foreclosed, since the county would receive the fair value of the lien as consideration for its release. It must be presumed that in carrying out this section a board of supervisors would not abuse the power conferred upon it of ascertaining value. Hecke v. Riley, supra.

As none of the objections raised by respondent's demurrer is valid, it is ordered that a peremptory writ of mandate issue as prayed.

We concur: GIBSON, C. J.; SHENK, J.; CARTER, J.; YORK, Justice pro tem.; MOORE, Justice pro tem.

41 Cal.App.2d 148

PRESTON v. BATHS.

Civ. 11433.

District Court of Appeal, First District,
Division 2, California.
Oct. 11, 1940.

1. Theaters and shows 🔑6

In action for injuries to one slipping on iron pipe as she stepped out to grab hold of barrel revolving around pipe in defendant's swimming tank, where defendant denied and court found untrue allegation of complaint that defendant maintained and permitted use of pipe and barrel with knowledge that pipe was dangerous and slippery when wet, there was evidence that plaintiff knew pipe was wet and that all dangers were obvious, and there was no evidence of concealed or latent defect, plaintiff proved no negligence of defendant and hence was not entitled to recover.

2. Theaters and shows 🔑6

In action for injuries to one slipping on iron pipe as she stepped out to grab hold of barrel revolving around pipe in defendant's swimming tank, facts alleged in answer and found true by court, whose finding was supported by evidence, that plaintiff was negligent and that her negligence proximately contributed to happening of accident and injuries complained of, showed complete defense.

3. Appeal and error 🔑179(1)

Questions raised in briefs on appeal, but not presented by pleadings or proof, need not be considered.

◆

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Action by Meda Preston against the Sutro Baths, a corporation, for personal injuries. Judgment for defendant, and plaintiff appeals.

Affirmed.

Joseph A. Brown and A. E. Cross, both of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondent.

STURTEVANT, Justice.

The defendant operates a public bath house in San Francisco. It has two or more tanks for swimmers. On May 20, 1937, the plaintiff and other members of her family went to the baths for a swim. While in one of the tanks the plaintiff fell and severely injured herself. Later she commenced this action to recover damages for the injuries sustained. The trial court made findings in favor of the defendant. From the judgment based on those findings the plaintiff has appealed.

The tank in which the accident occurred is rectangular. In one part the water is maintained at a depth of about three feet. A gallery runs along that side of the room at an elevation of six feet or more above the bottom of the tank. The gallery is supported by substantial posts which stand on the bottom of the tank. To one of those posts an iron pipe is attached extending four or five feet horizontally out over the water. The outer end of the iron pipe is connected by an elbow with another piece of pipe which stands upright resting on the bottom of the tank. An iron oil barrel is so installed that the horizontal pipe extends through both ends of the barrel and the latter revolves freely around the pipe. The barrel when in place is partly submerged in the water. From each end of the barrel to each support above mentioned, about two feet of the horizontal pipe is exposed. Each of the foregoing measurements we have estimated by an examination of the photographs contained in the record and comparing the physical objects one with another. The barrel, according to the evidence, is intended as a roller on which the swimmer can rest on his stomach and turn over into the water.

The plaintiff saw one of the swimmers climb upon the end of the pipe adjacent to the gallery-support and step out onto the barrel straddling it. Later she induced one of her party to hold the barrel steady and she planned to straddle the barrel, grasp it with her legs and arms and in that manner her companion was to roll the barrel while she clung to it. To carry out the plan the plaintiff stepped up on the exposed end of the pipe adjacent to the gallery while holding onto the gallery post. She attempted to let go of the post and step out and grab ahold of the barrel. As she did so her foot slipped on the pipe, she fell astride of it, and suffered the injuries complained of.

[1] The plaintiff claims that under the facts the judgment should have been in her favor, but she wholly ignores the pleadings and the findings. She alleged in her complaint, "that each and all of the defendants herein knew that the said pipe about which the said barrel revolved was dangerous and slippery when wet, but nevertheless kept and maintained and permitted to be used said pipe and barrel with the knowledge of its dangerous condition and while knowing that it was dangerous to use the said barrel, all of which facts were known to defendants and were all unknown to plaintiffs herein". That charge was denied by the defendant. The court found the plaintiff's allegation was not true. There was evidence to the effect that the plaintiff knew the pipe was wet and there was evidence all of the dangers were obvious and there was not a particle of evidence of any concealed or latent defect. It follows that the plaintiff proved no negligence on the part of the defendant.

[2] In its answer the defendant alleged, "that plaintiff Meda Preston was careless and negligent in and about the matters alleged in said complaint and that said carelessness and negligence on the part of said plaintiff proximately contributed to the happening of the accident and to the injuries, loss, and damage complained of by plaintiff, if any there were". The court found said allegations were true. Said finding was supported by the evidence. Such facts show a second and complete defense.

[3] Something is said in the briefs about "how to construct" such a piece of apparatus as the revolving barrel, about instruction in the use thereof, and about warnings. In reply it is sufficient to state that neither the pleadings nor proof presented such questions.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

41 Cal.App.2d 98

PEOPLE v. SEPULVEDA.

Cr. 3391.

District Court of Appeal, Second District, Division One, California.

Oct. 10, 1940.

Criminal law ⚿1023(12)

An order made before judgment and revoking probation of defendant and sentence thereon was not an "appealable order." Pen.Code, § 1237.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Caroline Sepulveda was convicted of issuing worthless checks, and she appeals.

Appeal dismissed.

Lewis A. Schaffer, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Under the heading "Grounds for this Appeal" appellant's opening brief contains the following: "This appeal from the order revoking probation and from the judgment sentencing appellant to imprisonment in the state prison is predicated upon the following premises"; then follows the seven so-called "premises" which in substance set forth that the "imposition of sentence of imprisonment upon appellant in the state prison was void", and that "no competent legal evidence had been brought before the court to support the allegations that served as the basis for revocation of probation".

The record reveals that on August 29, 1938, appellant had pleaded guilty to one count of an information alleging the commission of four offenses of issuing worthless checks. After a hearing, further proceedings were suspended and probation was granted, the term thereof fixed at three years with the added condition that the defendant serve three months in the county jail. May 6, 1940, the above-mentioned order was revoked and, following a hearing, judgment was pronounced confining the defendant in the Women's Institution at Tehachapi for the term prescribed by law.

The record further reveals the notice of appeal to be as follows: "You, and each of you, will please take notice that the defendant above-named, Caroline Sepulveda, appeals from the *order revoking probation* and the *sentence* thereon, which said Order was duly made on the 7th day of July, 1940 in Department 41 of the above-entitled Court, the Honorable Frank G. Swain, Judge Presiding, Dated: July 10th, 1940. Lewis A. Schaffer, Attorney for Appellant." (Italics added.) It will be seen from the above notice that there is no appeal herein from the judgment, appellant's brief to the contrary notwithstanding.

The law makes no provision for an appeal from an order revoking probation made before judgment, nor is there any appeal from a sentence. Section 1237 of the Penal Code sets forth the decisions from which a defendant may appeal in a criminal action, and reads as follows: "An appeal may be taken by the defendant: 1. From a final judgment of conviction; 2. From an order denying a motion for a new trial; 3. From any order made after judgment, affecting the substantial rights of the party." The order here in question was made before judgment and is not appealable and the above-quoted provisions of the Penal Code immediately reveal the lack of a right of appeal from a sentence in any event. Though appellant's opening brief refers to an appeal from a judgment sentencing appellant to imprisonment, all points raised and arguments advanced are addressed solely to the order revoking probation and the sentence imposed. It is clear that this appeal is of the character denominated in appellant's notice of appeal above quoted.

For the foregoing reasons the appeal is dismissed.

We concur: YORK, P. J.; WHITE, J.

41 Cal.App.2d 31

CARR et al. v. LAURITSON.

Civ. 11365.

District Court of Appeal, First District, Division 2, California.

Oct. 3, 1940.

1. Vendor and purchaser ⚷17

Where purchaser deposited $500 to apply on purchase price of realty, and purchaser and brokers signed a deposit receipt which recited that it was subject to approval of vendors on or before a fixed date, the purchaser at most made a mere "offer" to purchase which was revocable before acceptance thereof was communicated to him. Civ.Code, § 1586.

See Words and Phrases, Permanent Edition, for all other definitions of "Offer".

2. Vendor and purchaser ⚷17

Where purchaser offered to purchase realty by depositing $500 to apply on purchase price and signing deposit receipt which recited that it was subject to approval of vendors on or before a fixed date, and before acceptance of the offer was communicated to purchaser he notified brokers who represented vendors that purchaser could not complete the transaction because of false representations which had been made to purchaser, the giving of notice constituted "revocation" of offer and no "contract" existed between vendors and purchaser. Civ.Code, § 1586.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract" and "Revocation".

3. Vendor and purchaser ⚷17

A purchaser, who offered to purchase realty by depositing $500 to apply on purchase price and signing deposit receipt which recited that it was subject to approval of vendors on or before a fixed date, was not required to obtain consent of brokers with whom purchaser dealt, or of the vendors, to revocation of the offer by purchaser prior to communication to him of acceptance thereof. Civ.Code, § 1586.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Sterling Carr and another against P. H. Lauritson for breach of contract for purchase of realty. From a judgment for the defendant, plaintiffs appeal.

Affirmed.

Sterling Carr, of San Francisco (L. H. Matthews, of San Francisco, of counsel), for appellants.

Bardin, Harrington & Bardin, of Salinas, for respondent.

SPENCE, Justice.

Plaintiffs sought by this action to recover damages from defendant for the alleged breach of a contract for the purchase of real property. The cause was tried by the court sitting without a jury and from a judgment entered in favor of defendant, plaintiffs appeal.

The material facts for the purpose of this discussion are not in dispute The negotiations leading up to the controversy were had between defendant on the one hand and Mr. Baird, a real estate broker in Salinas, and Mr. Hilliard, his salesman, on the other hand. Plaintiffs and defendant never met or communicated with each other until after the commencement of this action.

The uncontradicted testimony shows that Mr. Hilliard talked to defendant endeavoring to interest defendant in the purchase of a large tract of land which was represented to defendant as having approximately 900 feet frontage on the main highway leading north out of Salinas. At that time, plaintiffs were the owners of a large tract with a frontage on the east side of said highway between the main business district of Salinas and the California Rodeo Grounds. The land in the vicinity was apparently known as Carr Flats or Buell Field and portions of said land had been previously sold by plaintiffs. Plaintiff Carr testified that plaintiffs were interested in selling whatever they had left in what was known as Buell Field, but it does not appear that plaintiffs themselves knew how many acres remained unsold or how much frontage the remaining property had on the main highway. On the other hand, it does not appear that defendant knew who were the owners of any of the property which the real estate brokers were endeavoring to sell to him.

Throughout the negotiations with defendant, the brokers stressed the amount of frontage on the highway and the value of such frontage. Several conversations were had and defendant was taken out to the property on two occasions. Typical of the brokers' numerous representations concerning the frontage of the property to be sold was the following uncontradicted statement: "Look here, here is the main thing, you have 900 feet, approximately 900 feet on the highway, and this is very valuable property." They stated to defendant that he would have 18 fifty-foot lots on the main highway frontage and about 600 feet frontage on another road.

Following the negotiations, defendant and the broker signed a "Deposit Receipt" on November 14, 1938, under the terms of which defendant deposited $500 with the brokers to apply on the purchase price of $27,000 on that certain real property "known as the Car Flats—Buel Field being 42 acres, more or less, located on North Main St.—101 Highway, Salinas". This instrument recited that it was "subject to the owner's approval" on or before December 1, 1938. The receipt was signed by the broker and was also signed by defendant in the space provided for the signature of the purchaser. There was also a space provided for the signature of the owner.

Shortly thereafter, the broker advised defendant that there was not "quite as many feet of frontage as we thought" and that said frontage of the property on the main highway was only "around 581 feet, approximately" and not approximately 900 feet. Defendant called the broker's attention to the fact that the frontage on the main highway was the "main thing" and that the fact that there was less frontage than that represented "throws the deal out of balance". As a result, defendant advised the broker that he could not "go through with it" and that he expected to have his deposit returned. To this the broker assented saying, "Sure that is all right, we expect a man here this morning that will take it. We raised it $1000." Although none of this evidence is contradicted, it appears that defendant is still waiting for the return of his deposit.

In support of their claim to damages for alleged breach of contract, plaintiffs introduced evidence showing that on November 15, 1938, being the day after the brokers and defendant signed the "Deposit Receipt", plaintiff Carr had also signed said instrument; and that on November 30, 1938, plaintiffs deposited a deed to their property in escrow and has caused the brokers to advise defendant to that effect. In this connection, however, it may be stated that it does not appear that the "Deposit Receipt" was ever signed by plaintiff Cook or anyone authorized to do so on her behalf nor does it appear that said "Deposit Receipt" was ever delivered to defendant or that he was ever advised that it had been signed by the owners or any of them. It does appear that when plaintiff Carr signed said instrument, he changed the date thereon from November 14, 1938, to November 15, 1938, and that he altered the body of the instrument by adding thereto "subject to Rec. Bonds from date of sale".

Defendant contended upon the trial that there never was any valid and binding contract between plaintiffs and defendant; that no recovery could be had upon the instrument pleaded as it had been altered by plaintiff Carr in a material respect; that the false representations regarding the frontage of said property entitled defendant to withdraw his offer or rescind and that he did so promptly; and that in any event, plaintiff's tender was insufficient as plaintiffs' title was not good and marketable as called for by the instrument. The trial court found in favor of defendant on all of said issues and entered its judgment in favor of defendant.

[1-3] While plaintiffs argue numerous propositions in their brief, it appears to us that the judgment of the trial court must be affirmed as the uncontradicted evidence required that judgment be entered in favor of defendant and said evidence would not have supported a judgment in favor of plaintiffs. Plaintiffs were suing upon the theory that an enforceable contract had been entered into by plaintiffs and defendant and that defendant had breached such contract. The trial court found that "there was no valid binding contract made and entered into between plaintiffs and defendant". In our opinion said finding is supported by the evidence. At most, defendant made a mere offer or proposal to purchase real property, which offer could be revoked at any time before the acceptance thereof was communicated to him. Civ.Code, sec. 1586. No acceptance of said offer was ever communicated to him unless the notification to him on November 30, 1938, that plaintiffs had deposited a deed may be considered such communication. But that notification followed defendant's notice to the brokers, who were the persons with whom defendant had dealt and the only persons known to him in the transaction, that he could not "go through with it" and that he expected to have his deposit returned. To this, the brokers consented. It was not essential that defendant obtain the consent of the brokers or the owners to the revocation of his offer (Barsotti v. Vedovi,

108 Cal.App. 308, 291 P. 585), and we are of the opinion that said revocation by notice to the brokers was a sufficient revocation under the circumstances. In view of the conclusions which we have reached, it appears unnecessary to consider the other points raised.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

41 Cal.App.2d 177

PEOPLE v. MIX.

Cr. 3383.

District Court of Appeal, Second District, Division 1, California.
Oct. 15, 1940.

1. Criminal law 🔑409

Evidence that defendant had in his possession a book containing betting notations, that betting paraphernalia was found in automobile registered in defendant's name, which material included a "time book" containing record of business done by bookmaker, and that defendant remained mute in face of accusatory statement made in presence of police officer by one of defendant's associates, was sufficient to establish prima facie proof of "corpus delicti" and thus make statements by defendant to police officer admissible in prosecution for recording and registering bets. Pen.Code, § 337a, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

2. Criminal law 🔑409, 535(2)

Proof beyond a reasonable doubt is not required to establish the corpus delicti, but all that is necessary is a prima facie showing.

3. Gaming 🔑98(1)

Evidence sustained conviction for recording and registering bets. Pen.Code, § 337a, subd. 4.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Cecil L. Mix was convicted of recording and registering bets, and he appeals.

Appeal from sentence dismissed. Judgment of conviction affirmed.

Chotiner & Chotiner, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Defendant was convicted of the crime of recording and registering bets, as that offense is set forth in subdivision 4 of section 337a of the Penal Code. He appeals from the judgment, the sentence, and from the order denying his motion for a new trial.

On April 20, 1940, police officers observed the appellant in a parking lot on Santa Monica Boulevard, standing near an automobile in which four men were seated. The appellant had a small cardboard notebook in his hand and the men inside the automobile were looking at some papers that were of the size and general appearance of scratch sheets. The automobile in question was registered to appellant. On two occasions appellant was observed in the act of receiving money from the men in the car and making notations in the small notebook he had in his hands. Upon the approach of an officer appellant threw the notebook under the automobile and the officer immediately picked it up. Following a stipulation entered into at the trial that one of the police officers who appeared as a witness was qualified to testify as an expert in bookmaking matters, the officer testified that the notebook contained betting markers recording the number of the horse, the bettor's name or initial, and three columns for win, place or show notations. The officer further testified that he compared the numbers on the notebook with the National Scratch Sheet he had purchased for that day, April 20, and found the notations on the betting markers to be numbers of horses running on various tracks for the same day. The officer further testified that he compared a National Scratch Sheet for April 19, which he found in appellant's car, with the notebook of appellant, and found the numbers in the notebook for

Friday, April 19, corresponded with the numbers on the National Scratch Sheet of that date. There were two Metropolitan Scratch Sheets dated April 20 found in appellant's car, which were identified by the police officer as the sheets the occupants of the car were holding prior to the interference of the officer. A book marked "Time Book" was also found in appellant's car, which book the arresting officer testified was in his opinion a record of the business done by a bookmaker. At the time of the arrest one of the other occupants of the automobile gave the name of "Jim." On the betting marker, opposite the number 706, was the notation, "Jim, one to win". In the presence of appellant "Jim" stated to the officer that that was his bet. This proved to be a horse running in the fifth race at Havre de Grace on that day. Another notation appeared in appellant's "book" indicating a further bet by "Jim" on a horse running that day at Narragansett named "Liberty Flight". In the presence of the defendant the person giving his name as Jim admitted this also was his bet.

Appellant admitted having received these bets and on questioning by one of the arresting officers admitted he owned all the betting paraphernalia and writings. He confessed ownership of some small envelopes among such paraphernalia, bearing his name, "Cecil", stating that the same were used by men who left bets in them and left them with some third party for appellant. There were some further admissions by appellant that such notations were a record of appellant's bets made on the day of and previous to his arrest. It was further stated by appellant that he had been in the bookmaking business for a long time.

The sole point urged by appellant on appeal is that the foregoing testimony does not constitute a sufficient proof of the corpus delicti, by reason of which the statements and admissions of appellant were inadmissible, and hence the judgment is not supported by sufficient competent evidence. In support of his contention appellant relies entirely upon the case of People v. Newman, 37 Cal.App.2d 627, 99 P.2d 1067; but this case is easily distinguishable from the one before us. For instance, in the Newman case there was an utter failure to identify through competent evidence the slips of paper containing betting notations as being the property of or in the possession of the defendant, while in the case at bar the incriminating notations were positively identified as being in the possession of defendant, who threw them away upon the approach of the police officer. Further, in the matter now under investigation we find evidence of much betting paraphernalia in the automobile, the latter of which was registered in defendant's name, and which material included a "time book", characterized, as heretofore indicated, as being a record of the business done by a bookmaker. In addition to the foregoing, we have the defendant remaining mute in the face of accusatory statements made in the presence of the officer by one of appellant's associates, who stated that certain entries in the betting marker represented bets made by him that day with appellant.

[1-3] By reason of the foregoing we are satisfied that the evidence is sufficient to sustain the conviction and that appellant's claim that the corpus delicti was not established, resulting in error on the part of the trial court in admitting evidence with regard to statements and admissions by defendant, is without merit. It is not necessary or required that proof beyond a reasonable doubt must be offered to establish the corpus delicti. All that is necessary is a prima facie showing. People v. Taylor, Cal.App., 104 P.2d 846, and cases therein cited. That such a showing was here made cannot be questioned. In fact all the documentary matter discovered in appellant's automobile and possession seems to have been only such as ordinarily goes to make up the working material of a bookmaker receiving and recording bets, all of which, taken in conjunction with appellant's conduct, is sufficient to establish prima facie proof of the corpus delicti. Therefore the statements made by defendant to the police officer were admissible in evidence. Without here recounting such statements, the verity of which were undenied at the trial by appellant himself or any other witness, suffice it to say that taken in conjunction, with the facts and circumstances herein set forth, the entire evidence amounted to a complete demonstration of guilt.

The appeal from the sentence is dismissed. The judgment and the order appealed from are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.

41 Cal.App.2d 150

HOLMES EUREKA LUMBER CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 6510.

District Court of Appeal, Third District, California.

Oct. 11, 1940.

1. Constitutional law 🔑301

The Industrial Accident Commission, in determining compensation claimant's petition for additional compensation based on medical reports filed subsequent to an open hearing, which reports were not referred to or used on such hearing and contents of which employer and insurer had no knowledge or opportunity of rebutting by cross-examination violated employer's and insurer's constitutional right to "due process", even though a counter medical report was received and filed by commission. St.1917, p. 873, § 64, now St.1937, p. 302 et seq., § 5900 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process".

2. Workmen's compensation 🔑1703

In compensation proceeding, denial to employer and insurer of right to examine witnesses who rendered medical reports, filed after termination of open hearing, or to rebut or explain the contents of such reports, was not a mere "error in procedure", but constituted an absolute denial of right to cross-examination in violation of the statute. St.1937, p. 299, § 5704.

See Words and Phrases, Permanent Edition, for all other definitions of "Error in Procedure'.

◆

Proceeding under the Workmen's Compensation Act by Oley J. Hanson, employee, opposed by the Holmes Eureka Lumber Company, a corporation, employer, and the Lumbermen's Mutual Casualty Company, insurance carrier. To review an order of the Industrial Accident Commission, denying application of insurance carrier and employer for rehearing after a final award of compensation in favor of employee, employer and insurance carrier bring certiorari.

Award annulled and proceeding remanded, with direction.

R. P. Wisecarver, of San Francisco, for petitioners.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Thomas Cotter, of Eureka, for respondent Oley J. Hanson.

Mr. Justice THOMPSON delivered the opinion of the court.

By means of a writ of certiorari the petitioners seek to review an order of the Industrial Accident Commission, denying their application for rehearing after a final award of compensation was made in favor of Oley J. Hanson, an employee of the Holmes Eureka Lumber Company. It is contended the commission exceeded its jurisdiction in making the award based on reports of physicians which were received in evidence after the hearing was concluded without affording petitioners an opportunity to cross-examine the physicians or rebut their evidence, contrary to the provisions of section 5704 of the Labor Code of California, St.1937, p. 299.

The claimant, Oley J. Hanson, was injured August 23, 1935, in the course of his employment, while he was hauling logs for the Holmes Eureka Lumber Company. The Lumbermen's Mutual Casualty Company was the insurer of the lumber company. After a hearing, the claimant, in February, 1939, was awarded compensation on a basis of fifty and one-half per cent disability. After approximately one year the claimant petitioned the commission for increased compensation on account of permanent disability of his injured leg. The hearing on that petition was held at Eureka on April 18, 1940. Both the claimant and these petitioners were represented at that hearing by counsel. The claimant and one other nonmedical witness were examined. No medical witnesses were then examined and no reports of physicians were then filed. The record discloses no application at that hearing to subsequently file medical reports. All that the record shows is that, at the close of the testimony, the referee made the following order: "Case held open ten days; otherwise submitted." This language implies that the proceeding was to remain open for either party, upon application therefor, to supply additional evidence within ten days, in the absence of which the cause would then be deemed to stand submitted. It accords with reason and justice that such additional evidence should be permitted to be adduced only upon notice to the adverse party with full opportunity to be heard and rebut such evidence if he so desires.

April 22, 1940, the attorney for the claimant sent to the commission four written medical reports. Two of these reports were signed by Dr. J. F. Walsh, and two of them were signed by Dr. Carl Wallace. They were filed on the last-mentioned date and notice thereof was immediately forwarded to the attorney for these petitioners. It is significant that these medical reports were dated and evidently rendered by the physicians on the following dates: October 30, 1939, November 15, 1939, April 13, 1940, and April 15, 1940. All of them were evidently made prior to the hearing, and they were either in the possession of the claimant at the time of that hearing or they were accessible to him.

April 23d the commission received a letter from Mr. Wisecarver, one of the attorneys for these petitioners, asking that he be associated as counsel for the respondents in that proceeding and stating that since the four medical reports, which were available to the claimant at the time of the hearing, were thereafter received in evidence without the opportunity of learning of their contents, cross-examining the affiants, or supplying evidence in rebuttal or explanation thereof, the respondents were prejudiced thereby. He requested the commission to grant a further hearing to enable them to cross-examine the affiants and to supply evidence in rebuttal of those reports. No action upon that request was taken by the commission. After the expiration of ten days from the hearing, during which period the proceeding was held open, and after it was therefore submitted pursuant to the former order, Mr. Wisecarver again wrote to the commission on May 20th, and demanded a hearing to cross-examine the physicians who had filed their reports and to supply rebuttal evidence. The last-mentioned letter was accompanied with a counter-report of Dr. Edmund Butler, which was filed by the commission on the following day. On that day the commission adopted findings awarding the claimant for total disability $2,481.60 and a life pension of $6.36 a week.

June 6th a formal petition for rehearing on the grounds previously mentioned was filed pursuant to section 64 of the Workmen's Compensation Act, St.1917, p. 873. See sec. 5900 et seq. of the Labor Code, St. 1937, p. 302 et seq. That application for a rehearing was denied. This petition for a writ of review was then filed.

Section 5704 of the Labor Code, upon which the petitioner relies, reads as follows: "Transcripts of all testimony taken without notice and copies of all reports and other matters added to the record, otherwise than during the course of an open hearing, shall be served upon the parties to the proceeding, and an opportunity shall be given to produce testimony in explanation or rebuttal thereof before decision is rendered."

[1, 2] We are of the opinion the Industrial Accident Commission exceeded its jurisdiction in submitting and determining the claimant's petition for additional compensation based on medical reports filed subsequent to the "open hearing" which reports were not referred to or used on that hearing and the contents of which the employer and the insurer had absolutely no knowledge or opportunity of explaining or rebutting by cross-examination of the affiants or otherwise. That was a violation of the constitutional right to due process. Walker Mining Company v. Industrial Accident Comm., 35 Cal.App.2d 257, 262, 95 P.2d 188. Apparently these petitioners had no intimation of the existence of these reports at the time of the hearing, or any warning that they would be subsequently filed by the claimant. They were actually filed after the "open hearing" before the proceeding was submitted. Within the time prior to which the cause was submitted, application was duly made to permit these petitioners to cross-examine the affiants and to produce evidence explaining or rebutting the averments of the reports which, in effect, were denied.

It is true that the counter-report of Dr. Edmund Butler was received and filed by the commission after the cause was finally submitted and on the same day that the findings were adopted and the award rendered, but the record fails to show that it was actually considered by the commission. At least no opportunity in open hearing was afforded the respondents there to examine the witnesses who rendered those reports or to rebut or explain the contents thereof. Those reports were certainly prejudicial to them. That denial was not a mere error in procedure. It did not involve a discretion to limit or curb the cross-examination of witnesses. It was an absolute denial of the right to any cross-examination and to supply evidence to rebut damaging reports upon which the award was primarily based, contrary to the provisions of section 5704 of the Labor Code. That section is very clear to the effect that all such reports which are added to the record after the termination of the open hearing entitles the adverse parties to an opportunity to "produce testimony in explanation or rebuttal thereof". It follows that the commission exceeded its jurisdiction in denying the petition for a rehearing.

The award is annulled and the proceeding is remanded with direction to the commission to grant the rehearing and give these petitioners an opportunity to adduce evidence in rebuttal of the claimant's medical reports.

We concur: PULLEN, P. J.; TUTTLE, J.

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41 Cal.App.2d 100

PEOPLE v. PINEDA.

Cr. 3395.

District Court of Appeal, Second District, Division 1, California.

Oct. 10, 1940.

1. Homicide 🔑86

In prosecution for assault with intent to commit murder, a specific intent to murder must be proved; such intent being an essential ingredient of the offense.

2. Criminal law 🔑24

Generally, one is presumed to have intended the immediate and natural consequences of his act, but, where the act becomes criminal only when performed with a particular intent, the intent must be alleged and proved as a fact.

3. Criminal law 🔑738

Where specific intent is a necessary element of an offense, the intent is a question of fact to be determined from all the circumstances, and, except where facts proven afford no reasonable ground for inference as to intent, it is the province of the jury to find the intent and to say what particular intent follows from the acts done.

4. Homicide 🔑257(1)

Evidence sustained conviction of assault with intent to commit murder.

5. Burglary 🔑41(1)

Evidence sustained conviction of burglary.

6. Burglary 🔑45
Homicide 🔑269

Whether accused had specific intent to commit burglary and to kill an officer who arrived at scene of burglary, so as to authorize conviction for burglary and for assault with intent to commit murder, was question of fact for jury, to be deduced from circumstances surrounding entry of building and shooting of the officer.

7. Criminal law 🔑829(18)

Refusal of requested instruction that if jury should believe that accused was guilty of assault or of assault with deadly weapon, and there was reasonable doubt concerning whether the assault was made with intent to commit murder, the jury should give accused benefit of the doubt, and not find him guilty of assault with intent to murder, was not error in view of other instructions including complete instructions on subject of reasonable doubt.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Arturo Aurelio Pineda was convicted of burglary and of assault with intent to commit murder, and he appeals.

Affirmed.

John Oliver, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was charged in an information containing two counts with assault with intent to commit murder and with the crime of burglary. The jury returned its verdict finding appellant guilty as charged, and also found that he was armed at the time of the commission of each offense. This appeal is prosecuted from the judgment of conviction, it being urged: (1) that the evidence is insufficient to sustain a conviction upon either count, "inasmuch as there was no proof as to the intent with which the shots were fired * * * (or) of the intent with which the entry into the building was made"; (2) that the court erred in failing to instruct the jury on the subject of intent; (3) that the court erred in refusing to give a certain instruction requested by appellant.

The facts which form the basis of the instant prosecution may be summarized briefly as follows:

Around the hour of 1:30 o'clock in the morning of March 20, 1939, one Benjamin F. Sanford, who operated a grocery store in the city of Burbank, residing in a building at the rear thereof, was awakened by the buzzer of his electric burglar alarm at the head of his bed. He shut off the alarm and looking through a window in his apartment saw two men trying to open one of the windows in the rear of the store building. A light was shining in the yard between the two buildings, the distance between them being approximately twenty feet. He waited until the men had opened the window with a bar and one of them had crawled into the store, when he called the police department of the city of Burbank and reported a burglary. He then obtained a shotgun from a closet and stationed himself at the door of his apartment facing the rear of the store. Shortly thereafter officer Loyd arrived in response to the call, and walking up to one of the intruders who was standing outside a window at the rear of the store, he ordered him to put up his hands or he would kill him. At that moment a shot was fired at said officer Loyd, either by the man standing outside the window or by the man who was inside the store. The man on the outside, who was later identified as John Lorton, surrendered to the officer who disarmed and handcuffed him. In the meantime, the man who had been inside the store came to the door holding a revolver in his hand and was told by Mr. Sanford to stick up his hands. He thereupon went back inside the store followed by officer Loyd, who was immediately fired upon, the shot creasing his arm. Officer Loyd jumped behind a pillar and two more shots were fired, the officer returning the fire. One of the shots allegedly fired by the assailant glanced off a wooden butter case, four or five feet from the ground, near the place where officer Loyd was standing; another shot struck the pillar behind which said officer had taken refuge, at a point three feet and ten inches from the ground; a third shot struck a gum rack and pierced the wall above the place where officer Loyd was standing.

At the trial officer Loyd testified with respect to the gun fight in the store as follows: "* * * at that time Mr. Sanford said there was another man in the building, and with that I went to this rear door which was partially open, swung it wide open, looked in, and it looked to be kind of a storeroom, flashed my light and there was no one there, and then I saw a switch on the wall, so I went over to the switch and put the light on, the switch on, and with that, instead of lighting up the whole building, it threw a light directly over me and just as the light came on there was a shot and I felt my arm apparently numb. * * * I jumped behind a pillar, an upright pillar, about five feet from me, which is about ten inches square, and I waited for an instant, and I called to this man, whoever he was, to stand up. * * * I could not see anyone, no, but the rest of the store was in semi-darkness. I called to him twice but there wasn't any sound, or any reply, and not knowing where the man was, I took my cap off, kind of held it to one side, and when I did there was another shot. Well, that gave me the location of where this man was, and then is when I returned the fire, and after I had shot the one time there was another shot towards me; I did not know at the time where that shot had gone. I returned two more shots and then everything was quiet, so I kept waiting, thinking I would hear some person, and I saw the front door start to open; you could just see the light from the street and the only thing I could see, it looked like just over the top of a man's head or hat, as he slid out the front door, and that is when I called to officer Evans, when I saw this front door start to open, to look out, that he was coming out. Immediately after that there was a shot outside, so I went back then and took the man that Mr. Sanford was guarding."

Appellant was arrested in Porterville and brought back to Burbank by Chief of Police Adams of the latter city, who testified that he had a conversation with appellant on the return trip, to-wit: "I was talking to him about the burglary of the Sanford Market and the shooting of the officer—shooting at him, rather, and he said yes, that he did, but that he did not mean to hit the officer, that he shot at him to scare him so that he could get away. I asked him what kind of a gun he used. He said it was a 30-30 rifle with the barrel sawed off. * * * I said, 'Well, you know that we had Johnny'—

speaking of Johnny Lorton—I said, 'You know we had him up and tried him on the charge and he testified that you made him go in there and shoot at the officer and burglarize this place or that you would kill him.' He says, 'I did not say that.' He says, 'Johnny and I went out there together. We broke in the store. * * * I went in first and * * * Johnny held the gun,' meaning the 30-30, and also that Johnny had a revolver and that 'if Johnny wanted to get away or wanted to kill me, * * * he could have, because I am the one that went in the store.' So then when we got down home I booked him and locked him up * * * and then I called Johnny in the office and Pineda (appellant) in the office, and I asked Pineda to tell me the same story he had told me yesterday, so he related the same story * * * in the presence of Lorton. First, Lorton said that it was not true, that Pineda was lying, so then he changed his mind and Pineda says, 'Well, why don't you tell the truth?' He (Lorton) changed his mind and said it was not true, that he had just lied to just get out of the other case." This witness also testified that on the day of the preliminary trial, Lorton took the witness stand and related the same conversation that he had told him.

Appellant took the stand in his own defense, denied firing the shots or entering the building, and attempted to place the blame on one Frank Lopez, whose whereabouts was not disclosed. Appellant admitted he told Chief of Police Adams that he had been a participant in the burglary and had shot at officer Loyd; that he made these admissions because he was trying to protect his friend, Frank Lopez.

John Lorton, the man who was caught at the scene of the crime and who was later tried and acquitted, testified on behalf of appellant. On direct examination he said it was not appellant who had been at the store with him on the night in question, but Frank Lopez. On cross-examination, he admitted perjury. He admitted that when he was tried for burglary he stated that appellant was the man who was with him at the store. He also admitted having testified at the preliminary hearing in appellant's case at which time he had definitely stated that appellant was the man in the store on the night of the burglary.

[1] "In a prosecution for an assault with intent to commit murder, a specific intent to murder must be proved. Such intent is an essential ingredient. In this respect the offense differs from murder and from an assault with a deadly weapon, or other means likely to produce great bodily injury, in which no intent is necessary to be proved. * * * It is not necessary to prove a deliberate and premeditated intent to kill, but only an intent to kill under circumstances from which malice would be implied. * * *

[2] "As a general rule, one is presumed to have intended the immediate and natural consequences of his act, but where the act becomes criminal only when performed with a particular intent, such intent must be alleged and proved as a fact. Whether the required intent existed is a question for the jury, to be determined from all the circumstances, including the nature of the weapon, and the consequences likely to follow from the use thereof." 13 Cal.Jur. 752, 753, and authorities there cited.

[3] "Where a specific intent is a necessary element of an offense, the intent is a question of fact to be determined from all the circumstances of the case. And except in a case where the facts proven afford no reasonable ground for an inference as to intent, it is the peculiar province of the jury to find the intent, and to say what particular intent follows from the acts done." 8 Cal.Jur. 278, citing People v. Espalian, 92 Cal.App. 610, 268 P. 702, 703.

In the Espalian case, defendant was convicted of the crime of burglary and contended upon appeal that the corpus delicti was not established by the evidence. There the evidence showed the presence of defendant in a lodging house at the hour of 4:30 o'clock in the morning, and when "discovered, he was standing within two feet of the door of one of the rooms in the lodging house, which door was then slowly closing. On being questioned, defendant stated that he was a roomer in the lodging house, and that he was 'looking for a toilet.' He was not a roomer there; nor did it appear that he used the toilet after his discovery." He was armed with a knife and had in his possession a passkey known as a "pick", and it appeared in evidence that the lock on the door which was closing at the time defendant was first discovered in the lodging house was one which could have been readily unlocked with the key in defendant's possession.

In the cited case it was held at page 612 of 92 Cal.App., at page 703 of 268 P.:

"The final determination of whether the corpus delicti was proved depends upon the motive which actuated defendant in entering the lodging house. If, as defendant claimed, his only purpose was to visit a toilet, no crime would have been committed. On the other hand, if defendant entered the lodging house with the intention of committing either grand or petit larceny he was guilty of the crime of burglary. Section 459, Pen.Code.

"From the circumstances of the case, it would appear that evidence tending to establish the corpus delicti, as well as evidence of the fact that defendant was the person, if any, who committed the crime of burglary, was so interwoven that evidence to the effect that the crime of burglary had been committed would also point to defendant's guilt."

The circumstances present in the case under consideration point with greater force to the commission of the crime of burglary than did those of the Espalian case. Here Mr. Sanford watched appellant and Lorton together force an entrance into his grocery store at 1:30 o'clock in the morning, using a bar three feet in length. Both men were armed and it was conclusively shown that the moment officer Loyd appeared upon the scene in answer to Mr. Sanford's telephone call, one or the other of the intruders fired a shot at him.

Appellant's statement to the chief of police and upon which he relies as showing a complete lack of intent to kill officer Loyd, to-wit: that he did not mean to hit him; that he only shot to scare him so that he could make his escape, is so incompatible with the facts established by the evidence herein as to be ridiculous. Appellant was not content with one shot which struck officer Loyd and creased his arm, but he continued to fire his 30-30 sawed off rifle and barely missed hitting the officer with at least two other shots.

[4-6] The evidence was amply sufficient to sustain the convictions upon both counts. The question of intent with which appellant acted was one of fact for the determination of the jury to be deduced from all the facts and circumstances surrounding the entry of the building and the shooting of the officer.

A review of the instructions reveals that the court fully instructed the jury as to the law involved in the cause. However, appellant urges that the court erroneously refused to give the following instruction requested by him: "If, after hearing all the evidence in this case, you believe that the defendant is guilty, either of an assault or of an assault with a deadly weapon, but there is in your minds a reasonable doubt as to whether or not at the time of making such assault he did so with the intent to commit murder you must give him the benefit of such doubt and must not find him guilty of an assault with intent to commit murder as charged in the information though you may find him guilty of an assault or of an assault with a deadly weapon."

[7] The jury was fully and correctly instructed as to how to draw inferences from facts proved, and an instruction was given correctly defining assault with a deadly weapon, as well as defining deadly weapon. An instruction was also given on the question of injury in an assault and violent injury, followed by an instruction with respect to assault with a deadly weapon with intent to kill and murder. In a previous instruction the court had directed the jury with regard to the presumption of innocence and gave complete instructions on the subject of reasonable doubt. There was no error on the part of the trial court in its refusal to give an additional instruction on the subject of reasonable doubt.

On the burglary charge, the court's instructions contained the direction that "The essence of the offense of burglary consists in the intent with which such entry is made." This was followed by an instruction with respect to evidence susceptible of different constructions, in which the jury was cautioned that where two constructions were possible and both were reasonable, it was bound to adopt the interpretation which would admit of appellant's innocence and reject that which pointed to his guilt.

Since the jury received instructions on the subject of specific intent, the cases cited by appellant, including People v. Snyder, 36 Cal.App.2d 528, 97 P.2d 976; and People v. Warren, Cal.Sup., 104 P.2d 1024, in support of his third and fourth contentions are not in point.

The evidence was legally sufficient to support the judgment of conviction and no prejudicial error appears in the record.

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

41 Cal.App.2d 25

Ex parte BOZA.

Cr. 462.

District Court of Appeal, Fourth District, California.

Oct. 2, 1940.

1. Habeas corpus 🔑92(1)

Where there was substantial evidence supporting verdict finding a violation of ordinance, facts could not be considered in application for writ of habeas corpus.

2. Habeas corpus 🔑30(2)

Complaint charging that defendant did willfully and unlawfully commit the crime of being intoxicated in a public place or a place open to public view in certain city, contrary to ordinance, stated facts sufficient to constitute a public offense within jurisdiction of police court as against contention in habeas corpus proceeding that the particular place in the city where the defendant was claimed to be intoxicated was not definitely described. Pen.Code, § 1426.

3. Habeas corpus 🔑30(2)

Where complaint under which defendant was convicted charged that defendant did willfully and unlawfully commit the crime of being intoxicated in a public place or a place open to public view in certain city in violation of ordinance, the failure to allege the precise address of the public place or place open to public view was not open to criticism in habeas corpus proceeding.

4. Municipal corporations 🔑639(1)

Where complaint under which petitioner seeking release on habeas corpus was convicted alleged that he did willfully and unlawfully commit the crime of being intoxicated in a public place or place open to public view in certain city in violation of ordinance, even though complaint failed to allege the precise address of the public place or place open to public view, evidence was admissible under the allegation to establish such facts as were essential.

5. Habeas corpus 🔑30(2)

Where complaint under which petitioner seeking release on habeas corpus was convicted charged that he did willfully and unlawfully commit the crime of being intoxicated in a public place or a place open to public view in certain city in violation of ordinance, it was not mandatory to charge the degree of intoxication as such word has a well-understood meaning.

6. Municipal corporations 🔑594(1)

The city of Riverside had authority to enact ordinance making it a crime to be intoxicated in a public place or a place open to public view. Const. art. 11, § 11.

7. Constitutional law 🔑81

The measures needful or appropriate to be taken in the exercise of police power are determined by legislative policy within constitutional limitations and for such purpose a wide discretion is committed to the lawmaking body.

8. Constitutional law 🔑70(1)
Municipal corporations 🔑63(1)

Unless it clearly appears that a statute or ordinance ostensibly enacted for purpose of securing the public safety, morals, or welfare has no real or substantial relation to such objects and that the fundamental rights of a citizen are assailed under the guise of police regulation, the action of the legislative department is conclusive.

9. Municipal corporations 🔑592(1)

Ordinance of city of Riverside making it unlawful for any person to be intoxicated in a public place or in any place open to public view is not unconstitutional on ground that it forbids the drinking of intoxicating liquor in public places and is, therefore, repugnant to the state law which specifically provides for and allows the sale of intoxicating liquors. Gen.Laws 1937, Act 3796; Const. art. 11, § 11.

Habeas corpus proceeding by Michael M. Boza.

Writ discharged and petitioner remanded.

W. E. Kalbfleisch, of Corona, for petitioner.

Eugene Best, City Atty., of Riverside, for respondent.

GRIFFIN, Justice.

On March 1, 1940, a complaint was filed against Michael M. Boza, petitioner herein in the police court of the city of Riverside, charging him with a violation of section 2 of ordinance No. 415 (new series) of said city. After due proceedings had, and on March 21, 1940, the petitioner was found guilty by a jury. On April 22, 1940, an order and judgment of the police court was duly made to the effect that the petitioner be fined the sum of $50 or serve one day in jail for each $2 of the fine unpaid.

Thereafter an appeal was taken to the superior court. On July 1, 1940, the judgment of the police court was affirmed. The petitioner refused to pay any portion of the fine and on July 17, 1940, surrendered himself into custody.

Petitioner now contends that the imprisonment is illegal and that the illegality thereof consists in this: (1) That the complaint charges that the petitioner "did wilfully and unlawfully commit the crime of being intoxicated in a public place or a place open to public view in the City of Riverside contrary to the provisions of Section 2 of Ordinance No. 415 (N.S.) of the City of Riverside * * *"; that the ordinance above mentioned provides in part: "An ordinance of the City of Riverside making certain things and acts unlawful and for the protection of public morals * * *. Section 2. It shall be unlawful within the City of Riverside for any person to be intoxicated in any public place, or in any place open to public view, and any person so found intoxicated in such place shall be arrested by the proper officers, and the Chief of Police and all policemen of said city are hereby empowered to enter such places and take therefrom any person so intoxicated. * * * Section 50. Any violation of any of the provisions of this ordinance shall constitute a misdemeanor and every person found guilty * * * shall, upon conviction thereof, be fined in the sum of not more than Three Hundred Dollars ($300.00) or by imprisonment in the City Jail of said City for not more than three months, or be punished by both such fine and imprisonment"; (2) that said complaint fails to state a public offense against defendant under the laws of California and in particular under and as required by the provisions of section 1426 of the Penal Code; (3) that section 2 of the ordinance is unconstitutional and void for the following reasons: (a) that at no place in the ordinance is there any definition of the "public morals" that are or were to be protected; (b) that at no place in the ordinance is "a public place, or place open to public view" defined so as to know when a person can definitely and positively be adjudged within the provisions thereof; (c) that there is no definition of the words "intoxication" or "intoxicated" or "that the 'intoxicated' condition was caused by over-consumption of alcoholic liquors, and that such 'intoxicated' condition so affected the actions of the accused person by his mode of walk or gait, his speech or the things he said as to be noticeable to any person and 'shock' the 'public morals' of any person of said city, and thereby come within the police powers of said City of Riverside to regulate the drinking of alcoholic liquors"; (4) that said section 2 of the ordinance is so indefinite, vague and uncertain as to fail to define any crime that was within the jurisdiction of the city of Riverside to regulate at the time of petitioner's arrest, because the ordinance was enacted in the year 1925, at which time it was unlawful to sell intoxicating liquors, and by a parity of reasoning, to drink the same unless under doctor's orders, under the laws of the United States then regulating the same; that since said time the provisions of the federal Constitution prohibiting the sale of intoxicating liquors have been repealed and it is not now illegal to sell intoxicating liquors; that by the same parity of reasoning it is not unlawful to drink the same, and accordingly the drinking of intoxicating liquors can only be regulated under the police powers of the city of Riverside when properly exercised in accordance with the laws of California.

The facts reflected in the statement on appeal are that on February 27, 1940, at 12:30 a. m., the petitioner Michael M. Boza was in an automobile which had run off the road and into a ditch near the corner of Cleveland and Van Buren streets in Riverside. The defendant was asleep in the front seat of the car under the steering wheel when the officers arrived. The defendant was ordered out of the car and was unable to stand up very well (apparently due to intoxication).

Petitioner argues that the arrest and detention were unlawful because petitioner was merely asleep at the time the officers arrived and he was not drinking alcoholic liquors in their presence; that it was not on the complaint of any person that the police officers went to the place where petitioner was arrested and that merely by being asleep in his own car he was not committing any crime or violating said ordinance. People v. Beifuss, 22 Cal.App. 2d Supp. 755, 67 P.2d 411; People v.

Ekstromer, 71 Cal.App. 239, 235 P. 69; Tracy v. Brecht, 3 Cal.App.2d 105, 39 P.2d 498; In re Hernandez, 64 Cal.App. 71, 220 P. 423; In re Peppers, 189 Cal. 682, 686, 209 P. 896.

[1] It is quite apparent that the issues of fact were decided against petitioner by the jury and sustained by the reviewing court. They cannot be considered again in this application for a writ of habeas corpus (In re Williams, 183 Cal. 11, 14, 190 P. 163), where there is substantial evidence supporting the verdict.

[2] The contention that the complaint does not state facts sufficient to constitute a public offense within the jurisdiction of the police court, in that the particular place in the city where petitioner was claimed to be intoxicated is not definitely described nor was it stated whether it was a public place or place open to the public, is untenable. By the allegations the petitioner was sufficiently informed of the nature of the charge, that is, "being intoxicated in a public place or a place open to public view in the City of Riverside". In re Stambaugh, 117 Cal.App. 659, 662, 4 P.2d 270; In re Hayward, 62 Cal.App. 177, 216 P. 414; In re Kaster, 52 Cal.App. 454, 198 P. 1029; sec. 952, Pen.Code; People v. Mitchell, Cal.App., 104 P.2d 545; In re Maldonado, 97 Cal.App. 288, 275 P. 495; In re Berto, 195 Cal. 774, 235 P. 735.

[3-5] The failure to allege the precise address of the public place or place open to public view is not open to criticism in a habeas corpus proceeding. Evidence was admissible under such an allegation to establish such facts as were essential. It was not mandatory or essential to charge the degree of intoxication, as such word has a common and well-understood meaning. People v. Ekstromer, supra; Tracy v. Brecht, supra; Nelson v. State, 97 Tex.Cr.R. 210, 261 S.W. 1046; Scott v. State, 130 Tex.Cr.R. 635, 95 S.W.2d 396; State v. Reifsteck, 317 Mo. 268, 295 S.W. 741; Words and Phrases, Perm.Ed., vol. 22, p. 427 et seq.; People v. Beifuss, supra.

The remaining question is whether the ordinance is unconstitutional and void for the reason that it is claimed the ordinance forbids all drinking of intoxicating liquor in the city of Riverside for the claimed reason that "a person is intoxicated after one drink of intoxicating liquor" according to petitioner's interpretation of Tracy v. Brecht, supra. In this respect it is claimed that since the Alcoholic Beverage Control Act (Stats.1935, p. 1123, as amended, Act 3796, Deering's Gen.Laws 1937) specifically allows a licensed "on sale place" to sell liquor to its patrons, that therefore in effect the ordinance is repugnant to the state law which specifically provides for and allows the sale of intoxicating liquor to its customers. It is further argued that being intoxicated in a public place without any boisterousness, violent or profane language, is not a matter subject to regulation by city ordinance and not a public offense, citing Ramey v. State, 40 Ga.App. 658, 151 S.E. 55; Lewis v. Commonwealth, 197 Ky. 449, 450, 247 S.W. 749; Smith v. Commonwealth, 204 Ky. 448, 264 S.W. 1047; State v. Munger, 43 Wyo. 404, 4 P.2d 1094, 1095; In re Dees, 46 Cal.App. 656, 660, 189 P. 1050; Griffin v. Smith, 184 Ga. 871, 193 S.E. 777; In re Harder, 9 Cal.App.2d 153, 49 P.2d 304; In re Peppers, 189 Cal. 682, 209 P. 896; People v. Beifuss, supra.

[6] There can be no question but that the subject matter of the ordinance falls within the police power of the city of Riverside Const. of Calif., art. XI, sec. 11; Ex parte Drexel, 147 Cal. 763, 765, 82 P. 429, 2 L.R.A.,N.S., 588, 3 Ann.Cas. 878; 5 Cal.Jur., p. 687, sec. 100.

[7, 8] The measures needful or appropriate to be taken in the exercise of police power are determined by legislative policy, within constitutional limitations, and for this purpose a wide discretion is committed to the law-making body. Whether it shall entirely prohibit or only regulate by confining such infractions within prescribed limits must be determined primarily by the legislative department of the state, or by the municipality authorized to exercise this great power which may be conferred for the purpose of securing the public safety, morals and welfare, and unless it clearly appears that a statute or ordinance ostensibly enacted for this purpose has no real or substantial relation to these objects, and that the fundamental rights of the citizen are assailed under the guise of a police regulation, the action of that department is conclusive. Ex parte Tuttle, 91 Cal. 589, 27 P. 933.

[9] The ordinance does not attempt to forbid the drinking of intoxicating liquor

in public places but does provide a punishment for those who become intoxicated within the meaning of that term, in "a public place or a place open to public view". We see little merit to petitioner's argument in this respect. The constitutionality of the ordinance is not subject to attack upon the grounds stated.

To us the other points presented do not appear to merit further consideration.

Writ discharged; petitioner remanded.

We concur: BARNARD, P. J.; MARKS, J.

41 Cal.App.2d 158

PEOPLE v. CHRISTMAN.

Cr. 3358.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1940.

1. Criminal law ⇨572

Evidence warranted conviction for petty theft accomplished by trick and device, as against defendant's claim of alibi.

2. Criminal law ⇨1186(4)

Where defendant, on hearing of defendant's application for probation, admitted that he was guilty of offenses charged, defendant could not claim a reversal on ground that there had been a "miscarriage of justice". Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

3. Criminal law ⇨1202(1)

In prosecution for petty theft, it was not error to permit an amended information to be filed, over defendant's objection, prior to trial charging defendant with a prior violation of State Narcotic Act, where defendant was convicted for violating Narcotic Act prior to offenses charged in information and was placed on probation and, after violating terms of probation, was sentenced to state penitentiary on a date later than date of offenses charged in information. St.1929, p. 380; Pen.Code, §§ 17, 969a.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Tony Christman was convicted on two counts charging petty theft, it being also charged that he had been previously convicted of petty theft and of a violation of the State Narcotic Act, St. 1929, p. 380, and he appeals.

Affirmed.

Josiah Coombs and Ralph Paonessa, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was convicted at a jury trial on two counts charging petty theft, it being also charged that he had suffered a prior conviction of petty theft and also that he had previously been convicted of a violation of the State Narcotic Act, St.1929, p. 380. He appeals from the judgments of conviction and from the order denying his motion for a new trial.

Early in the afternoon of October 30, 1939, defendant drove to the gasoline service station operated by Walter M. Rapp on Lincoln Avenue in the city of Pasadena and purchased two gallons of Economy gasoline. Upon receiving the gasoline defendant handed Rapp a ten dollar bill. Rapp went into the station and rang up the sale on the cash register. As defendant received the change, $9.69, defendant told Rapp that the change was too much, that he had given him only a one dollar bill. The change given to defendant consisted of a five dollar bill, four one dollar bills and sixty-nine cents in coins. Defendant reached in his pocket, took out thirty-one cents in coins and handed the bills, with the exception of the five dollar bill, and one dollar in coins to Rapp, who returned to him the ten dollar bill. Rapp testified that he did not count the change at that time "because he interrupted me and asked about a fan belt for a Ford V-8 and asked me if I had one and the price of it." Rapp looked up the price of the fan belt and defendant said that a young lady would bring the Ford to get the belt. Another customer drove in and Rapp placed the money on the edge of the cash register. Defendant then drove away. After he had waited on the new customer Rapp counted the money and discovered that he was five dollars short.

The evidence concerning the transaction which is the subject of the second coun is quite similar to that concerning the first count. Shortly after the transaction with Mr. Rapp defendant drove to the service station operated by Edward M. Nightingale on Colorado street in Pasadena and purchased one gallon of Indian gasoline. He handed Nightingale a ten dollar bill and falsely induced him to believe that he should return as change the sum of five dollars more than was actually due. Nightingale testified that "the money changed hands about four different times, and then when it was over, and I turned my back to him, he says, 'Where is that five dollars?' and I says, 'What five dollars?' And he says something to the effect that he still had five dollars coming to him, and I was quite sure that he didn't have, but I was rushed at the time; the station was full of people, so I had—after a certain amount of hesitation I went to the register and gave him another five dollars".

[1, 2] The evidence introduced by the prosecution establishes that defendant is guilty on each count of the crime of petty theft accomplished by trick and device. Indeed, defendant does not argue on appeal that the evidence is insufficient to establish the crimes, but contends that defendant was not the party who defrauded the service station operators. He refers to his attempt to establish an alibi. He also argues that the court committed prejudicial error during the trial, especially in instructing the jury. We need not discuss the alleged errors for the reason that on the hearing of defendant's application for probation he admitted that he was guilty of the offenses charged. Manifestly, it cannot be successfully argued that there has been a miscarriage of justice. Section 4½ of Article VI of the Constitution of California is applicable. People v. Steinfeld, 38 Cal.App.2d 280, 101 P.2d 89.

[3] Just prior to the trial the court permitted, over the objection of defendant, an amended information to be filed charging a prior violation of the State Narcotic Act, a felony. The court did not err in so doing. Pen. Code, sec. 969a; People v. Barwick, 7 Cal.2d 696, 62 P.2d 590. It was stipulated that defendant was convicted of the violation of the State Narcotic Act in 1937; that he was then placed on probation but served six months in the county jail as a condition of his probation; that in January, 1940, he was brought before the court on a charge of violating the terms of his probation and was then sentenced to the state penitentiary, his sentence being suspended. Defendant argues that since he was not sentenced to the state penitentiary until January, 1940, a date later than the offenses charged in the information, he could not be charged at the trial of the present action with having been convicted of a felony. There is no merit in this contention. When defendant was convicted of the violation of the Narcotic Act he stood convicted of a felony. His status could have been changed by "a judgment imposing a punishment other than imprisonment in the state prison". Sec. 17, Pen. Code; In re Rogers, 20 Cal.App.2d 397, 66 P.2d 1237; In re Miller, 218 Cal. 698, 24 P.2d 766. No such judgment was imposed but rather a judgment was later imposed by which defendant was sentenced to the penitentiary.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

41 Cal.App.2d 173

AKOBOFF v. DUSENBURY et al.

Civ. 12077.

District Court of Appeal, Second District,
Division 1, California.
Oct. 15, 1940.

1. Automobiles 🔑223(4), 226(2)
Death 🔑23

Where nine year old child, not wanting in capacity to use ordinary care for his own safety, attempted to cross street 60 feet from intersection at a place where under statute he was required to yield right of way to approaching automobile and to use due care, but did neither, and ran in front of motorist's automobile, sustaining injuries from which he died, the child was guilty of negligence contributing proximately to the accident, and parents could not recover for his death. Vehicle Code, § 562(a), St.1935, p. 188.

2. Death 🔑23

In parent's action for death of nine year old child killed by automobile while attempting to cross street at place other than intersection, defense of contributory negligence was available to defendant.

3. Automobiles ⚷245(74)

In action for death of nine year old child killed by automobile, whether the child exercised care to avoid danger in crossing street some 60 feet from intersection was for the trier of fact.

4. Automobiles ⚷227(1, 5)

The "last clear chance doctrine" is applicable to an automobile injury case only where the person injured is known to be in a position of peril from which he cannot extricate himself by ordinary care.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance Doctrine".

5. Automobiles ⚷227(1, 5)

Where nine year old child attempted to cross street some 60 feet from intersection and, when he reached center of highway, ran in front of motorist's automobile when he could have stopped or refrained from running, and thereby freed himself from whatever perilous position he might have been in, and motorist was not aware or in the exercise of ordinary care could not have been aware of any dangerous situation from which the child was not able to extricate himself, parents could not recover for death of the child killed when struck by automobile on ground that motorist had "last clear chance" to avoid the accident and failed to exercise it.

* * *

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Bersop Macardichian Akoboff against Frank Dusenbury and another for the death of plaintiff's minor son resulting when run over by an automobile operated by the named defendant. From a judgment for the defendants, plaintiff appeals.

Affirmed.

Earl E. Moss and H. W. Steiner, both of Los Angeles, for appellant

Parker & Stanbury and Raymond G. Stanbury, all of Los Angeles, for respondent Frank Dusenbury.

WHITE, Justice.

Plaintiff brought this action for damages for the wrongful death of her minor son, who died from the effects of injuries received when he was struck and run over by an automobile operated by the defendant Frank Dusenbury. John Macardichian, father of the child and former husband of the plaintiff, was joined as a defendant, but did not appear at the trial. Trial was commenced before a jury, but at the conclusion of plaintiff's evidence defendant Dusenbury chose to waive the jury, and no objection being interposed by plaintiff, the trial proceeded before the court. The trial judge found as facts that the sole proximate cause of the accident was the negligence of the deceased minor child and that so far as defendant Dusenbury was concerned the accident was unavoidable and "resulted without negligence or carelessness" upon his part. Judgment was accordingly entered that plaintiff take nothing, from which judgment she prosecutes this appeal.

From the record it appears that on the morning of December 12, 1936, the deceased, a boy of the age of nine years, attempted to cross from the north to the south side of Anaheim-Telegraph road, an "arterial highway" in the city of Los Angeles, at a point about 60 feet east of its intersection with Ford boulevard. When the boy reached the center of the street he broke into a run, and while running was struck by the car of defendant Dusenbury, who was driving east on the south side of the street. At the scene of the accident Anaheim-Telegraph road is 70 feet wide; it was a clear day and the traffic was light.

The witness Mike Akopoff testified that he saw the accident from the sidewalk; that the boy looked both ways before stepping into the street, and then walked straight across until he reached the center of the street, when he began to run and was struck at a point about 10 feet from the opposite sidewalk. This witness estimated the speed of the car at from 45 to 55 miles per hour, but stated that he did not see the car until it struck the boy, and that it came to a stop in about 25 feet after the impact, without skidding. Another witness, Charles Mainer, testified that he first saw the car as one of its rear wheels was passing over the boy, and that the car stopped in about one length or 15 feet; that at the time he saw the car it was traveling between 15 and 20 miles per hour. Akopoff testified that there was no other traffic on the street, and Mainer stated that he did not see any other cars. The defendant Dusenbury, called as a witness in his own behalf, testified that he was traveling between 20 and 25 miles per hour, and that he first saw the boy "a fraction of a second" before the impact, when he was about 6 feet away; that he applied his brakes, but the car struck the boy, passed over him and went on about a length and a half before coming to a stop.

As sole ground for reversal appellant urges that the only reasonable conclusion which could be drawn from the evidence was that respondent was negligent, because, under the undisputed physical facts as to the conditions in the street, respondent must have seen the boy much sooner than he admitted seeing him, and hence had the last clear chance to avoid the accident. Respondent testified to seeing another car entering Anaheim-Telegraph road from Union Pacific avenue, which runs into Anaheim-Telegraph road from the south about 70 feet east of Ford boulevard. From this testimony and the physical facts, argues appellant, it conclusively appears that respondent was looking straight ahead at the time of and prior to the accident. "The one point of conflict," says appellant, "is whether respondent saw the child sooner than he asserts, and within time to permit him to stop his automobile. * * * Where the physical facts show that the respondent was watching the entire highway, that the weather was clear, that there were no obstructions to his view, and that the child traversed at least 48 feet of the street before being struck, the only reasonable conclusion which can be drawn is that the respondent saw the boy during all or most of the time he was crossing the street."

[1-3] From a consideration of the foregoing factual situation appellant is not aided, even though we assume respondent was guilty of negligence, because there can be no question of the negligence of the decedent. This for the reason that the accident did not occur at an intersection having either a "marked" or "unmarked" crosswalk, but deceased was struck at a point some 60 feet west of the nearest street intersection. Therefore, in crossing the main thoroughfare decedent was not only obliged to "yield the right of way" to the automobile of respondent, but was required at all times, in his use of the highway, to exercise due care. Vehicle Code, sec. 562(a), St.1935, p. 188. From the conduct of decedent it is obvious that he made no effort to do either one or the other, and it is equally manifest that his failure in that regard contributed proximately to the happening of the accident. Consequently, appellant herein could recover no damages. The deceased child in this case having admittedly attained sufficient age to exercise discretion in the avoidance of injury, the defense of contributory negligence may be invoked in an action brought by a parent for damages on account of the child's death (Patania v. Yellow-Checker Cab Co., 102 Cal.App. 600, 283 P. 295); while the question of the capacity of a particular child to exercise care to avoid danger is ordinarily for the trier of fact. Cahill v. E. B. and A. L. Stone Co., 167 Cal. 126, 138 P. 712. The following are cases where the ages of the minors varied from 8 to 11 years, and the question of capacity to avoid injury and danger was determined as one of fact: Patania v. Yellow-Checker Cab Co., supra; Moeller v. Packard, 86 Cal.App. 459, 261 P. 315; Moss v. Stubbs, 111 Cal.App. 359, 295 P. 572, 296 P. 86. The youth in the instant case was 9 years of age, and concerning his intelligence his mother testified: "He was wise and very clever—I mean he was very smart—he was very smart." From the facts in the present case there is nothing which would warrant us in saying as a matter of law that the child was wanting in capacity to use ordinary care for his own safety.

[4, 5] Finally appellant urges that we disregard the finding of the trial court and conclude from the evidence herein that respondent had the last clear chance to avoid the accident and failed to exercise it. However, the evidence does not bring the case within the rule where the doctrine of the last clear chance becomes applicable. The rule in question is applicable only in a case where the person injured is known to be in a position of peril from which he cannot extricate himself by the exercise of ordinary care. Palmer v. Tschudy, 191 Cal. 696, 218 P. 36; Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915; Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918. While the deceased was negligent, he was not in a position from which he could not have escaped by the exercise of ordinary care. He could have stopped or refrained from running when he was in the center of the highway, and would thereby have freed himself from whatever perilous position he might have been in. Neither can it be said as a matter of law that respondent was aware, or in the exercise of ordinary care should have been aware, of any dangerous situation from which the deceased was not able to extricate himself while yet it lay within the power of respondent by the use of ordinary care to avoid the injury.

The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

41 Cal.App.2d 143

PEOPLE v. BRENNAN.

Cr. 2127.

District Court of Appeal, First District,
Division 2, California.
Oct. 11, 1940.

Rehearing Denied Oct. 26, 1940.

1. Embezzlement 🔑1
Larceny 🔑14(1)

Where one honestly receives possession of goods upon a trust and thereafter fraudulently converts them to his own use, he is guilty of "embezzlement"; but, where possession has been obtained through trickery or deceit with intent at time of receipt of goods to convert them, and owner parts merely with possession and not with title, the offense of "larceny" has been committed.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzlement" and "Larceny".

2. False pretenses 🔑20
Larceny 🔑62(2)

Testimony of complaining witness that accused represented to witness that accused owned race horses which had been attached for feed bill, that accused would lose horses if bill was not paid, and that he desired to borrow $300 in order to pay the bill, and that acting on such false representations witness loaned money to accused, who did not repay the money, authorized jury to find accused guilty of "larceny" as distinguished from "obtaining money under false pretenses". Pen.Code, § 332.

See Words and Phrases, Permanent Edition, for all other definitions of "Obtaining Money under False Pretenses".

3. Larceny 🔑62(2)

Where jury was warranted in returning verdict of larceny as distinguished from offense of obtaining money under false pretenses, upon the testimony of the complaining witness, such testimony was not required under statute to be corroborated to sustain conviction. Pen.Code, § 1110.

4. False pretenses 🔑49(3)

Evidence corroborating testimony of complaining witness was sufficient to sustain conviction of accused, even if facts involved offense of obtaining money under false pretenses as contended by accused, instead of larceny as contended by the Attorney General. Pen.Code, § 1110.

5. Criminal law 🔑369(2)

In prosecution for obtaining money by falsely representing that accused owned race horses which had been attached for feed bill, that if bill was not paid the horses would be sold, and that accused wished to borrow the money to pay feed bill, evidence that accused obtained other money from complaining witness to bet on a race pursuant to a scheme to make a winning which was explained to witness by accused was admissible where there was some evidence that accused represented that a horse which was involved in the scheme was one of the horses whose feed bill had not been paid. Pen. Code, § 332.

◆

Appeal from Superior Court, Monterey County; Ray B. Lyon, Judge.

George Brennan was convicted of larceny, and he appeals.

Affirmed.

Ralph O. Marron, of Monterey, for appellant.

Earl Warren, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

The defendant was charged with the crime of grand theft. Pen.Code, sec. 484. The charge was contained in an information filed by the district attorney. The defendant entered a plea of not guilty. The jury returned a verdict against him. He made a motion for a new trial. The motion was denied. He has appealed from the judgment and from the order denying him a new trial.

It was the theory of the district attorney that the defendant represented to the prosecuting witness, E. Werner, that the defendant owned some race horses that had been attached for a feed bill amounting to $300, and that if the bill was not paid said horses would be sold and he would lose them; that for the purpose of paying said feed bill he desired to borrow $300; that acting on such representation E. Werner loaned defendant the sum of $300; that in truth and in fact defendant did not owe a feed bill on any horses; and that the money has never been repaid.

[1-4] The defendant asserts that the specific charge against him was, as shown

above, the offense of obtaining money under false pretenses. But continuing, the defendant further asserts the prosecution introduced no testimony which corroborated the testimony of the complaining witness and that such corroboration was essential to sustain the judgment. People v. Edwards, 133 Cal.App. 335, 24 P.2d 183, and People v. Carter, 131 Cal.App. 177, 21 P.2d 129. The attorney general does not question the rule but he calls to our attention certain facts which he claims show the offense complained of was that of obtaining money by trick and device (Pen.Code sec. 332) and therefore the rule is not applicable to the instant case. Werner testified that he and Brennan met at Bay Meadows during the meeting in the spring of 1939. Werner was an elderly man seventy-eight years of age. Brennan was about forty-four. From the day they first met Brennan and Werner commenced to talk horses and racing. Brennan told Werner much about the various horses and induced the latter to make certain bets. The two met frequently at Bay Meadows and afterwards at Santa Anita. While at Bay Meadows Brennan told Werner of a scheme he had to make a winning. A horse known as Unparallel was on the track. Brennan said he knew of another horse which the witnesses speak of as the "ringer". That horse Brennan stated looked so much like Unparallel that many could not tell one from the other. Brennan stated it was his plan, when the meeting was held at the Hollywood track to substitute the "ringer" for Unparallel and that the "ringer" would certainly win large sums. Werner gave Brennan $1,500 to bet on the "ringer", which Brennan claimed was stabled nearby the Santa Anita race track. Difficulties arose in carrying the plan into execution. Many delays followed. Werner says the "ringer" was never run and he never got his money back. The defendant claims the bet was to be placed on Unparallel, that it was so placed, the horse was disqualified, and the money was lost. But he also testified the bet was oral and he produced not even a coupon as evidence of the bet. In the month of October, while the parties were still waiting for the "ringer" to be run and the $1,500 to be bet on him, defendant and one Wagner called on Werner and asked the latter for $300 to pay the feed bill against some horses. While there are conflicts in the testimony it must be conceded there is some evidence to the effect that Brennan represented the "ringer" was one of those horses whose feed bill had not been paid. There was evidence neither Wagner nor Brennan owned any horses and that neither owed a feed bill on any horses. Therefore the possession of the $300 was not obtained honestly. Similar principles were before the court in People v. Sichofsky, 58 Cal.App. 257, 208 P. 340. At page 263 of 58 Cal.App., at page 342 of 208 P., the court said: "But, as it is, the possession of the money of each complaining witness was obtained through fraud and deceit. It therefore follows that its fraudulent appropriation by appellant to his own use, he having had from the beginning the intention to obtain it for that purpose, constituted, in law, an act of larceny. People v. Delbos, 146 Cal. 734, 81 P. 131; People v. Shwartz, 43 Cal.App. [696] 697, 185 P. 686. As was said in People v. Tomlinson, supra [102 Cal. 19, 23, 36 P. 506], there must often be, on the *facts*, a very narrow margin between cases of larceny and embezzlement, because the character of the crime depends upon the secret intention of the parties, which is often difficult to ascertain; but, so far as the *law* is concerned, the principles upon which the question of guilt or innocence is to be determined are plain. Where one honestly receives the possession of goods upon a trust, and, after receiving them, fraudulently converts them to his own use, it is a case of embezzlement. But, where the possession has been obtained through trickery or deceit, with the intent at the time the defendant receives the goods to convert them to his own use, and the owner of the goods parts merely with the possession, and not with the title, the offense is larceny. It was a question for the jury to decide whether appellant obtained possession of the money fraudulently, with the intent at the time he received it to convert it to his own use, and whether the complaining witnesses intended to part with the ownership at the time of delivery. By its verdict the jury has decided these matters adversely to appellant's contention; and, as there is ample evidence to sustain the jury's conclusion, we may not disturb it." So in the present case, if the jury believed the story as told by the complaining witness, and from its verdict we must assume it did, then the jury was warranted in returning a verdict of guilty and the offense constituted larceny as distinguished from the offense of obtaining money under false pretenses. That being so the provisions of section 1110 of the Penal Code are not applicable. But if we assume the facts involved the offense of obtaining money under false pretenses, the attorney general contends there was an abundance of such evidence. We think that is so. He calls to our attention that the talking was done sometimes by the defendant and sometimes by Henry Wagner of whom the defendant said, "Anything Wagner says is OK." All of the facts, except the representations and the falsity thereof are abundantly supported. The facts so excepted are supported by the testimony of other witnesses including the defendant. As to the representation it was testified to by both Werner and Brennan. The only variance is that the defendant claims Wagner did the talking in his presence. Werner says the defendant did the talking. The undisputed evidence was that the $300 was paid by E. Werner by drawing a check on October 17, 1939. It was dated at Watsonville. He testified he handed it to Brennan. The latter delivered it to Wagner. He had Yvonne Derran cash it. She paid it to him as "Mr. Obermeier". She testified she had no horses and had no horse feed bill against anyone. Furthermore the defendant testified a conversation took place between Werner and Wagner at the former's ranch at about the time specified by Werner in which Wagner said he had some horses, that they had been attached, that he needed $300, and that Wagner asked Werner to advance said sum. Continuing he testified he was not present when the check was turned over to Wagner and that he got none of the proceeds. Considering all of these facts we are unable to say there was no corroboration of the testimony of the prosecuting witness.

[5] The defendant complains because the trial court admitted the evidence concerning Unparallel. He asserts it was an instance of receiving evidence of other wrongful acts or crime. We think not. It was distinctly a part of the offense on trial.

Finally the defendant contends the trial court erroneously allowed the district attorney "* * * to introduce evidence showing that over a period of time the complaining witness, Werner, had given to Brennan and Wagner considerable sums of money to be placed as bets on horse races. That as a result of these moneys given to bet the complaining witness lost between $7000 and $8000." That Werner testified he lost $8,000 through Brennan is true. But he testified that he never bet more than $2 on a race. He did not testify that his loss of $8,000 was composed of bets in whole or in part.

The judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

41 Cal.App.2d 157

PEOPLE v. RANDALL et al.

Cr. 3376.

District Court of Appeal, Second District,
Division 2, California.
Oct. 14, 1940.

Robbery 🔑24(3)

Evidence identifying accused as being one of three men engaged in robbery was sufficient to sustain conviction of robbery.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Proceeding by the People against Henry V. Randall and others, wherein Terrell Redding was convicted of robbery, and from a judgment of conviction and an order denying his motion for new trial, he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

WOOD, Justice.

In each of three counts of an information appellant Terrell Redding was accused of the crime of robbery. He was also charged with two prior felony convictions, which he admitted. He waived a jury trial and was found guilty on all counts by the court. He prosecutes this appeal from the judgments of conviction and from the order denying his motion for a new trial.

The only contention made on appeal is that the evidence is insufficient to justify the convictions. On December 18, 1939, at a public market at 1965 West Pico street in the city of Los Angeles three men forcibly took certain sums of money from three individuals. Appellant was identified by three different witnesses as being one of the three men engaged in the robbery. Counsel for appellant refers to certain points brought out on cross-examination concerning the identification by these witnesses. The points brought out go to the weight and not to the sufficiency of the evidence. The record discloses that the evidence is ample to sustain the convictions. The appeal is devoid of merit.

The judgments and the order denying the motion for a new trial are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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41 Cal.App.2d 107

COLLINS v. NELSON et al.

Civ. 12059.

District Court of Appeal, Second District, Division 1, California.

Oct. 10, 1940.

Hearing Denied Dec. 9, 1940.

1. Appeal and error 🔑1078(1)

Where appellant, who appealed from order denying motion to disqualify trial judge, made no reference in appellant's briefs to order denying motion, District Court of Appeal would assume that appeal from such order had been abandoned.

2. Judges 🔑51(4)

The filing of written motion by plaintiff to disqualify trial judge from passing upon defendants' motion for new trial on date when judge was to rule upon defendants' motion divested judge of jurisdiction to rule on motion for new trial.

3. Judges 🔑51(4)
New trial 🔑155

Where plaintiff filed written motion on January 13, 1937, which was date when trial judge was to pass upon defendants' motion for new trial, to disqualify trial judge from passing upon defendants' motion, during interim between January 13, and September 2, 1938, when special proceeding instituted by plaintiff was properly disposed of, trial judge's power to pass upon defendants' motion was suspended, and the period of time between January 13 and September 2 was to be excluded in computing 60-day period provided for determination of motions for new trial. Code Civ.Proc. § 660.

4. New trial 🔑155

Where defendants filed notice of intention to move for new trial on December 12, 1936, and plaintiff filed written motion on January 13, 1937, which was date when trial judge was to rule upon defendants' motion, to disqualify judge from passing upon defendants' motion, and plaintiff's motion was denied on September 1, 1938, trial judge had jurisdiction to enter an order on September 2, granting motion for new trial, since total time elapsing between filing of notice of intention to move for new trial and granting of new trial was to be deemed 32 days. Code Civ.Proc. §§ 170, 660.

5. New trial 🔑155

A trial judge, by directing the filing of briefs on defendants' motion for new trial and by allowing time for filing briefs, did not divest himself of jurisdiction to rule on motion until allotted time for filing briefs had expired, and hence he could, without notice to parties, enter order granting new trial on day after the day when he directed filing of briefs, especially where the 60-day period within which judge could rule upon motion would have expired if judge permitted time to elapse which he had granted for filing briefs. Code Civ.Proc. § 660.

6. New trial 🔑157

It is within trial court's discretion to refuse to extend to a party the privilege of arguing a motion for new trial, and such refusal is not ground for reversal.

7. New trial 🔑132

A trial court may decline to receive or read briefs upon a motion for new trial.

8. Appeal and error 🔑440
Courts 🔑116(1)

While trial court has no authority under guise of an amendment to correct a judicial error or make of record an order that was never made, where order entered is not the order made, the court may correct records to make them speak the truth, and such inherent right to amend is not suspended or impeded by an appeal where amendment does no violence to substantial rights of appellant and when order seeks to correct a clerical mistake.

9. Appeal and error ⚷933(1)

When a nunc pro tunc order assigning the reason for granting a new trial is made, every intendment is in favor of validity and regularity of order, and every presumption not controverted by record will be indulged in by appellate court to uphold validity of order.

10. New trial ⚷163(1)

Where trial court's order entered September 2, granting defendants' motion for new trial, did not state grounds upon which motion was granted, the entry of a nunc pro tunc order on September 12, assigning as reason for granting new trial the insufficiency of evidence to support judgment for plaintiff, was proper, especially where original order granting defendants' motion, which original order had been vacated on appeal prior to September 2, expressly specified that motion was granted on ground of insufficiency of evidence.

11. Appeal and error ⚷1202

Where decision of District Court of Appeal on first appeal of case dealt only with propriety of trial court's order granting defendants judgment notwithstanding verdict and was not applicable to situation presented on hearing of a motion for new trial, decision did not become the "law of the case" so as to deprive trial judge of power to grant defendants' subsequent motion for new trial on ground of insufficiency of evidence to support judgment for plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

12. New trial ⚷69, 72

Restrictions imposed upon a trial court in the matter of weighing evidence and judging of credibility of witnesses do not apply when the court is concerned with a motion for new trial.

13. Appeal and error ⚷934(1)

When appeal is from a judgment notwithstanding verdict or a judgment following a directed verdict or nonsuit, District Court of Appeal must consider evidence in light most favorable to losing party in trial court, and cannot express an opinion as to weight of evidence or its truth.

14. Appeal and error ⚷1202

Where trial court entered an order on January 13, 1937, granting defendants' motion for new trial, and order was set aside solely upon ground that trial judge was temporarily divested of jurisdiction to make order by reason of disqualification proceedings instituted by plaintiff, and District Court of Appeal restored case to trial court to determine in proper manner plaintiff's motion for disqualification of trial judge, trial judge, by thereafter making an order on September 2, 1938, granting motion for new trial, was, in contemplation of law, passing upon motion for first time, and hence trial judge had jurisdiction to enter such order. Code Civ.Proc. § 473.

15. New trial ⚷71

Where guest's action for injuries received in automobile accident rested upon willful misconduct of minor defendant, and defendants offered no evidence, order granting defendants' motion for new trial could not be sustained on ground that extrajudicial statements of one of guest's witnesses created such conflict in evidence as to authorize granting new trial where other testimony in record, aside from witness' testimony, was in accord and was insufficient as matter of law to support verdict for defendants.

16. New trial ⚷71

Extrajudicial statements made by plaintiff's witness outside presence of plaintiff and other witnesses for plaintiff, while admissible for purpose of impeachment, could not serve to create a conflict in evidence authorizing trial judge to grant defendants' motion for new trial where record, exclusive of testimony of such witness, established liability of defendants and would, as matter of law, require reversal of a judgment in defendants' favor.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Betty Collins, a minor, by Ray A. Collins, her guardian ad litem, against Jack Nelson, a minor, W. W. Nelson, Jr., his guardian ad litem, and others, for personal injuries sustained in an automobile accident. From an order denying plaintiff's motion to disqualify the trial judge, and from an order of the trial judge denying plaintiff's motion to dismiss defendants' motion for a new trial, and from an order granting defendants' motion for a new trial, plaintiff appeals.

Judgment in accordance with opinion.

Avery M. Blount and H. R. Skinner, both of Los Angeles, for appellant.

Joe Crider, Jr., Clarence B. Runkle, and Elber H. Tilson, all of Los Angeles, for respondents.

WHITE, Justice.

Through her guardian ad litem, plaintiff, a fifteen-year-old girl, commenced this action to recover damages for personal injuries sustained in an automobile accident while she was riding as a guest in a car owned and operated by defendant Jack Nelson, also a minor. Plaintiff's cause of action is predicated upon wilful misconduct.

A verdict in favor of the plaintiff for $6,000 was set aside by a judgment for defendants notwithstanding the verdict. From such judgment plaintiff appealed, and this court reversed the same. See Collins v. Nelson, 16 Cal.App.2d 535, 61 P.2d 479, to which reference is made for a comprehensive statement of the factual situation surrounding this litigation. Upon the going down of the remittitur, defendants, on December 12, 1936, filed a notice of intention to move for a new trial on all statutory grounds. When such motion came on for hearing on January 13, 1937, plaintiff filed a written motion to disqualify the trial judge from hearing and passing upon the motion for a new trial. Code Civ.Proc., sec. 170. On the day of its presentation the trial judge denied the motion to disqualify him and granted the motion for a new trial. From the last-named order plaintiff again appealed to this court, and we held the trial judge was without jurisdiction to personally pass upon the motion to disqualify, and that all subsequent proceedings, including his order granting defendants' motion for a new trial, were void ab initio. Collins v. Nelson, 26 Cal.App.2d 42, 78 P.2d 758, 759. In remanding the cause this court said: "The orders made by the trial judge, after the filing by appellant of the verified statement above mentioned, are vacated, and the cause is restored to the jurisdiction of the trial court, with directions to proceed under and according to section 170 of the Code of Civil Procedure."

The remittitur resulting from the second appeal was lodged with the trial court on June 23, 1938. On July 23 of the same year defendants served upon plaintiffs and filed with the trial judge a notice of motion to transfer to another judge for determination the motion to disqualify such trial judge. On August 4 the trial judge entered an order referring the matter to the judicial council pursuant to section 170 of the Code of Civil Procedure because the parties could not agree upon another judge. By order of the judicial council the matter of disqualification of the trial judge was referred to another judge of the superior court of Los Angeles county, who on September 1, 1938, denied plaintiff's motion to disqualify the trial judge and forthwith referred the pending proceeding in its entirety to such trial judge. On that same day the trial judge entered an order denying plaintiff's motion to dismiss the motion for a new trial and directed that defendants' motion for such new trial stand submitted and allowed the filing of briefs in three, two and one weeks. However, on the following day, without notice to either party, the trial judge entered an order reading as follows: "The motion for a new trial herein, heretofore submitted, is hereby granted." On September 12, 1938, the trial judge entered a further order reading as follows: "It appearing to the court that, through inadvertence and mistake, the minute order of September 2, 1938, fails to state the grounds upon which the motion for a new trial is granted, it is ordered that said minute order be corrected and amended, nunc pro tunc as of September 2, 1938, to read that said motion for a new trial is granted upon the ground that the evidence herein is insufficient to support the judgment."

[1] Plaintiff appeals from the order denying her motion to disqualify the trial judge; from the order of the trial judge denying plaintiff's motion to dismiss defendants' motion for a new trial, and from the order of September 2 granting defendants' motion for a new trial. However, in her briefs appellant makes no reference whatever to the order of September 1 denying her motion to disqualify the trial judge, by reason of which we shall assume that the appeal therefrom has been abandoned.

[2-4] As a first ground of appeal it is urged that the trial judge was without power or jurisdiction to enter the order of September 2, 1938, granting defendants' motion for a new trial, for the reason that the sixty-day period provided in section 660 of the Code of Civil Procedure had expired. Appellant's claim in this regard is without merit. The record reflects that defendants' notice of intention to move for a new trial was filed December 12, 1936, and was presented to the trial judge for a ruling thereon January 13, 1937, or 31 days after filing of the notice of intention. When on the last-named date plaintiff filed her written motion to disqualify said trial judge, the latter was thereby divested of authority or jurisdiction to rule on the new trial motion. Collins v. Nelson, 26 Cal.App.2d 42, 78 P.2d 758. During the interim between January 13, 1937, when plaintiff filed her motion to disqualify the trial judge from hearing the motion for a new trial, until September 2, 1938, when such special proceeding instituted by plaintiff was properly disposed of, the power of the trial judge to pass upon the motion was suspended, and the period of time last referred to must be excluded in computing the sixty-day period provided for determination of new trial motions. The order granting the new trial having been made September 2, 1938, the day following disposition of the motion to disqualify the trial judge, we conclude that the total time elapsing between the filing of the notice of intention to move for a new trial and the granting of the same was 32 days. Keating v. Keating, 169 Cal. 754, 759, 760, 147 P. 974. To hold otherwise would lead to absurdity, because a party resisting a motion for new trial could defeat it merely by resorting to the proceedings named in section 170 of the Code of Civil Procedure in the determination of which motion to disqualify the trial judge more than 60 days might reasonably be expected to elapse, especially if an appeal were taken, as in the instant case.

[5-7] However unusual may appear to be the action of the trial judge, who after allowing time for filing briefs on the motion for a new trial nevertheless on the following day, without notice to the parties, entered an order granting a new trial, the judge had a right to then rule upon such motion. Undoubtedly in the case before us the trial judge became cognizant of the fact that if he permitted the time to elapse which he had granted for filing briefs the sixty-day period within which he could rule upon the motion for a new trial would have expired, whereupon he entered his order. When the trial judge directed the filing of briefs he did not thereby divest himself, as claimed by appellant, of jurisdiction to rule on the motion for a new trial until the allotted time for filing briefs had expired. Obviously, all this was procedural and within the control and discretion of the trial judge. It has been held that the refusal of a trial court to extend to a party the privilege of arguing a motion for a new trial is a matter of discretion resting with the trial court and is not ground for reversal. Morel v. Simonian, 103 Cal.App. 490, 495, 284 P. 694. Obviously, if the trial court may refuse to hear argument on a motion for a new trial, he may also decline to receive or read briefs upon such a proceeding.

[8-10] It is next urged by appellant that the nunc pro tunc order of September 12, 1938, assigning as the reason for granting a new trial insufficiency of the evidence to support the judgment, was wholly void. While it is true the trial court has no authority under the guise of an amendment to correct a judicial error or make of record an order that was never made (Kaufman v. Shain, 111 Cal. 16, 19, 43 P. 393, 52 Am.St.Rep. 139), it is firmly established as the law that where the order entered is not the order made, the court may correct the records to make them speak the truth. Nor is this inherent right to amend suspended or impeded even by an appeal, where the amendment does no violence to the substantial rights of appellant and when the order seeks to correct a clerical mistake. In the instant case no question of laches is involved, because the nunc pro tunc order was made ten days after entry of the order sought to be corrected. When a nunc pro tunc order is made every intendment is in favor of the validity and regularity of such order. Every presumption not controverted by the record will be indulged in by the appellate court to uphold the validity of such order. Brush v. Pacific Electric Ry. Co., 58 Cal.App. 501, 505, 208 P. 997; Niles v. Gonzalez, 155 Cal. 359, 100 P. 1080. There is nothing in the record before us to indicate that the trial judge did not direct that the order made September

12 should state the ground upon which the motion was granted, but there is in the nunc pro tunc order a recital by the trial judge that through "inadvertence and mistake, the minute order of September 2, 1938, fails to state the grounds upon which the motion for a new trial is granted". Added to this is the fact, disclosed by the record, that the order originally entered granting defendants' motion for a new trial and which was vacated on the second appeal expressly specified that the motion was granted on the ground of insufficiency of the evidence, thereby indicating that the trial judge was of the opinion and had in mind that the motion should be granted upon the grounds stated in the amendatory order. We are of the opinion that the nunc pro tunc order made September 12, 1938, was a proper exercise of the trial court's rights in the premises. Haynes v. Los Angeles R. R. Corp., 80 Cal.App. 776, 252 P. 1072; Gulf Mail S. S. Co. v. W. A. Hammond S. S. Co., 67 Cal.App. 420, 227 P. 938.

[11] Appellant's contention that because the court held in the first appeal that certain of the evidence was sufficient to sustain a verdict for plaintiff, such holding became the law of the case and deprived the trial judge of power to grant a new trial on the ground of insufficiency of the evidence, is without merit. The language in the first appeal relied upon by appellant for the foregoing claim is as follows [16 Cal.App.2d 535, 61 P.2d 482]: "Upon the record before us, and in the light of the testimony herein set forth, which we must view in the light most favorable to plaintiff, and without consideration of opposing or conflicting evidence, we conclude that such evidence, if believed by the jury, would support a finding. * * * Conceding the existence in the record of evidence somewhat in conflict with the foregoing, still such conflict does not destroy the substantiality of the testimony herein quoted from the evidence given by the minor [plaintiff and the] defendant driver, because, although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict."

[12, 13] The decision on the first appeal dealt only with the propriety of the trial court's order granting defendants judgment notwithstanding the verdict, and was in no wise applicable to a situation presented on the hearing of a motion for a new trial. As specifically stated by us in the foregoing language, the restrictions imposed upon a trial judge in the matter of weighing evidence and judging of the credibility of witnesses do not apply when the court is concerned with a motion for a new trial. As this court has so often pointed out, when the appeal is from a judgment notwithstanding the verdict, or a judgment following a directed verdict or nonsuit, we are controlled by the rule requiring the appellate tribunal to consider the evidence in the light most favorable to the losing party in the court below, and we do not and cannot express an opinion as to the weight of the evidence or its truth or falsity. Therefore, what we had to say with reference to the evidence on the first appeal herein from the judgment entered notwithstanding the verdict could not be and is not controlling upon the lower court in its consideration of a subsequently made motion for a new trial.

[14] Appellant next contends that by its first order granting defendants' motion for a new trial on January 13, 1937, the trial court exhausted its jurisdiction to enter any other or further order as to such motion. The cases cited by appellant deal only with the familiar rule that a court may not rule upon a motion for a new trial and then by its own order vacate the ruling and make a new and different order, save and except, of course, when a proper showing is made under section 473 of the Code of Civil Procedure. In the case now under consideration the trial court at no time vacated or changed its order of January 13, 1937, granting defendants' motion for a new trial. It was this court on appeal that vacated and set aside such order, solely upon the ground that the trial judge was temporarily divested of jurisdiction to make the order by reason of the disqualification proceedings instituted by plaintiff herself. By our decision the cause was restored to the trial court to determine in a legal and proper manner the motion for disqualification. Consequently, when the trial judge, after conforming to the directions of this court with reference to his qualifications, made his order of September 2, 1938, granting defendants' motion for a new trial, he did not make a new or further order, but was in contemplation of law passing upon the motion for the first time, because, as declared by us, the first order was

void ab initio and never had a legal existence.

We come now to appellant's final contention, that in granting defendants' motion for a new trial the trial court abused its discretion. Plaintiff's cause of action rested upon wilful misconduct of the minor defendant, because plaintiff was a guest in his automobile at the time of the accident. At the trial defendants introduced no evidence whatever and the case was submitted to the jury solely upon the evidence adduced from witnesses produced by the plaintiff. For a detailed statement of the testimony of all eye-witnesses as to the conduct of defendant driver, save and except the testimony of Jack Wilkinson, to which we will later advert, reference is made to the factual situation as shown in the opinion of this court on the former appeal. 16 Cal.App.2d 535, 539, 61 P.2d 479.

Based on the testimony just referred to, we adhere to the conclusion expressed by us in the first appeal of this cause when we said: "Surely it cannot be claimed that driving an automobile with defective brakes at the rate of 45 to 50 miles per hour on Pico Boulevard, 'cutting in and out among the automobiles', constitutes anything but a wanton and reckless disregard of the possible result of a combination of speed, erratic driving and defective brakes."

[15, 16] It is, however, argued by respondents that the witness Jack Wilkinson created a conflict in the evidence when at the trial he testified as to the speed of defendant's automobile, also concerning what the minor plaintiff said to the defendant driver about the latter's driving prior to the accident, and as to whether or not the Stutz car turned from its path, and which evidence was at variance with statements concerning these facts made by the witness to an insurance company investigator three or four days after the accident. We cannot agree with respondents that the extrajudicial statements of the witness Wilkinson created such a conflict in the evidence as to authorize the trial judge to grant a new trial. Let us assume that the witness was thoroughly impeached and that the trial court not only was justified in viewing his testimony given at the trial with caution or even suspicion, but was warranted in rejecting the testimony of such witness in its entirety; nevertheless, without the testimony of this witness, and considering only all the other testimony in the record, the latter presents no conflict whatever, substantial or unsubstantial, on the material issues, but on the contrary is in thorough accord, and certainly, considered as a whole, would be insufficient as a matter of law to support a verdict in favor of defendants herein who moved for a new trial. Such being the case, the order granting the new trial cannot be sustained. Moss v. Stubbs, 111 Cal.App. 359, 295 P. 572, 296 P. 86; Gold v. Arizona Realty & Mortgage Co., 12 Cal.App.2d 676, 677, 55 P.2d 1254, and cases therein cited. It must be remembered that at the trial the witness Jack Wilkinson gave testimony in absolute accord with and corroborative of the only other testimony in the record, all of which, as heretofore pointed out, was uncontradicted, and points unerringly to conduct on the part of defendant driver from which but one reasonable inference could be drawn, viz., a conscious, reckless disregard on his part of the safety of his guests, coupled with actual knowledge or its equivalent on the part of such driver that injury to his guests would be a probable result of his conduct. While the impeachment of the witness Jack Wilkinson might have warranted the court in disbelieving or ignoring his testimony given at the trial, manifestly his extrajudicial statements made outside the presence of the plaintiff and all other witnesses in her behalf, replete as such statements are with conclusions and opinions, none of which would be competent as evidence upon a trial, while admissible for the limited purpose of impeachment, cannot serve to create a conflict where the record, exclusive of the testimony of the last-named witness, without question establishes the liability of defendants and would as a matter of law require a reversal of a judgment in their favor.

The order granting a new trial is reversed.

We concur: YORK, P. J.; DORAN, J.

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WIERSMA v. CITY OF LONG BEACH et al.

Civ. 12034.

District Court of Appeal, Second District, Division 1, California.

Oct. 1, 1940.

1. Appeal and error 🔑766

Where appellant failed to file a supplement to his opening brief setting forth his points separately and under appropriate headings, reviewing court's review of record was limited to a determination of propriety of trial court's action in directing a verdict in favor of respondents.

2. Municipal corporations 🔑742(4)

No cause of action against a city accrued in favor of a claimant until after filing of a claim against city as required by city ordinance, and hence a complaint which failed to allege that prior thereto a claim had been presented pursuant to city charter was insufficient to state a cause of action against city, even though claimant was permitted to file an amendment alleging presentation to the city clerk for filing with the city council of a copy of the complaint and summons which had been filed five months prior thereto, since the presentation of a claim was a "condition precedent" to the filing of a suit for damages against the city. St.1921, p. 2151, § 338.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

3. Pleading 🔑279(4)

A party who has no cause of action at the time of the institution of his action cannot maintain it by filing a supplemental complaint founded on matters which have subsequently occurred.

4. Municipal corporations 🔑753(1)

Where wrestling matches were held in municipal auditorium, even though it had been established that city was liable for acts of a wrestler within scope of his employment, city could not be bound under doctrine of "respondeat superior" to pay damages for injuries to a spectator resulting from willful assault by wrestler, since a master is not responsible for the willful torts of his servants.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

5. Municipal corporations 🔑848

A concession agreement whereby a city permitted a promoter to hold wrestling matches in municipal auditorium at a rental basis based on a percentage of gate receipts established "landlord and tenant relationship" between city and promoter, but it did not make city liable for injuries to a spectator resulting from willful assault by a wrestler, since a landlord cannot be held liable for the torts of a tenant.

See Words and Phrases, Permanent Edition, for all other definitions of "Landlord and Tenant Relationship".

6. Landlord and tenant 🔑167(1)

A landlord is not responsible to other parties for the misconduct or injurious acts of his tenant to whom his estate has been leased for a lawful and proper purpose, when there is no nuisance or illegal structure upon it at the time of the letting.

7. Insurance 🔑514

Where agreement leasing municipal auditorium to promoter of wrestling matches required promoter to obtain a policy of insurance indemnifying city from liability for injury, loss or damage, and under policy obtained by promoter, insurer contracted to insure promoter and city, but not the general public or the patrons of the wrestling exhibitions, insurer was not liable on policy until a judgment was rendered against promoter or city.

8. Partnership 🔑32

Where liability policy protected wrestling promoter and city, leasing municipal auditorium to promoter, but did not protect the general public or patrons of the wrestling exhibitions, fact that premium rate was based on gross receipts from wrestling matches did not make insurer a "partner" of promoter and hence insurer's alleged liability for injuries to a patron of a wrestling match resulting from willful assault by a wrestler could not be based on partnership relation between insurer and promoter.

See Words and Phrases, Permanent Edition, for all other definitions of "Partner".

9. Master and servant 🔑302(3)

Even if a wrestler was an employee of promoter of wrestling exhibitions, promoter was not liable for wrestler's deliberate and malicious assault on patron which had no connection with wrestling exhibition where promoter did not fail to use ordinary care to protect his patrons from any dangers which could be anticipated.

10. Master and servant ⚿302(6)

Where an employee acts without any reference to the service for which he is employed and to effect some independent purpose of his own, employer is not responsible for either the act or omission of the employee.

11. Theaters and shows ⚿6

A promoter licensed to conduct wrestling matches and his manager were only required to anticipate reasonably probable happenings, and in order to prevent injury to patrons were only required to use ordinary care, and a willful assault by a wrestler on a patron was a happening which could not have been reasonably anticipated by promoter or his manager and consequently they were not liable for damages as result thereof.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by Henry Wiersma against the City of Long Beach, a municipal corporation, La Verne Baxter, and others to recover damages for injuries suffered when plaintiff, while attending a wrestling match, was struck by a wrestler defendant Baxter. From a judgment against defendant Baxter and in favor of all other defendants, plaintiff appeals.

Affirmed.

Frank E. Downey, of Long Beach, for appellant.

C. A. Pinkham, of Los Angeles, and Geo. W. Trammell, Jr., and Wahlfred Jacobson, both of Long Beach, for respondent City of Long Beach.

Joseph A. Ball, of Long Beach, for respondents Pacific Indemnity Co., Daro and McDonald.

YORK, Presiding Justice.

It appears from a review of the record herein that prior to July 29, 1937, the City of Long Beach entered into an agreement whereby it leased space in its municipal auditorium to the respondent Jack E. Daro, who was licensed to conduct wrestling matches in the City of Long Beach by the state athletic commission under the fictitious name of Long Beach Wrestling Association.

On July 29, 1937, the appellant purchased a ticket for a wrestling match to be conducted on that date in said municipal auditorium. Inside the auditorium a ring had been erected which was elevated about four feet above the floor in the form of a square, the sides of which were protected by ropes. Appellant occupied a ringside seat near the southeast corner of the ring, and during the course of a wrestling exhibition between Myron Cox and defendant La Verne Baxter, the latter, suddenly and, apparently without provocation, jumped from the ring at the southwest corner thereof, and running toward appellant deliberately struck him over the head with a chair, inflicting painful injuries upon him.

Thereafter, appellant brought the instant action to recover damages for such injuries against his assailant Baxter (who defaulted and against whom judgment was rendered by the trial court), and joined as defendants the respondents herein, to-wit: City of Long Beach, Pacific Indemnity Company, Jack E. Daro, doing business as the Long Beach Wrestling Association, and Don W. McDonald. Trial was had before a jury and at the conclusion of appellant's case, the court directed a verdict in favor of said respondents. From the judgment entered pursuant to said verdict, this appeal is prosecuted, as well as from the order by which appellant's motion for a new trial was denied.

[1] Since appellant has not seen fit to file a supplement to his opening brief setting forth his points separately and under appropriate headings, as was suggested by this court in its opinion denying respondents' motion to dismiss this appeal, our review of the record must necessarily be limited to a determination of the propriety of the trial court's action in directing a verdict in favor of the respondents.

With respect to the City of Long Beach, the trial court sustained its objection to the admission in evidence of the agreement between its city manager and respondent Daro concerning the concession for wrestling exhibitions in the municipal auditorium, but by stipulation of counsel for appellant and said city, which was joined in by counsel for Daro, it was agreed that on July 29, 1937, "the city, as a city, permitted the Long Beach Wrestling Association to hold wrestling matches in the auditorium at a rental basis upon a percentage of the gate receipts".

It is here urged by city in support of the directed verdict that (1) the pleadings and proof failed to show that appellant complied with section 338 of the city charter which provides that all claims for damages must be presented to the city council and filed with the city clerk within six months after the occurrence for which the damages arose. (Stats.1921, p. 2151.) (2) There is a total lack of evidence to show that respondent city had any responsibility for appellant's injuries (a) under the doctrine of respondeat superior, or (2) landlord and tenant.

The evidence presented by appellant at the trial of this cause in April, 1938, affecting the City of Long Beach may be summarized briefly as follows: City owned the auditorium and in 1936 leased it to respondent Daro for one year. On the evening of July 29, 1937, said city permitted respondent Daro to hold wrestling matches in the auditorium "at a rental basis upon a certain percentage of the gate receipts". No claim or demand was presented to the city clerk or the city council prior to the filing of the instant action. On February 27, 1938, a copy of the summons and complaint was filed with the city clerk of the City of Long Beach, who presented it to the city council on January 28, 1938.

[2, 3] Since the presentation of a claim is a condition precedent to the filing of suit for damages against the city (Bancroft v. City of San Diego, 120 Cal. 432, 439, 52 P. 712), no cause of action accrued in favor of appellant until after the filing of such claim (Bigelow v. City of Los Angeles, 141 Cal. 503, 507, 75 P. 111; Spencer v. City of Los Angeles, 180 Cal. 103, 119, 179 P. 163; Western Salt Co. v. City of San Diego, 181 Cal. 696, 697, 186 P. 345); therefore, the original complaint filed by appellant on August 21, 1937, which failed to allege that prior thereto a claim had been presented pursuant to said section 338 of the city charter, was insufficient to state a cause of action against respondent city. And this is true despite the fact that appellant was permitted to file an amendment to his complaint during the trial in April, 1938, alleging compliance with the provisions of said section 338, supra, by presenting on January 27, 1938, to the city clerk for filing with the city council a copy of the complaint and summons which had originally been filed five months prior thereto. This holding finds support in the decision in the case of Turney v. Shattuck, 96 Cal.App. 590, at page 596, 274 P. 442, at page 445, where it is said: "If a party has no cause of action at the time of the institution of his action he cannot maintain it by filing a supplemental complaint founded on matters which have subsequently occurred." See, also, Kirk v. Culley, 202 Cal. 501, 507, 261 P. 994, and authorities there cited.

At the trial herein it was stipulated that respondent Daro was licensed to conduct wrestling matches in Long Beach under the name of Long Beach Wrestling Association; that respondent McDonald was Daro's manager; and it was proved that defendant La Verne Baxter was wrestling in the ring at the municipal auditorium on the evening in question, but under whose authority he was wrestling there is an entire lack of proof.

[4] The only connection respondent city had with the transaction under consideration was through its ownership of the municipal auditorium, and even though it had been established that respondent city was liable for the acts of defendant Baxter within the scope of his employment, said city could not be bound under the doctrine of respondeat superior for the reason that a master is not responsible for the wilful torts of his servants. Lane v. Safeway Stores, Inc., 33 Cal.App.2d 169, 173, 91 P. 2d 160, citing Stephenson v. Southern Pacific Co., 93 Cal. 558, 563, 29 P. 234, 15 L.R.A. 475, 27 Am.St.Rep. 223.

[5, 6] While the concession agreement is doubtless sufficient to establish the relation of landlord and tenant between respondents city and Daro, nevertheless, a landlord cannot be held liable for the torts of a tenant. In the case of Meloy v. City of Santa Monica, 124 Cal.App. 622, 628, 12 P.2d 1072, 1074, it was stated: "A landlord is not responsible to other parties for the misconduct or injurious acts of his tenant to whom his estate has been leased for a lawful and proper purpose, when there is no nuisance or illegal structure upon it at the time of the letting. Gould v. Stafford, 91 Cal. 146, 27 P. 543; Kalis v. Shattuck, 69 Cal. 593, 11 P. 346, 58 Am.Rep. 568.

There was no error on the part of the trial court in directing a verdict in favor of the respondent city.

The only proof offered to connect the Pacific Indemnity Company with the incident complained of was the concession agreement or lease between respondents city and Daro, and the policy of liability insurance issued by said Indemnity Company. Neither document was admitted into evidence but they were marked plaintiff's exhibits Nos. 1 and 2 for identification, respectively.

The concession agreement provided for a policy of liability insurance in the following terms:

"Concessionaire agrees to save and hold the City free and harmless from any and all responsibility and/or liability in connection with injury to the person and/or property sustained and/or suffered by any participant in any such exhibition, the manager or any employee of any such participant, employee of the City and/or Concessionaire when not on duty, patron and/or any other person during the entire period of any occupancy hereunder permitted and licensed. The Concessionaire hereby agrees in partial performance of the provisions of this paragraph to procure, coincident with the execution of this license, a policy of liability insurance * * * protecting the City against any and all liability for such injury, loss and/or damage as aforesaid; such policy * * * shall be in the following amounts, to-wit: for death or injury to the person, a maximum of * * * $25,000.00 for death of or injury sustained by one person in any accident, and a maximum of * * * $100,000.00 for death or injuries sustained by more than one person in any one accident. * * * The Concessionaire shall deliver said policy to the City Manager for approval * * *."

Pursuant to this agreement respondent Daro obtained a policy of liability insurance from respondent Indemnity Company which named as assureds, Jack E. Daro, an individual, and/or Jack E. Daro, doing business as Long Beach Wrestling Association, and/or the City of Long Beach and/or its elective and/or appointed officers, when acting as such, and covered "wrestling or boxing exhibitions conducted by Jack E. Daro, doing business as Long Beach Wrestling Association, at or in Long Beach Municipal Auditorium, Long Beach, California. Basis of Premium Computation $.553 per $100.00 of gross receipts to be applied to all operations covered by this policy. * * * 1. To insure the assured against loss by reason of the liability imposed by law upon the assured for damages on account of such injuries, and to pay and satisfy judgment finally establishing assured's liability in actions defended by the Company. * * *"

[7] It is clear that said lease agreement only required respondent Daro to obtain a policy of insurance indemnifying city from liability for injury, loss or damage, and that respondent Indemnity Company by the terms of its policy contracted to insure respondents Daro and city, but not the general public or the patrons of the wrestling exhibitions. Until a judgment is rendered against Daro or the city, the assureds have no liability and have suffered no loss under the policy. See Van Derhoof v. Chambon, 121 Cal.App. 118, 127, 8 P.2d 925.

[8] Because the premium rate was based upon gross receipts appellant urges that this constituted the Indemnity Company a partner of respondent Daro. There is no merit in this contention. The policy is the usual form of insurance contract requiring a premium proportionate to the risk involved, and this risk is measured by the number of patrons attending the exhibitions.

[9, 10] With regard to respondents Daro and McDonald, while the complaint herein alleges these two men were partners doing business under the name of Long Beach Wrestling Association, it was stipulated at the trial that McDonald "was the manager of Jack Daro who was licensed to conduct wrestling bouts in Long Beach by the State Athletic Commission, doing business as the Long Beach Wrestling Association".

There is not the slightest indication that respondent Daro was negligent in any way or that he did not use ordinary care to protect his patrons from any dangers which could be anticipated. Moreover, it was clearly established both by the pleadings and proof that defendant Baxter committed a deliberate and malicious assault upon appellant which had no connection whatsoever with the wrestling exhibition. Whether defendant Baxter was an independent contractor or was an employee of respondent Daro is immaterial, for the reason that if the relationship of employer and employee existed between them, respondent Daro would not be liable for the tortious acts of Baxter committed entirely outside the scope of his designated employment as a participant in a wrestling exhibition.

It was stated by this court in the opinion in Lane v. Safeway Stores, Inc., 33 Cal.App.2d 169, 172, 91 P.2d 160, 161: "It is firmly established as the law that where an employee acts without any reference to the service for which he is employed and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the employer is not responsible in that case for either the act or omission of the employee."

[11] Respondent Daro and his manager, McDonald, were only required to anticipate reasonably probable happenings, and in order to prevent injury to patrons were only required to use ordinary care. The tort complained of herein was one which under the circumstances could not have been anticipated by any of the respondents; consequently, they cannot be held to respond in damages on account thereof.

Viewing the record in the light most favorable to appellant, it is obvious that there is no evidence of sufficient substantiality to support a verdict in his favor, if such a verdict were rendered. See 24 Cal. Jur. 914, note 2, and authorities there cited.

For the reasons stated, the judgment is affirmed. The appeal from the order denying appellant's motion for new trial is dismissed.

We concur: DORAN, J.; WHITE, J.

SPECK et al. v. SARVER et al.

Civ. 11405.

District Court of Appeal, First District, Division 2, California.

Oct. 8, 1940.

Hearing Granted Dec. 5, 1940.

1. Negligence 🔑122(1)

There is no presumption that a plaintiff is not guilty of contributory negligence, although because of presumption that a person takes ordinary care of his own concerns, plaintiff is entitled to inference that he is free from contributory negligence in absence of proof to the contrary. Code Civ. Proc. §§ 1957, 1962, 1963.

2. Appeal and error 🔑1064(2)
Trial 🔑194(16)

An instruction that the law presumes that plaintiffs did everything that reasonably prudent persons would have done under circumstances was reversible error as taking from jury the issue of fact which was most essential to the defense, where plaintiff driver testified that he observed defendants' automobile approaching on wrong side of highway and turned his automobile into middle of highway where collision occurred because he believed he could best take care of "his own concerns" by taking collision "head-on" rather than in a contact on side of his automobile. Code Civ.Proc. §§ 1957, 1962, 1963.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Alice Speck, Matthew E. Speck and Margaret Winthrop against Philip R. Sarver and Lillian Sarver for injuries arising out of an automobile collision, wherein defendants filed a cross-complaint. From a judgment for plaintiffs, the defendants appeal.

Reversed.

Francis N. Foley, of San Mateo, for appellants.

Norman S. Menifee, of Redwood City, for respondents.

NOURSE, Presiding Justice.

The three plaintiffs had a judgment on a verdict for damages for injuries arising out of an automobile collision. The record of the testimony detailing the circumstances of the collision contains the usual conflict among the various witnesses, but it is not necessary to discuss the evidence as a whole, and since we confine our opinion to the propriety of one of the instructions, we will assume that the evidence of defendants' negligence would have been sufficient to sustain a verdict against them if the error in this instruction had not occurred.

The defendants were driving an automobile northerly upon Canyon road near the limits of Redwood City at the same time that the plaintiff, Matthew Speck, was driving a car southerly upon the same road; the other two plaintiffs being his passengers. As the plaintiffs approached a curve in the road they noticed defendants' car approaching to the left or west of the imaginary center line of the highway. At that point the macadam surface of the highway was about 17 feet wide; it had no lanes and no center line was marked on it for traffic; and on the easterly side of the road there was a bank running upward, on the westerly side a slope going down.

The shoulder on the east side was not more than one foot wide; the shoulder on the west side was somewhat wider and was covered with gravel or sand. When the plaintiffs observed defendants' car approaching, plaintiffs were traveling on the right or westerly side of the highway. At some point thereafter the plaintiff driver turned his car to the left so that the two machines met head-on approximately in the center of the road.

Taking the testimony of the plaintiffs alone, the record discloses that in his opening statement to the jury their counsel stated that the plaintiff driver was afraid of getting too far off the westerly side of the highway, that the two cars made a head-on collision "which was approximately in the center of the curve and approximately in the center of the road". The plaintiff driver, when a witness on his own behalf, testified that when the cars came into collision the westerly rear end of his car stood about three feet from the westerly edge of the macadam pavement, and that the front end stood about five feet from that point. Upon cross-examination in further explanation of his actions in the operation of his car this plaintiff gave the following testimony:

"Q. Now, just before the collision, did you turn your car? A. Yes, I turned my car in toward the bank slightly.

"Q. In toward the other automobile? A. In toward my east."

In endeavoring to further explain the position of his car after the accident he testified: "Well, as I took my little girl out of the car, I took her from the door over to the bank and I looked down on the road and I saw there was room enough there for a car to pass easily, right there. Q. Yes? A. Right after the accident."

He testified that the day before his testimony was given he "stepped off" the car which he had been driving at the time of the collision and found it to be thirteen feet long, that defendants' car was about fourteen feet long and both were about six feet wide, also that after the collision the car which he had been driving was moved "about a foot" toward the easterly bank and that thereafter other automobiles including an ambulance were able to pass between his car and the westerly edge. He further testified under examination by his own counsel that on the day following the accident he went to the place of collision to observe skid marks made on the highway by defendants' car at the time of the collision. In this connection he stated: "The following day I noticed the skid marks were about six feet from the bank; the one to the east was six feet from the east edge of the pavement, six feet over, the first one, and to the west of that approximately five feet, was another skid mark. In other words, it was about eleven feet from the bank to the west skid mark."

In reference to the operation of defendants' car this same plaintiff still testifying on his own behalf gave the following answers to the following questions:

"Q. What portion of the road was he traveling on? A. When I first saw him the center of his car was over the center line, the imaginary center line, what I consider the center line of the road.

"Q. Did he change the course of his car at all? A. Yes, he turned his car over to the west, to my side of the road.

"Q. More to the outside of the curve, in other words? A. Yes.

"Q. Then what did he do? A. Well, he did not decrease his speed any, and at that point he turned inward sharply."

Other witnesses called by plaintiffs testified that plaintiffs' car was traveling on the right or westerly half of the highway, but they did not state when their observation was made, or whether this continued up to the point of contact.

A simple mathematical calculation based on plaintiffs' own evidence is that when the cars came into collision both were headed easterly toward the inside bank of the highway, that the right front end of plaintiffs' car was five feet from the westerly edge of the pavement and that the left front end, being six feet further in, was eleven feet from the westerly edge of the pavement, that at the same time the left front end of defendants' car was approximately eleven feet westerly from the easterly edge of the pavement. The parties agree that this pavement was approximately seventeen feet wide or eight and one-half feet from each edge to the median line. Upon this evidence of the plaintiffs it is therefore patent that at the time of the collision the left front end of plaintiffs' car was two and one-half feet to the east of the median line, and the left front end of defendants' car was a little more than two and one-half feet west of that line. With this evidence all coming from the plaintiffs, the issue was put to the jury to determine whether the plaintiffs were guilty of contributory negligence proximately causing the injuries complained of. We will not discuss the evidence on the basis of its sufficiency or insufficiency or on the basis of whether it discloses contributory negligence as a matter of law; we will not discuss the propriety of the instruction complained of on the basis that it was improper to invoke a presumption of due care in the light of plaintiffs' evidence as this question is discussed in Ellison v. Lang Transportation Co., 12 Cal.2d 355, 84 P.2d 510; Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590, and similar cases. We refer to the fact that the evidence on that issue all comes from the plaintiffs as a basis of our opinion that the instruction complained of was prejudicial to the defendants.

This instruction, given at respondents' request, reads: "In the absence of evidence to the contrary, the law presumes that the plaintiffs did everything that reasonably prudent persons would have done under the circumstances for the protection of their safety. The presumption that plaintiffs were not guilty of contributory negligence is, in itself, a species of evidence which continues with the said plaintiffs throughout the trial of this action and unless and until overcome by evidence to the contrary. This presumption in favor of said plaintiffs must prevail until and unless it is overcome by satisfactory evidence to the contrary." Respondents defend the instruction on the authority of Ellison v. Lang Transportation Co., supra, 12 Cal.2d page 358, 84 P.2d 510; Westberg v. Willde, supra, 14 Cal.2d page 364, 94 P.2d 590; and Scott v. Sheedy, Cal.App., 102 P.2d 575. In the Ellison and Scott cases the approved instruction advised the jury that "the presumption is that a person takes ordinary care of his own concerns". [12 Cal.2d 358, 84 P.2d 511] That approved in the Westberg case read "that every man obeys the law". [14 Cal.2d 360, 94 P.2d 593.] Here the instruction complained of reads "the law presumes that the plaintiffs did everything that reasonably prudent persons would have done under the circumstances". The rule of these cases, based upon numerous authorities cited therein, that a presumption is evidence which is sufficient to support a finding, is but a recognition of the express declarations of the Code of Civil Procedure, section 1957. But in this reference to the presumptions the provisions of sections 1962 and 1963 which specify the conclusive and disputable presumptions respectively cannot be overlooked. It will be noted that in the latter section some forty disputable presumptions are listed including (1) "that a person is innocent of crime or wrong", and (4) "that a person takes ordinary care of his own concerns". It should also be noted that in no part of the code section is to be found any presumption reading substantially like that complained of here.

[1] We find that in many of the cases involving negligence and contributory negligence the appellate courts have loosely referred to a presumption "that plaintiff is not guilty of contributory negligence". No such presumption is known to the code. What is meant in the decisions is that, because of presumption of "ordinary care", the plaintiff is entitled to the inference that he is free from contributory negligence in the absence of proof to the contrary. To illustrate the distinction it is easy to picture a case where plaintiff has exercised "ordinary care" for his own concerns, but is negligent in relation to the "concerns" of others. Now if, under such circumstances, and because of some unforeseeable event, the plaintiff suffers injury, he may still be presumed to have used ordinary care for "his own concerns", but could not be presumed free from negligence because he did not use ordinary care for the concerns of others.

[2] Counsel have not cited any authority involving an instruction similar in substance or effect to that here complained of, and a reasonable search on our part has failed to disclose any. We have said that a presumption such as that mentioned in the instruction is not to be found in the code. We know of no rule which would justify us in adding to the code section what the legislature has omitted. The difference is not trivial. It is well illustrated by the facts of this case. If the plaintiff driver believed that he could best take care of "his own concerns" by turning his car into the middle of the road and take the collision "head-on" rather than in a contact on the side of his car, he would not be entitled to the presumption that he was obeying the law when he acted in direct violation of it, and he would not be entitled to the (misused) presumption that he "was not guilty of contributory negligence".

At the most he was entitled to the presumption of ordinary care with the question left to the jury to decide whether he was or was not guilty of negligence. Technically there is no presumption known to our law that a party is "not guilty of contributory negligence" and the giving of such instruction is error. Whether the error is prejudicial and reversible as such depends upon the circumstances of the particular case.

One error of the instruction is that it takes from the jury the determination of the very issue of fact which is most essential to the defense. Under proper instructions the jury might have determined that plaintiffs "did everything" that reasonably prudent persons would have done and might then have found that they were not guilty of contributory negligence, but, under the instruction complained of, the determination of both of these facts was taken from the jury, and it was told that the ultimate issue was "presumed" to be determined in favor of the plaintiffs. The question whether a party may purposely disobey an express statute in order to save himself from injury is not an easy one. We have been told by men in high station that they have frequently and deliberately disobeyed the law in the interest of the public welfare. The existence of an emergency which would justify such course is not a fixed matter of law or fact. If in the case at hand the turning of the vehicle into the middle of the highway so that the two cars would collide head-on was an act which "reasonably prudent persons would have done under the circumstances" it was within the province of the jury to determine whether such act proximately contributed to the injuries. But it was plain error to take from the jury the determination of the question whether such act was the act of a reasonably prudent person and to advise the jury that this was presumed in favor of plaintiffs when no such presumption is known to the law. The record discloses a case in which the jury might well have determined that both parties were to blame for the manner in which the two cars were operated, and we are unable to say that the error complained of was not prejudicial.

The judgment is reversed.

I concur: STURTEVANT, J.

I concur in the judgment: SPENCE, J.

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41 Cal.App.2d 118

PEOPLE v. WAITE.

Cr. 601.

District Court of Appeal, Fourth District, California.

Oct. 10, 1940.

Criminal law ⚿1182

Where cause was placed on calendar on July 9, 1940, and was continued to August 13, 1940, on which date appellant was granted 15 days in which to file opening brief, and no brief having been filed, cause was again placed on calendar for October 8, 1940, but no appearance, by brief or otherwise, was made on behalf of appellant when cause was called on October 8, 1940, judgment would be affirmed on motion of Attorney General. Pen.Code, § 1253.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Proceeding by the People against Gail Waite. From an adverse judgment, the latter appeals.

Affirmed.

No appearance for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The clerk's transcript was filed in this court on May 15, 1940, and the reporter's transcript on June 6, 1940. The cause was placed on the calendar on July 9, 1940, and continued to August 13, 1940, on which date the appellant was granted fifteen days in which to file an opening brief. No brief having been filed, the cause was again placed on the calendar for October 8, 1940. No appearance, by brief or otherwise, has been made on behalf of the appellant and when the cause was called on October 8, 1940, the attorney-general moved to affirm the judgment under the provisions of section 1253 of the Penal Code.

The motion is granted and the judgment affirmed.

We concur: MARKS, J.; GRIFFIN, J.

41 Cal.App.2d 133

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. PERRY et al.

Civ. 11109.

District Court of Appeal, First District, Division 1, California.

Oct. 11, 1940.

Rehearing Denied Nov. 9, 1940.

Hearing Denied Dec. 9, 1940.

1. Appeal and error ⇨996

Where evidence is largely uncontradicted and is capable of two interpretations, case is one resting entirely within discretion of trial court.

2. Principal and agent ⇨97

A general power of attorney to do acts for use and benefit of person conferring the power does not confer power on donee to do acts for benefit of the donee or for benefit of a third person.

3. Principal and agent ⇨148(3)

In action by bank against indorser of note, evidence supported finding that bank knew that indorsement, signed by indorser's wife pursuant to general power of attorney given to wife more than four years before when indorser enlisted for service in the World War, was for accommodation of wife's brother, and was not for benefit of indorser, so that indorser was not bound by the indorsement.

4. Evidence ⇨590

As respects weight to be given testimony of witness, one who acted in behalf of bank in transaction in which bank accepted note on which it was suing indorser, but who at time of trial was employed by another bank not connected with the plaintiff bank, was not a "disinterested witness".

See Words and Phrases, Permanent Edition, for all other definitions of "Disinterested Witness".

5. Appeal and error ⇨1012(1)

In action by bank against indorser of note on indorsement signed by indorser's wife pursuant to a general power of attorney, weight to be given presumption against wrongdoing and fraud on part of bank in accepting indorsement and to testimony of one who acted in behalf of bank in accepting note, but who was not connected with bank at time of trial, was solely for trial court.

6. Principal and agent ⇨169(1)

Any act consistent only with recognition of binding force of unauthorized act will constitute a "ratification".

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

7. Principal and agent ⇨169(3)

Where bank was chargeable with knowledge that indorser was not liable on indorsement signed by indorser's wife pursuant to general power of attorney because indorsement was for accommodation of wife's brother, and not indorser, and bank represented to indorser that he was responsible and secured a waiver of statute of limitations from indorser based on such representation, waiver did not constitute a "ratification" of wife's act, nor "estop" indorser from denying liability.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

8. Appeal and error ⇨931(1)

District Court of Appeal must interpret evidence most favorable to respondent and disregard all conflicts.

Appeal from Superior Court, Santa Clara County; James L. Atteridge, Judge.

Action by the Bank of America National Trust & Savings Association, a national banking association, against E. F. Perry, Charles A. Wayland individually, and Charles A. Wayland as executor of the estate of Lucy M. Wayland, deceased, and another, on a note. From a judgment for defendant Charles A. Wayland, individually, the plaintiff appeals.

Affirmed.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

Keyes & Erskine, of San Francisco, and Rea, Free & Jacka, of San Jose, for appellant.

Ackerman, Wayland & Mathews and Keesling, Wayland & Eliot, all of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Bank of America National Trust and Savings Association, appeals from a judgment for defendant, Charles A. Wayland, rendered in an action brought against Dr. Wayland as endorser of a promissory note. Plaintiff sues as successor of the Bank of San Jose to whom the note was originally endorsed and delivered. Judgment in favor of the defendants, E. F. Perry and the estate of Lucy M. Wayland, was previously entered and has long since become final on the ground that as to them the note was barred by the statute of limitations. Defendant Rucker was deceased and no personal representative was appointed for his estate, he apparently having died a bankrupt.

[1] This appeal presents a situation where, since the two main participants in the transaction—Rucker and Mrs. Wayland—were dead at the time of trial, the basic facts depended, to a large extent, on inferences and circumstantial evidence. The evidence, which was largely uncontradicted, is capable of two interpretations, each equally reasonable. Findings in favor of either party would find ample support in the record. Under such circumstances, the case is one resting entirely and peculiarly within the discretion of the trial court.

The promissory note in question was secured by a deed of trust on some Fresno property, was executed on November 2, 1922, by E. F. Perry as maker, was in the sum of $12,000, became due two years from date, and was payable to the order of Charles A. Wayland, Lucy M. Wayland (his wife) and Jos. H. Rucker. On the date the note was executed it was transferred for value to the Bank of San Jose by an endorsement which reads as follows:

"Presentation and demand, protest and notice of non-payment waived, and the within obligations guaranteed, for value received.

"Charles A. Wayland,
"By Lucy M. Wayland, his Attorney in Fact.
"Lucy M. Wayland,
"Jos. H. Rucker."

[2, 3] Admittedly, Rucker and Mrs. Wayland (who was Rucker's sister) personally signed the note, and Mrs. Wayland also signed for her husband, purportedly acting under a general power of attorney which conferred upon her authority to do acts for her husband's use and benefit. This power of attorney was delivered to the bank on the date the note was transferred to it, and remained in its possession thereafter. The trial court found that neither Doctor nor Mrs. Wayland received any part of the proceeds of the note, and that the transaction was without the knowledge or consent of Dr. Wayland, who did not learn of it until early in 1928. The trial court also found that, when the loan was made, the bank knew that it was for the sole use and benefit of Rucker. Appellant's first major contention is that the evidence, as a matter of law, is insufficient to support this last mentioned finding. This finding is decisive of this phase of the case because the rule is well-settled that a general power of attorney to do acts for the use and benefit of the person conferring the power (such as the power of attorney here involved) does not confer the power on the donee to do acts for the benefit of the donee or for the benefit of a third person. Many cases are cited by respondent to support this rule. These cases, and the rule therein stated, are not challenged by appellant. It concedes that the power of attorney here involved did not confer on Mrs. Wayland the power to execute or endorse, in the name of Dr. Wayland, commercial paper for the accommodation of Mrs. Wayland or of Rucker, provided the bank knew or should have known that the endorsement was not for the benefit of Dr. Wayland. Notice is the important element.

The evidence shows that Dr. Wayland had given his wife the power of attorney in 1918, upon his departure from San Jose after enlistment for service in the World War. There was no evidence that the power had ever been exercised except in the transaction here involved. Rucker was a large scale real estate operator with offices in San Francisco and San Jose. He did a large portion of his banking business with the Bank of San Jose. Mr. Victor J. La Motte, vice-president and general manager of the bank at the time of the transaction here involved, testified that Rucker obtained a great many loans from the bank. The Waylands did their banking with another bank. Rucker carried on real estate operations on his own behalf as well as in the capacity of a broker for others.

The exact circumstances surrounding the execution of the note do not appear in the record. The Fresno property which secured the note had been owned by Dr. and Mrs. Wayland. On October 28, 1922, the Waylands traded it and another parcel in San Jose for an apartment house in San Francisco, Rucker acting as broker for the Waylands. Dr. Wayland testified that he understood that Rucker was acting as a broker in this exchange, and that it was no part of his understanding with Rucker that the $12,000 note of November 2, 1922, should be executed as a part of the exchange transaction.

From the facts in possession of the bank it may be inferred that the bank knew that Miss Perry, the maker of the note and deed of trust, was merely a dummy for Rucker. La Motte testified that he knew that Miss Perry was a mere clerical employee in Rucker's office, and that it was the custom to place title to property in the name of an employee; that the Fresno property, the security for the note, was not appraised, nor was any investigation made of the credit of the Waylands or of Perry; and that he had no knowledge of who received the proceeds of the note. However, the records of the bank disclose that on November 3, 1922, a draft was issued to Joseph H. Rucker & Co. in the sum of $11,965.60. This draft was never explained by the bank, but it is a reasonable inference that it was the proceeds of the $12,000 note, less the usual expenses.

Miss Perry testified that she held title to the Fresno property and executed the note and deed of trust as the representative of Rucker, and that Rucker received the proceeds of the note and disbursed them for his own use and benefit.

From the above testimony the trial court could reasonably infer that the bank made the advance on the credit of Rucker, and that the bank knew when it made the advance that Rucker was to get, and did get, the proceeds. This alone is sufficient to support the challenged finding.

In addition, there is evidence to support the finding that after the advance was made, the bank, for many years, treated Rucker as the party primarily liable. The ledger card of the bank showing payments made on the note was entitled:

"Original Maker Perry, E. F. Loan No. 687.

"Endorsed by: Chas. A. Wayland, Lucy M. Wayland and Jos. H. Rucker."

The appellant's witnesses testified that no notice of interest payments were ever sent to Dr. and Mrs. Wayland. While it is true that the bank officials testified that notices were customarily only sent to the maker and not to the endorsers, Miss Perry testified that she never received the notices personally; that the notices were received by Mr. Rucker; that Rucker instructed her to make the interest payments, which she did with a Rucker check; that she had never personally received any communication from the bank regarding the note. Reading Miss Perry's testimony as a whole, including her cross-examination, it appears from her testimony that the finding that after the loan was made, the bank dealt exclusively with Rucker, is amply supported by the record. While it is true, as urged by appellant, that evidence that the bank knew after the loan was made that Rucker was the person primarily liable, is not direct evidence that the bank knew this fact at the time the loan was made, it is a circumstance that the trial court could, and did, weigh together with other circumstances in ascertaining that fact. It is a reasonable, although not inevitable, inference from such facts that the bank had such knowledge at the time the loan was made.

It is true that La Motte testified that he did not know that the Wayland endorsements were for the accommodation of Rucker, and that he did not know what was going to happen to the proceeds at the time the note was endorsed. Appellant contends that if La Motte did know that the proceeds of the note were for Rucker's use, the bank was guilty of a fraud upon Dr. Wayland in procuring Mrs. Wayland to endorse the note on behalf of her husband for the accommodation of Rucker, which was beyond the authority given her by the power of attorney. The bank contends that, unless it was guilty of a "downright fraud" on Dr. Wayland, the judgment cannot stand, and that the presumption against wrongdoing and fraud supports its position. We believe the evidence supports the finding that La Motte knew the Wayland endorsements were for the accommodation of Rucker, but this does not mean that La Motte was guilty of active fraud. It is a far more reasonable inference that La Motte, seeing the broad authority conferred by the power of attorney, failed to appreciate that it was confined to acts for the use and benefit of Dr. Wayland, and deemed it amply sufficient to authorize Mrs. Wayland to endorse any note, including the note here involved.

[4, 5] Appellant contends that La Motte is a "disinterested" witness, and seems to argue that for that reason, in the appellate court, his testimony is entitled to more

weight than that of an interested witness. It is true that La Motte left the employ of the Bank of San Jose in 1926 or 1927, and that at the time of trial was employed by another bank not connected with appellant. In that sense he had no interest in the case. But, since it was he who acted on behalf of the bank in the transaction, and any misunderstanding of the scope of the power of attorney or failure to exercise due care was his, it can scarcely be contended that he was a disinterested witness. At any rate, the weight to be given to the presumption, and to La Motte's testimony, was a matter solely and exclusively for the trial court.

The next contention of appellant is that, even though Mrs. Wayland exceeded her authority in endorsing the note, Dr. Wayland subsequently ratified her unauthorized act by executing a waiver of the statute of limitations in 1928. The circumstances surrounding the execution of the waiver were these: Interest payments on the note were paid by Rucker until early in 1928. Upon Rucker's default, Mr. Frank C. Mitchell, the then vice-president and manager of the San Jose branch of appellant, wrote to Dr. Wayland requesting him to call at the bank. At this time Dr. Wayland first learned of the transaction. He told Mitchell that he did not feel "legally or morally responsible" for the note. Thereafter, Rucker made several more interest payments. On October 30, 1928, (the statute of limitations would have run on November 2, 1928), at the request of Mitchell, Dr. Wayland signed a waiver of the statute of limitations. The waiver reads, in part, as follows:

"For a valuable consideration, I hereby agree that I, as endorser and as a guarantor, will not set up or claim any benefit by reason of the statutes of limitations in defense to any action brought by the owner and holder of that certain promissory note in words and figures, as follows: [here follows copy of note] and I hereby expressly waive any and all rights which may hereafter accrue to me under the statute of limitations or otherwise.

"Dated: October, 30, 1928.
"Charles A. Wayland."

[6,7] The trial court found that Dr. Wayland, for a valuable consideration, executed the waiver of the statute, but that Dr. Wayland did not thereby intend to, nor did he, in fact, ratify the acts of his wife, nor did he thereby intend, nor did he, in fact, acknowledge the loan as his obligation or agree to pay it.

The appellant contends that if respondent's conduct expressed ratification to the bank, what he may have secretly intended is immaterial. The appellant notes statements in cases discussing the law of ratification that ratification is more often implied from conduct than from expressed words. The appellant also finds sound authority for the proposition that it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been done in his name by the purported agent without authority, with the result that passivity and silence may be construed as a ratification. There can be no doubt of the soundness of these cases. Any act consistent only with recognition of the binding force of the unauthorized act would constitute a ratification. We have no doubt that, if a principal, with full knowledge of the facts, without qualification, executes a waiver of the statute of limitations, that a third person, such as appellant, would be entitled to rely on his act as a recognition of the binding force of the obligation. But in this case the evidence most favorable to respondent shows that the waiver was not signed by Dr. Wayland at a time that he had full knowledge of the facts. On the contrary it is a reasonable inference from the evidence that Dr. Wayland signed the waiver in the mistaken belief, induced by Mr. Mitchell of the bank, that he was legally liable on the endorsement because of the power of attorney given his wife.

Dr. Wayland testified that when he signed the waiver he said to Mr. Mitchell: "Frank, this simply means that I do not take advantage of the statute of limitations?", and that Mitchell replied, "Yes that is all it is"; that he told Mitchell on several occasions before signing the waiver that, "I do not feel legally or morally responsible for this note."

When asked if, at the time he signed the waiver, he had denied liability on the note, he replied: "A. It was ignorance that I didn't know all my liability. I thought Mr. Mitchell knew more about these business transactions than I did, and he never at any time accused me of saying that I would pay the note; he never told me that; *he told me that because Mrs. Wayland had signed this note and signed my name to this note, and that I had given her power* *of attorney that I was legally bound to pay that note.*

"Q. You didn't tell him that you wouldn't pay it, did you, Doctor? A. I couldn't tell him that I wouldn't because I didn't know how far my legal obligations extended. I had not consulted my attorney, but *he told me that was a fact, and I naturally thought it was a fact.*" (Italics ours.)

From this testimony the trier of the facts was entitled to find that Mitchell had represented to Dr. Wayland that he was legally responsible on the endorsement, and that it was upon that representation that the waiver was signed. This does not mean that Mitchell was guilty of active fraud. By 1928 La Motte had left the employ of the bank. Mitchell, the new manager and vice-president, did not have possession of the same facts known only to La Motte. Mitchell may not have known, and probably did not know, that the bank had knowledge of facts that legally charged it with knowledge that the Dr. Wayland endorsement was for the accommodation of Rucker. Without imputing any intent on the part of Mr. Mitchell to overreach Dr. Wayland, the most likely explanation of the situation is that Mitchell, in good faith, made the representation to Dr. Wayland.

It is true that in reliance on the waiver the bank may have failed to take steps to enforce the liability against Rucker and Mrs. Wayland's estate, believing that in any event it had the liability of Dr. Wayland. Any loss of the bank in reliance on the waiver was brought about not by Dr. Wayland, but by the bank's failure, through its officers then in charge, to clearly ascertain the facts and law bearing on Dr. Wayland's liability.

The appellant makes the further contention that the trial court failed to find on the issue that respondent was estopped to deny liability. The claim of estoppel is based on the same facts upon which the claim of ratification is predicated. The same reasons which uphold the trial court on the issue of ratification also preclude an estoppel.

[8] Interpreting the evidence most favorable to respondent, and disregarding all conflicts, as we must, the case is one where the bank knew that Mrs. Wayland signed her husband's name for the accommodation of Rucker; where the bank is chargeable, as a matter of law, with knowing that Dr. Wayland was not liable on the endorsement; and where the officers of the bank represented to Dr. Wayland that he was legally responsible, and secured a waiver from him based on that misrepresentation. There was either a mistake of law by both parties, or a misrepresentation of the law by the bank officials who were legally chargeable with notice of facts which demonstrated that the doctor was not legally responsible. No case has been cited that holds that a waiver of the statute secured under such circumstances can constitute a ratification. Had the trial court on the conflicting evidence found in favor of the bank, then its position would be impregnable. Having found in favor of Dr. Wayland on conflicting evidence, we have no power to disturb the finding.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

SIEDLETZ v. GRIFFITH et al. *

Civ. 6456.

District Court of Appeal, Third District, California.

Oct. 7, 1940.

Hearing Granted Dec. 5, 1940.

1. Appeal and error 🔑616(1)

Clerk of trial court had no authority to certify evidence introduced upon the trial by exhibits or otherwise as part of the judgment roll. Code Civ.Proc. § 670.

2. Appeal and error 🔑544(2)

Where appeal was upon judgment roll only, and no bill of exceptions was presented or settled, and no notice for preparation or filing of the transcript of evidence under statute was given, only question which District Court of Appeal could determine was whether judgment was supported by trial court's findings. Code Civ.Proc. §§ 670, 953a.

3. Appeal and error 🔑907(3)

On appeal upon judgment roll only from judgment quieting title to two placer mining claims in one of defendants, where trial court found that company, of which one who attempted to relocate claim in behalf of plaintiff was agent and trustee, was owner of claim at time of attempted relocation, District Court of Appeal would assume, in support of judgment, that the record adequately showed that agent and trustee had no authority to relocate claims in behalf of plaintiff or anyone, except company which he represented, and that his attempted relocation was therefore contrary to his trust and void.

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* Subsequent opinion 114 P.2d 598.

4. Mines and minerals 🔑38(2)

In suit to quiet title to two placer mining claims, plaintiff must prevail on strength of his own title and not on any weakness of defendants' title.

5. Mines and minerals 🔑60

In suit to quiet title to two placer mining claims, wherein defendants filed a counterclaim, defendants were not "estopped" from denying title of plaintiff on account of alleged relationship of landlord and tenant growing out of lease of premises, where it was alleged in cross-complaint that lease was procured by fraud of plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

6. Appeal and error 🔑1033(7)

An appellant is not prejudiced by failure to find upon issues which would necessarily be adverse to him.

7. Landlord and tenant 🔑62(1)

A fraud or misrepresentation on part of landlord which induces a tenant to enter into a lease of property relieves tenant of general rule estopping him from denying title of the landlord.

8. Landlord and tenant 🔑63(2)

Where landlord not only seeks possession of realty but also attempts to quiet title thereto as against tenant, tenant is not "estopped" from denying landlord's title, but tenant can, under such circumstances, set up and establish any superior title which he may have afterwards acquired.

9. Mines and minerals 🔑38(24)

In suit to quiet title to two placer mining claims, wherein defendants filed a counterclaim, trial court's findings supported judgment quieting title in one of defendants.

Appeal from Superior Court, Sierra County; Raymond McIntosh, Judge.

Suit by Ray Siedletz against J. K. Griffith, Myrtle Griffith, and others, to quiet title to two placer mining claims, wherein the defendants filed a cross-complaint. From a judgment quieting title in defendant Myrtle Griffith, the plaintiff appeals.

Affirmed.

Richard A. Haley, of Los Angeles, for appellant.

A. J. Just, of Downieville, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment quieting title in the defendant Myrtle Griffith to two placer mining claims in Sierra county. The appeal is presented on the judgment roll alone. The only question to be determined on this appeal is whether the judgment is supported by the findings.

The complaint is couched in three counts. The first count alleges that plaintiff is the owner of the "Gold Blossom", quartz mining claim in Sierra county. The second count alleges that on November 1, 1937, the defendants entered upon and took possession of the "Gold Blossom" claim, without plaintiff's consent, and extracted therefrom and appropriated to their own use minerals of the value of $10,000. The third count alleges that on September 5, 1935, the plaintiff leased said "Gold Blossom" claim to the defendants for the purpose of mining a portion of the claim; that pursuant to the terms of the lease the defendants made certain improvements on the property and supplied machinery, tools and equipment for conducting the placer mining enterprise, which, by the terms of the lease, became the property of the plaintiff for failure to remove them from the premises within sixty days from the termination of the lease; that the lease provided that for breach of any of its covenants, at the option of the lessor, it could be terminated after thirty days' notice; that the defendants did breach the terms of their lease, and were given notice of the termination thereof and thereby forfeited said lease, together with title to the improvements, tools, machinery and quartz extracted from the mining property. The prayer of the complaint asked for a decree quieting title in plaintiff to the "Gold Blossom" mining claim and machinery and for damages in the sum of $10,000 as the value of the mineral extracted from the claim.

The defendants joined in an answer and cross-complaint which denies each and all of the material allegations of the complaint. They specifically deny that plaintiff was the owner of "Gold Blossom" quartz claim. It is admitted the defendants entered into the alleged lease of the mining claim as a result of false and fraudulent representations made by the defendant that he was the owner thereof, but that they soon thereafter discovered he was not the owner of the claim and upon the contrary that the lease was void and that on May 1, 1936, they therefore repudiated the lease; that on July 1, 1925, the mining claim was sold and conveyed to the state of California pursuant to law for delinquent taxes; that defendants never entered upon or extracted quartz from the mining property claimed by the plaintiff, and upon the contrary that they are the owners of two mining claims in that vicinity known as "Lady Esther" and "Bonnie Brae". The answer and cross-complaint asked for a decree quieting title in defendants to the quartz mining claims and that plaintiff be determined to have no right, title or interest therein and that she take nothing by her complaint.

In the answer to the cross-complaint it is alleged that defendants' quartz mining claims "Lady Esther" and "Bonnie Brae" were wrongfully located and recorded *over and upon* the plaintiff's said "Gold Blossom" claim in which they have no right, title or interest.

At the trial oral and documentary evidence was adduced in behalf of respective parties. The chief issues were the ownership of the respective claims and the alleged fraud of the plaintiff in procuring from the defendants the lease of the "Gold Blossom" claim on September 5, 1935. The court adopted findings against the plaintiff, determining that on and prior to July 1, 1931, of the Sierra Syndicate, a common-law trust organization, of which one William G. Dean was at all times an agent and trustee, owned the Gold Blossom quartz mining claim involved in this action; that on the last-mentioned date the said Dean contrary to his said trust, purported to relocate said claim *in the name of the plaintiff* Ray Siedletz, which attempted relocation was void; that on June 1, 1936, the defendant Myrtle Griffith legally located and became the owner of the two placer claims, "Lady Esther" and "Bonnie Brae", described in the cross-complaint. As conclusions of law the court found that William G. Dean's attempt to relocate the "Gold Blossom" claim in the name of the plaintiff was void, and that Myrtle Griffith is the owner and entitled to a decree quieting title in her to the two quartz claims, "Lady Esther" and "Bonnie Brae". A decree was accordingly rendered and entered quieting title to the two claims last mentioned in the defendant Myrtle Griffith and determining that the plaintiff has no right, title or interest therein. From that decree the plaintiff has appealed.

[1, 2] This is an appeal upon the judgment roll only. No bill of exceptions was presented or settled. No notice for the preparation or filing of a transcript of evidence under the provisions of section 953a of the Code of Civil Procedure was given. No evidence which was adduced at the trial is properly before this court. The record contains a number of exhibits which were received in evidence, but they are no part of the judgment roll. Sec. 670, Code Civ.Proc. The exhibits were not a part of the pleadings. No evidence introduced upon the trial by exhibits or otherwise are a part of the judgment roll, and the clerk had no authority to certify such exhibits. Woods v. Berry, 105 Cal.App. 90, 286 P. 1073; 2 Cal.Jur. 519, sec. 258. We must therefore assume the findings of the court are adequately supported by the evidence. The only question which we may determine on this appeal is whether the judgment is supported by the findings.

[3, 4] Since the court found that on and prior to July 1, 1931, the Sierra Syndicate, of which William G. Dean was the agent and trustee, was the owner of the "Gold Blossom" claim, in support of the judgment and in the absence of the testimony adduced at the trial, we must assume the record adequately shows that Dean, as the agent and trustee of the Sierra Syndicate had no authority to relocate that claim in behalf of the plaintiff or anyone, except the company which he represented, and that his attempted relocation was therefore contrary to his trust and void. It follows that plaintiff took no title to the claim by the ineffectual and void action of Dean, and that the plaintiff's purported lease of the property to the defendants was also void. In this

suit to quiet title the plaintiff must prevail on the strength of his own title and not on any weakness of the defendants' title.

[5, 6] The defendants and cross-complainants in this case were not estopped from denying the title of plaintiff on account of the alleged relationship of landlord and tenant growing out of the lease of the premises. It was alleged in the cross-complaint that the lease was procured by the fraud of the plaintiff. That alleged fraud was an issue at the trial. The court did not specifically find that the lease was procured by fraud, but it did find that Dean's attempted relocation of the claim in behalf of the plaintiff was void, and it follows that if a finding on the issue of fraud, with respect to the execution of the lease, had been adopted, in support of the judgment the court would have necessarily determined that issue against the plaintiff. A multitude of authorities hold that an appellant is not prejudiced by a failure to find upon issues which would necessarily be adverse to him. Kramer v. Sanguinetti, 33 Cal.App.2d 303, 311, 91 P.2d 604.

[7] It is uniformly held that fraud or misrepresentation on the part of a landlord which induces a tenant to enter into a lease of property relieves the tenant of the general rule estopping him from denying the title of the landlord. Kearney Investment Co. v. Golden Gate Ferry Co., 198 Cal. 560, 563, 246 P. 322; 15 Cal.Jur. 654, sec. 62; 2 A.L.R. 359, note; 16 R.C.L. 658, sec. 145. This exception to the general rule that a tenant may not dispute the title of his landlord is based on the principle that the lease is a contract, and the relationship grows out of the terms of the contract, and that when the contract is void because it is procured by fraud, the relationship of landlord and tenant does not exist and the alleged tenant is therefore not estopped from denying the lessor's title.

[8] Moreover, it is the rule in California and other jurisdictions that when a landlord not only seeks possession of the real property, but also attempts to quiet title thereto as against the tenant, the latter is not estopped from denying the landlord's title, but he may, under such circumstances, set up and establish any superior title which he may have afterward acquired. Hambey v. Wise, 181 Cal. 286, 184 P. 9; Collier v. Johnson, 79 Cal.App. 322, 325, 249 P. 217; San Juan Gold Co. v. San Juan Ridge Mutual Water Ass'n, 34 Cal.App.2d 159, 168, 93 P.2d 582; 35 C.J. 1233, sec. 575; 89 A.L.R. 1299, note. In the present case the respondents were not estopped from denying plaintiff's title to the mining claims.

[9] The judgment is adequately supported by the findings, and it is, therefore, affirmed.

We concur: PULLEN, P. J.; G. S. JONES, Justice pro tem.

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41 Cal.App.2d 74

SANTINA v. GENERAL PETROLEUM CORPORATION OF CALIFORNIA et al.

Civ. 11428.

District Court of Appeal, First District, Division 2, California.

Oct. 8, 1940.

Hearing Denied Dec. 5, 1940.

1. Appeal and error 🔑1032(1), 1170(1)

Under constitutional provision that a judgment shall not be reversed unless court shall be of opinion, upon review of all evidence, that error has resulted in "miscarriage of justice", error complained of must be substantial and must have affected the result, and the burden of proving prejudice is upon the appellant unless the error is such that prejudice is evident upon the face of the record. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

2. Appeal and error 🔑1031(1), 1170(1)

Under constitutional provision that a judgment shall not be reversed unless it shall appear upon examination of the entire record that the error has resulted in a "miscarriage of justice", prejudice must appear from an examination of the entire cause, including the evidence, and reviewing court must affirmatively find prejudice and such finding must be based either upon the facts found in the record or upon the reasonable inferences to be drawn therefrom, and a presumption of prejudice does not result from the fact of error alone. Const. art. 6, § 4½.

3. Appeal and error ⇨1031(1)

Where asserted irregularity of proceedings in jury room was assigned as prejudicial error, and record on appeal did not contain any portion of record, evidence, or instructions, but raised only question of prejudice without any showing of fact, prejudice would not be presumed from error alone and judgment would be affirmed. Code Civ.Proc. §§ 953a, 1959; Const. art. 6, § 4½.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action for injuries by Louis Della Santina against the General Petroleum Corporation of California and others. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Hearing denied; EDMONDS and HOUSER, JJ., dissenting.

Bronson, Bronson & McKinnon, of San Francisco, for appellants.

Ingemar E. Hoberg, and Anderlini & Molinari, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff recovered a judgment on the verdict for damages for personal injuries arising out of defendants' negligence. The appeal from the judgment is confined to the asserted irregularity of the proceedings in the jury room, hence, no statement of facts or of the issues involved in the trial is necessary.

The jury retired after complete instructions with two forms of verdict which were given them by the clerk. One form was to be used if the jury found for the plaintiff, the other to be used if the finding was for the defendants. After some deliberation the foreman called the bailiff and asked him: "Where is the third form of verdict?" The bailiff replied: "There are only two forms of verdict and the judge has instructed you upon them and those are the only ones you can use." These circumstances the appellants assert were prejudicial to them and to substantiate their claims they rest their argument upon the ground that prejudice must be presumed from the fact of irregularity alone. There is therefore just one question which needs discussion and that is whether in this jurisdiction prejudice must be shown to justify a reversal, or whether it will be sufficient to show that error occurred and that it will then be presumed, from the irregularity of the proceedings alone, that the error is prejudicial.

Section 4½ of article VI of the Constitution declares that a judgment shall not be reversed because of error as to any matter of procedure unless the court shall be of the opinion, upon a review of all the evidence, that the error has resulted in a miscarriage of justice. The appellants frankly concede that they have not been able to show what other form of verdict the foreman had in mind, and they have not been able to show that the bailiff's reply to the foreman's inquiry had any influence upon the verdict either favorable or unfavorable to their interests. They have not made any showing of fact which would justify this court in concluding that the asserted error resulted in a miscarriage of justice.

It has been said that the prevailing rule requires the reviewing court to presume the error to be prejudicial unless the record shows the contrary. The same authority states, however, that a minority, but more liberal view, is that prejudice will not be presumed, and one who seeks a reversal must come prepared to show that the error was prejudicial. 3 Am.Jur. pp. 493, 494. A more thorough treatment of the subject is found in 5 C.J.S., Appeal and Error, § 1677, p. 810 et seq., where care is taken to emphasize the difference between error which is prima facie irrelevant and without probable substantial relation to the disposition of the case, and error which is so substantial in nature "that it cannot be said prima facie not to have influenced the result." It is then said that the accepted rule as to this first class of error is that "there must be an affirmative showing that it is not unlikely that the error affected the result". To this statement authorities are cited from twenty-three of the states of the Union, and California is included as one of those following the rule. As to the second class of error, there is no conflict in the authorities, and the rule is generally accepted that, where the error is apparent on the face of the record and so substantial that it cannot be said not to have affected the result, it will be presumed to have been prejudicial.

[1, 2] Viewing these rules in the light of section 4½ of article VI of the Constitution, we find a purpose in the enactment of the section to adopt these principles as a guide to our appellate courts with a stronger demand as to the appearance of prejudice so that the effect of the enactment is to require an affirmative showing of prejudice, unless the error is such that prejudice is evident upon the face of the record. Though the text writer puts the statement of this phase of the rule in the negative, he reaches the same end as the constitutional section, i. e., that a judgment or order must not be reversed unless it shall appear upon examination of the entire record that the error has resulted in a miscarriage of justice. The effect of this declaration is that, to support a reversal, the error complained of must be substantial and must have affected the result. Manifestly, if it must appear from an "examination of the entire cause, including the evidence", that the error is prejudicial, it is not possible to presume prejudice without such examination. Hence, since such examination is necessary, the burden of proof is put upon the appellant to show that the error complained of is prejudicial. We have not overlooked the frequent use of the words "prima facie" in the text and in the authorities cited. We do not need to determine when an error is "prima facie" prejudicial. It is sufficient to say that we are not dealing with that kind of error here. We are dealing with error which is collateral and without probable substantial relation to the disposition of the cause. It is error which no appellate court could say of its own knowledge had any substantial bearing upon that result. It is true that a departure from the code provisions specifying the method of communication between the court and the jury is an "improper irregularity" and goes "to the substance of the right of trial by jury" (Nelson v. Southern Pacific Co., 8 Cal.2d 648, 655, 67 P.2d 682, 686), but it does not follow from this that any and every departure from that method has a "probable substantial relation to the disposition of the cause". These are the "exceptional circumstances" referred to in the Nelson case, and it is but another way of saying that the error must be substantial and real, not merely fancied or technical. Where any error is relied on for a reversal it is not sufficient for appellant to point to the error and rest there. Since the appellate court must affirmatively find prejudice such finding must be based either upon the facts found in the record or upon the reasonable inferences to be drawn therefrom. In the face of the constitutional limitation there is no room for the presumption that prejudice results from the fact of error alone. The fact of prejudice is just as essential as the fact of error.

Mention should be made of Nelson v. Southern Pacific Co., supra, an authority upon which the appellants place much hope. The expression of the court pertinent here reads: "The remaining error charged was that the court communicated with the jury after their retirement by sending them a message by the bailiff and without the presence of counsel. This is an improper irregularity. Section 614 of the Code of Civil Procedure requires that, if the jury desire further instruction, it shall be conducted into court and the information desired given in the presence of or after notice to counsel. Any other method of communication is held to go to the substance of the right of trial by jury and because of its nature is deemed to be prejudicial except in very exceptional circumstances." We have no quarrel with the rule quoted or with the language of the opinion, but we do not agree with appellants that the language requires a holding here that the error complained of was "prima facie" prejudicial to them. It should be noted that the court did not say that such error was "presumed" to be prejudicial, but that it used the word "deemed". There is a marked difference between these expressions. "A presumption is a deduction which the law expressly directs to be made from particular facts." Code Civ.Proc. sec. 1959. Hence, when a court presumes a fact to be true, it is because of this statutory direction. But, when it deems a matter to be true, it is the result of the exercise of an independent judgment forming an opinion upon the facts shown. To "deem" is defined in Webster as "to conclude or believe on consideration". When the Supreme Court used the expression "is deemed to be prejudicial" it used it in the light of this definition and the sentence as a whole means nothing more than that in the cases therein cited the court had concluded, or believed, that the error was prejudicial; or, in the words of the constitutional provision, "after an examination of the entire cause" the court had reached "the opinion that the error complained of has resulted in a miscarriage of justice".

[3] In the case at hand the appellants have elected to appeal under section 953a, Code of Civil Procedure; they have not printed any portion of the record, none of the evidence, and none of the instructions given. They have raised the question of prejudice without any showing of the fact. The only argumentative feature of their appeal rests wholly upon the claim that prejudice justifying a reversal is to be presumed from the error alone. As this theory is not in accord with the accepted rule in this state their appeal must fail.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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41 Cal.App.2d 92

ALHAMBRA TRANSFER & STORAGE CO. v. MUSE et al.

Civ. 6390.

District Court of Appeal, Third District, California.

Oct. 9, 1940.

1. Pleading 🔑417

Plaintiff, by amending its complaint after demurrer was sustained, "waived" the error, if any, in the ruling of trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

2. Trade-marks and trade-names and unfair competition 🔑70(3)

An action to enjoin use by one corporation or partnership of name of another corporation or partnership is ordinarily based on theory of invasion of an exclusive trade-mark or upon common-law doctrine of unfair competition.

3. Trade-marks and trade-names and unfair competition 🔑70(3)

Under statute declaring that one who conducts particular business cannot exclusively appropriate any designation or part of a designation which relates only to the name or description of the business or the place where the business is carried on, the name "Alhambra Transfer & Storage Company" related to description of business and place where business was carried on, and could not be subject of exclusive trade-mark. Civ.Code, § 991.

4. Trade-marks and trade-names and unfair competition 🔑71

The use of an identical name will not be enjoined where there is no competition in business between the parties.

5. Trade-marks and trade-names and unfair competition 🔑71

A corporation engaged in real estate business could not enjoin a copartnership engaged in transfer and storage business from using an analogous name upon common-law doctrine of unfair competition.

6. Corporations 🔑49(1)

The statute authorizing a corporation to enjoin use by another corporation of a name which is the same as, or resembles so closely as to tend to deceive, would not be available to corporation, so as to authorize corporation to enjoin copartnership from using an analogous name. Civ.Code, § 291.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by the Alhambra Transfer & Storage Company, a corporation, against O. C. Muse and others, both individually and as copartners doing business as the Alhambra Van & Storage Company, and another, to enjoin defendants from using a like name in connection with the transfer and storage business carried on by them in the city of Alhambra, California, and for damages. From a judgment dismissing the suit, the plaintiff appeals.

Affirmed.

H. S. Farrell, of Alhambra, and C. A. Lindeman, of Los Angeles, for appellant.

Chase, Barnes & Chase, Daniel P. Bryant, and Thomas R. Suttner, all of Los Angeles, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

Plaintiff is a corporation organized under the name of the "Alhambra Transfer & Storage Company". It brought this suit in equity to enjoin the defendants, who are copartners, from using a like name in connection with the transfer and storage business carried on by them in the city of Alhambra, California. A general and special demurrer was interposed to the original complaint, and thereafter, plaintiff filed its amended complaint. Defendants demurred generally and specially to the amended complaint, and the court entered its order sustaining the demurrer without leave to amend. Judgment was thereafter rendered dismissing the action, and from that judgment plaintiff has prosecuted this appeal.

[1] Appellant urges as grounds for appeal that the trial court erred in two particulars, first, in sustaining its demurrer to the original complaint; and, second, in sustaining its demurrer to the amended complaint. As to the first ground relied upon, we are of the opinion that it is without merit, for the reason that by amending his complaint after demurrer was sustained, plaintiff waived the error, if any, in the ruling of the court. This has been the settled law in California for many years, and the rule will be found laid down in the case of Ganceart v. Henry, 98 Cal. 281, 283, 33 P. 92. In the later case of Pearson v. Parsons, 173 Cal. 336, 159 P. 1173, 1174, it was held that: "Having thus gone to trial upon the complaint as amended, the plaintiff must be deemed to have waived the objection that the demurrer was improperly sustained." In that case plaintiff attempted to predicate error on the part of the trial court in sustaining a demurrer to the original complaint. The same ruling is followed in Carter v. Canty, 28 Cal.App. 323, 152 P. 312.

Taking up the demurrer to the amended complaint, the allegations of the latter are substantially as follows: That plaintiff is a corporation organized under the laws of the state of California, and has its principal place of business in Alhambra, California. It appears from the second paragraph of the complaint that while plaintiff was at one time engaged in the warehouse and storage business, it was not, at the time the complaint was filed, engaged in such business. In its opening brief plaintiff admits that it is not engaged in the transfer and storage business, but that it is a real estate holding corporation, and does not compete in any manner with the business conducted by defendants. Continuing further with the allegations of the complaint, it is alleged that defendants are engaged in the transfer and storage business, and have their principal place of business directly across the street from the office and warehouse of plaintiff; that defendants are unlawfully using the corporate name of plaintiff, and have conducted their business under such name since 1933; that said defendants operate large vans and trucks, upon which their corporate name appears, and they display the corporate name upon their letterheads and billheads, in the city directory, in the telephone directory, and other advertising matter; that defendants are using said name for the sole purpose of deceiving the general public and leading them to believe and understand that they are dealing with this plaintiff; that by reason of the foregoing facts, claims of various kinds are liable to arise, and litigation is liable to follow as a result thereof, and thus, plaintiff's title to its various properties is liable to be clouded; that it is impossible to estimate the amount of damage that might arise and be suffered by plaintiff by reason of the acts of defendants set forth above; that defendants, in the defense of said action, must employ an attorney, and that the reasonable compensation for such attorney would be $3,000. Plaintiff prays that the defendants be permanently enjoined from using its corporate name; and it also asks judgment for $3,000 damages.

[2] In cases of this character involving the use by one corporation or partnership, of the name of another corporation or partnership, there are two theories upon which a recovery may ordinarily be had. One of these is for the invasion of an exclusive trade-mark, and the other is based upon the common-law doctrine of unfair trade dealing or unfair competition. We are of the opinion that both of these questions are disposed of adversely to the contention of appellant in the case of R. H. Dunston, etc. v. Los Angeles Van & Storage Company, a Corporation, 165 Cal. 89, 131 P. 115, 117. There the plaintiff, in 1902, incorporated his business under the name of "Los An-

geles Van, Truck & Storage Company". In 1910, defendants started up a business similar to that of plaintiff, under the name of "Los Angeles Van & Storage Company". Plaintiff brought the action to enjoin the defendants from using the name of "Los Angeles Van & Storage Company". The trial court granted the injunction sought by plaintiff, and on appeal, that judgment was reversed. It was held that the trade name used by plaintiff was not susceptible of exclusive use, and therefore could not be protected as an exclusive trade-mark or name. In deciding this question the court goes on to say: "But, second, and more important, is the fact that the trade-name used by plaintiff is not susceptible under our law of exclusive use, and therefore of protection as an exclusive trade-mark or name. This proposition is completely covered by section 991 of our Civil Code, which declares: 'One who * * * conducts a particular business * * * cannot exclusively appropriate any designation, or part of a designation, which relates only (a) to the name * * * or (b) the description of the * * * business, or (c) the place where the * * * business is carried on.' It is too apparent to need discussion that the name here employed by plaintiff has reference in its first words to the place of business; in the remaining words to a description of the business. Such names, titles, or designations are not the subject of exclusive copyright or trade-mark. Eggers v. Hink, 63 Cal. 445, 49 Am.Rep. 96; Schmidt v. Brieg, 100 Cal. 672, 35 P. 623, 22 L.R.A. 790; Castle v. Siegfried, 103 Cal. 71, 37 P. 210 [211]; Hainque v. Cyclops Iron Works, 136 Cal. 351, 68 P. 1014; American Wine Co. v. Kohlman (C.C.) 158 F. 830."

[3] In our opinion, the name of plaintiff corporation, "Alhambra Transfer & Storage Company", comes directly within the provisions of section 991 of the Civil Code, in that it relates only to the name or the description of the business, or the place where the business is carried on. It therefore follows that the name is not entitled to protection as an exclusive trade name.

With reference to the second theory mentioned, that of unfair trade dealing, it first should be pointed out that plaintiff and defendants are not engaged in competitive enterprises, or in competitive businesses. This is clearly indicated in the opening brief of appellant, where he states: "We assume that the judgment of dismissal herein might well be construed as one on the merits, barring a subsequent action on the same or a similar state of facts. But even were this not the case, it would doubtless be futile to file an action in the same trial court, where it would be viewed as one for unfair competition, which *the facts do not justify.*" In another portion of the same brief, appellant states: "As to unfair competition, the foregoing paragraph II (of the complaint) is probably fatal, in that there is no direct allegation, and indeed, the facts do not justify such an allegation, that plaintiff is now engaged in the general transfer, storage and warehouse business." In appellant's reply brief it concedes that the question of unfair competition is not before the court.

Summarizing the situation, we thus have before us for decision the question whether or not a partnership which appropriates the name of an existing corporation can be enjoined from using that name for the sole reason that *confusion* might arise with reference to actions which might be brought, or in connection with the title to real property.

[4] The Dunston case above referred to may again be relied upon as authority to the effect that the use of an identical name will not be enjoined in the absence of fraud and deceit upon the public and the customers of plaintiff,—in other words, where there is no competition in business between the parties. It was held in that case that since plaintiff had no exclusive property right by way of trade-mark in the use of the name, it follows that the mere similarity of names does not establish fraud, and that there must be such a misuse of the name by advertising and soliciting as amounts to fraud, and which would tend to deceive prospective purchasers and customers of plaintiff. Continuing in its discussion of this question, the court goes on to say: "As the judgment cannot thus be supported upon the theory of an invasion of an exclusive right to property in a trade-mark, the only ground for the support of the judgment is that which has come to be known as 'unfair trade dealing.' This is but a succinct statement of the principle, that in the interest of fair commercial dealing courts of equity, where one has been first in the field doing business under a

given name, will protect that person to the extent of making competitors use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field. Spieker v. Lash, 102 Cal. 38, 36 P. 362; [American] Waltham Watch Co. v. United States Watch Co., 173 Mass. 85, 53 N.E. 141, 43 L.R.A. 826, 73 Am.St.Rep. 263 [265]; Shaver v. Shaver, 54 Iowa, 208, 6 N.W. 188, 37 Am.Rep. 194; Newman v. Alvord, 51 N.Y. 189, 10 Am.Rep. 588 [589]. *But, as has been intimated, relief in such cases really rests upon the deceit or fraud which the later comer into the business field is practicing upon the earlier comer and upon the public. Like all other kinds of fraud and deceit, this is not presumed but must be pleaded and shown. * * * The fact that confusion to the business of plaintiff has resulted from acts not in themselves illegitimate of itself affords no ground for relief.*"

[5] Referring to unfair competition arising out of one concern adopting the trade name of another, the general rule is stated in 63 C.J., page 389, section 100 to be as follows: "The doctrine is usually invoked when there is an actual market competition between the analogous products of plaintiff and defendant." Here, plaintiff is engaged in the real estate business, while defendants are engaged in the transfer and storage business. Under such circumstances the customers of plaintiff cannot be deceived. The most that can be said is that some confusion will result by the use of the same name. This is an every-day occurrence with individuals, and as stated in the Dunston case, it affords no ground for relief.

[6] Appellant places some faith in section 291 of the Civil Code, which provides in part as follows: "The Secretary of State shall not file articles which set forth a name which is likely to mislead the public or which is the same as, or resembles so closely as to tend to deceive. * * * The use by a corporation of a name in violation of this section may be enjoined notwithstanding the filing of its articles by the Secretary of State."

We are of the opinion that this section does not govern the situation here. In the first place it refers to a controversy between two corporations which have filed their articles with the secretary of state, while here, we have only one corporation, the plaintiff, the defendants being a partnership. If two corporations should be permitted to file articles of incorporation, each using the same corporate name, the remedy provided by the last-named section would be available to the corporation which had priority in the filing of its articles. We do not believe, however, that the remedy provided for in said section is available to the plaintiff under the circumstances of this case.

From what has been said, and from the authorities cited, it is quite clear that appellant's amended complaint failed to state a cause of action. It is therefore ordered that the judgment be, and it is hereby, affirmed.

We concur: THOMPSON, Acting P. J.; PAULSEN, Justice pro tem.

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41 Cal.App.2d 155

PEOPLE v. PALOMINO.

Cr. 603.

District Court of Appeal, Fourth District, California.

Oct. 11, 1940.

1. Criminal law 🔑90(5)

The Santa Ana justice's court in Orange county is a class A justice's court within statute providing that a justice's court of class A shall have jurisdiction exclusive of that of any municipal court established in the county, in all criminal cases amounting to a misdemeanor only. Pen.Code, § 1425; Code Civ.Proc. § 81.

2. Criminal law 🔑86

The Constitution vests exclusive jurisdiction of all felonies in the superior court, as well as all misdemeanors not otherwise provided for by the Legislature, and the Legislature may vest the jurisdiction of all misdemeanors in inferior courts established by the Legislature within the county, the effect of which is to deprive the superior courts of jurisdiction of misdemeanors within the county. Const. art. 6, § 5.

3. Criminal law ⚷90(5)

Under statute providing that a justice's court of class A shall have jurisdiction exclusive of that of any municipal court established in the county, in all criminal cases amounting to a misdemeanor only, where a justice's court of class A was established in the county in which offense was committed and offense was within subject matter jurisdiction of the justice's court, the justice's court had exclusive jurisdiction of the offense to the exclusion of the superior court. Pen.Code, § 1425.

4. Criminal law ⚷90(5)

The class A justice's court in Santa Ana, Orange county, and not the superior court of Orange county, had exclusive jurisdiction to try accused for nonsupport of an unborn illegitimate minor child, a misdemeanor. Pen.Code, §§ 270, 1425; Code Civ. Proc. § 81; Const. art. 6, § 5.

◆

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Louis Palomino was convicted of nonsupport of an unborn, illegitimate minor child and he appeals.

Reversed.

N. D. Meyer, of Santa Ana, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant Louis Palomino was charged in an information filed on April 12, 1940, by the district attorney of Orange county, with a misdemeanor under section 270 of the Penal Code, to-wit, nonsupport of an unborn illegitimate minor child, the maximum penalty for the offense being confinement for two years in the county jail or $1,000 fine. A plea of not guilty was made and entered. Trial by jury was had and a verdict of guilty as charged was returned. Motion for new trial was made and denied. On August 5, 1940, the appellant was sentenced to be confined in the county jail for the period of one year. Commitment was suspended provided he pay $15 per month for the support of the minor child. Notice of appeal was taken from the order denying the motion for new trial and from the judgment.

[1] The principal contention made by appellant is that the superior court of Orange county was without jurisdiction to try the appellant, the theory being that there was a class A justice's court in the county of Orange and that said court had exclusive jurisdiction to try so-called high-grade misdemeanors, citing section 1425 of the Penal Code. There is no doubt that the Santa Ana justice's court is a class A justice's court. Section 81, Code Civ.Proc.; Cambra v. Justice's Court of Santa Ana Township, 4 Cal. 2d 445, 49 P.2d 1121.

[2, 3] An uncertainty existed in the law as to the jurisdiction of the various courts in regard to certain so-called high-grade misdemeanors. Since perfecting the appeal in the instant case the Supreme Court on August 20, 1940, in the case of People v. Mulholland, Cal.Sup., 104 P.2d 1045, has definitely held that article VI, section 5, of the Constitution vests the exclusive jurisdiction of all felonies in the superior courts, as well as all misdemeanors not otherwise provided for by the legislature, and the legislature may vest the jurisdiction of all misdemeanors in inferior courts established by the legislature within the county, the effect of which is to entirely deprive the superior courts of the jurisdiction of all misdemeanors within the county. It further held that where in section 1425 of the Penal Code it provides that a justice's court of class A shall have jurisdiction exclusive of that of any municipal court established in the county, in all criminal cases amounting to a misdemeanor only, and a justice's court of class A was established in the county in which the offense was committed and the offense was one within the subject-matter jurisdiction of said justice's court, the justice's court had exclusive jurisdiction of the offense to the exclusion of the superior court.

[4] We are in accord with the statement of the attorney-general in reply to the appellant's contention that the case of People v. Mulholland, supra, is controlling in the instant case and that the judgment and order cannot be affirmed for the reason that there was a class A justice's court in Santa Ana and therefore that court and not the superior court of Orange county had exclusive jurisdiction to try the appellant, and that the superior court in trying the appellant acted in excess of its jurisdiction.

The judgment and order are reversed.

We concur: BARNARD, P. J.; MARKS, J.

41 Cal.App.2d 126

HYAMS v. SIMONCELLI et al. (two cases).
Civ. 11079, 11089.

District Court of Appeal, First District,
Division 1, California.
Oct. 11, 1940.

1. Appeal and error 🔑74

Where separate appeals were taken from a judgment and from order denying motion for a new trial and to strike orders extending plaintiff's time to file consent to reduction in judgment, appeal from order denying a new trial would be dismissed, since such order was reviewable on appeal from the judgment.

2. Appeal and error 🔑933(1)

In view of presumptions in favor of validity of judgments and orders, it would be presumed, in support of trial court's actions in extending plaintiff's time to file consent to reduction of judgment, that in each instance extension was granted and the stipulation filed before the hour fixed.

3. New trial 🔑162(5), 165

Where a trial court has once ruled on a motion for new trial, it cannot change its ruling because of an alteration in the view of the court as to the law even within period prescribed by law for passing on the motion, at least in absence of an application under the statute for relief from a judgment taken by mistake, but, before an order denying a new trial on condition that plaintiff file consent to reduction in amount of judgment becomes operative, trial court can grant an extension of time for filing consent as long as such extension does not exceed the time prescribed by law for passing on motion. Code Civ.Proc. § 473.

4. New trial 🔑162(5)

Where trial court denied motion for a new trial on condition that plaintiff file a consent to a reduction in amount of a judgment, and, before time fixed in order denying new trial had expired, extensions of time to file consent were granted and the consent was filed within the time so extended, trial court acted within its jurisdiction in granting extensions of time and defendant was not entitled to a new trial.

5. Automobiles 🔑206, 245(72)

A pedestrian is not required to anticipate the presence of automobiles on wrong side of the street, nor is he guilty of "contributory negligence", as a matter of law, in not keeping a lookout in a direction where automobiles are not to be anticipated.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

6. Appeal and error 🔑1122(2)

In action by pedestrian who was struck at intersection by automobile, wherein trial court did not state in its findings exact spot where accident occurred, if it were necessary, reviewing court in exercise of its powers to make findings of fact in nonjury cases could make a finding as to location of accident. Code Civ.Proc. § 956a.

7. Automobiles 🔑245(72)

Where pedestrian while crossing intersection did not look for oncoming automobiles but "went by the signal" and was struck by automobile turning left with traffic signal, pedestrian was not guilty of "contributory negligence" as a matter of law where there was some evidence that automobile was on wrong side of street when it struck pedestrian.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Jacob Hyams against Mario Simoncelli and J. Schilina, to recover for injuries suffered when plaintiff was struck by an automobile. From a judgment for plaintiff and from an order made after judgment denying defendants' motions for new trial and to vacate certain orders, defendants appeal. On motion to dismiss appeal from order.

Judgment as modified affirmed. Appeal from order dismissed.

Albert Picard, of San Francisco (Chester J. Keith, of San Francisco, of counsel), for appellants.

Louis L. Bernheim, of San Francisco, for respondent.

PETERS, Presiding Justice.

Three separate proceedings are pending in this court between the above-mentioned parties, all growing out of an automobile accident in which plaintiff was injured by an automobile owned by defendants as copartners. The first of these (No. 11079) is an appeal by the defendants from a judgment for plaintiff for the injuries so received. The second of these (No. 11089) is an appeal by defendants from an order of the trial court made after judgment on January 18, 1939, denying defendants' motions for a new trial and to vacate certain orders. The third proceeding is a motion by plaintiff to dismiss appeal No. 11089, on the ground that the order appealed from is nonappealable.

The main contentions of appellants are that by reason of certain prior orders of the trial court a new trial was automatically granted, and that the order of January 18, 1939, denying the motion for a new trial, was void as beyond the jurisdiction of the trial court. These contentions can best be explained as follows:

December 29, 1938:

Defendants served and filed a notice of intention to move for a new trial on most of the statutory grounds, including insufficiency of the evidence.

January 9, 1939:

The trial court duly made and entered in its minutes an order denying the motion for a new trial "providing plaintiff * * file before 10:30 o'clock A. M. Tuesday, January 10, 1939, a consent in writing agreeing to a modification and reduction of said judgment from the sum of one thousand ninety-four and 50/100 (1094.50) dollars to the sum of seven hundred (700) dollars; otherwise said motion * * * is hereby granted upon the grounds of the insufficiency of the evidence to justify the judgment".

January 10, 1939:

Upon the ex parte motion of plaintiff the trial court made and caused to be entered in its minutes an order extending plaintiff's time to file the consent to the reduction "until January 11, 1939, at 12:00 M.".

January 11, 1939:

Upon the ex parte motion of plaintiff the trial court made and caused to be entered in its minutes an order extending plaintiff's time to file the consent to the reduction "until January 12, 1939, at 12:00 o'clock M.".

January 12, 1939:

Plaintiff filed with the court a stipulation agreeing to the reduction of the judgment. The trial court thereupon made and caused to be entered in its minutes an order reducing the judgment as provided in the stipulation, and denying the motion for a new trial.

January 13, 1939:

Defendants served and filed a notice of motion to vacate the two ex parte orders extending time, and the order denying the motion for a new trial, and petitioned for an order granting a new trial.

January 18, 1939:

The trial court made a minute order denying the motion to vacate and denying the petition for an order granting a new trial.

[1] Within the time prescribed by law, defendants appealed from the judgment (No. 11079) and from the order of January 18, 1939 (No. 11089). This last appeal was taken out of an abundance of caution. The order denying a new trial is reviewable on appeal from the judgment. Appeal No. 11089, on the motion of respondent now pending should, therefore, be dismissed.

[2] All of the orders entered by the trial court and above-summarized were made and entered within the time prescribed by law for the passing upon the motion for a new trial. The record does not affirmatively show that the orders of January 10, 1939, and of January 11, 1939, extending time, nor the filing of the stipulation to remit a portion of the judgment, were in fact made or filed before the time limits fixed in the prior orders had expired. For the purposes of this appeal, however, in view of the presumptions in favor of the validity of judgments and orders, it must be presumed, in support of the trial court's actions, that in each instance the extension was granted and the stipulation filed before the hour fixed. Appellants do not contend to the contrary.

[3, 4] The theory of appellants is that the court below exhausted its jurisdiction when it made the order of January 9, 1939, giving plaintiff until 10:30 a. m. of the following day to file his consent to the remission; that when that hour arrived and no consent had been filed the new trial was automatically granted; and that before that hour arrived the trial court was without authority to extend the time. In this connection appellants place their main reliance upon the case of Gloria v. A. Colonia Portuguesa, 128 Cal.App. 640, 18 P.2d 87. In that case the trial court, in a conditional order denying a new trial, allowed the plaintiff five days to file a consent to a modification of the judgment, otherwise, the order granted a new trial. Plaintiff made no attempt to comply with the order

within the five days, nor did he within the five days or at all secure an extension of time. On the seventh day the plaintiff filed his consent to the modification, whereupon the clerk entered the modified judgment. The appellate court held that, upon the expiration of the five days fixed in the order without action by the plaintiff, the alternative provision of the order granting the new trial became "operative and final". In this connection, the court stated (128 Cal.App. at page 642, 18 P.2d at page 88): "The well-settled rule is that, when a trial court makes and causes to be entered a conditional order granting or denying a motion for a new trial, its jurisdiction is exhausted, and thereafter it has no power to change or modify the order except for inadvertence or mistake in the entry thereof [citing cases]; and that, unless the party upon whom the condition is imposed complies with such condition within the limitation of time fixed therefor, the alternative portion of the order becomes operative and final at once, *at the expiration of such period of time.* [Citing cases.] Two cases in point from other jurisdictions wherein additional authorities are cited are Bourne v. Moore, 77 Utah 184, 292 P. 1102, and Plecas v. Devich, 72 Utah 578, 272 P. 197." (Italics ours.) It is to be noted that the court states that the order granting the new trial became operative "at the expiration" of the time fixed in the conditional order. In the instant case, before the time fixed had expired, extensions were granted, and the consent was filed within the time so extended. This is a fundamental distinction. It is doubtless true that under the rule set forth in the Gloria case, supra, and the cases cited therein, where the trial court has once ruled on the motion for a new trial, it cannot change its ruling because of an alteration in the view of the court as to the law even within the period prescribed by law for passing on the motion, at least in the absence of application under section 473 of the Code of Civil Procedure. But no logical or legal reason exists why, before the order becomes operative, the trial court cannot properly grant an extension of time, as long as such extension does not exceed the time prescribed by law for passing on the motion. There is language in both the Utah cases relied upon as authority in the Gloria case, supra, to support this theory. In both cases the time fixed in the conditional orders had expired when the consent to reduction was filed. In holding that the order had become operative, the court, in both cases, emphasized that no extension had been sought before the operative date of the order. Thus in Bourne v. Moore, 77 Utah 184, 292 P. 1102, 1104, the court stated: "Plaintiff did not ask or obtain additional time within which to exercise her option, nor did she ask to be relieved from her default or noncompliance with the order nor did she seek to have this order set aside." The same limitation appears in Plecas v. Devich, 72 Utah 578, 272 P. 197, also relied upon in the Gloria case, supra. In that case (272 P. at page 199) the court stated: "* * * when the plaintiff failed to make her election within the time stated in the order, *failed to ask for or obtain additional time in which to make the election,* made no showing and did not ask to be relieved from her default or noncompliance with the order, and more than two months thereafter, without leave of court and without any showing of any excuse for her default or noncompliance, served and filed her election, the new trial became absolute and was so when the election was made." (Italics ours.)

A case closely in point is Harris v. Speirs, 55 Utah 474, 186 P. 445. In that case, before the expiration of time fixed in the order, an extension was secured. One of the grounds of the opinion was that, although the conditional order would have become operative upon the expiration of the time fixed, the trial court before the expiration of that period had properly extended the time. The court stated (186 P. at page 447): "No one does, or can, contend that the district court did not have the power to make the conditional order and in connection therewith to determine and fix the time within which plaintiff should be required to elect. Nor can anyone successfully dispute the proposition that the time plaintiff should be given to elect was not entirely within the sound legal discretion of the court. It could have fixed any reasonable time limit within which plaintiff should make the election. In view of that fact, why could not the court extend the time limit as originally fixed, on proper application being made for such an extension? In case where a court may fix a time limit within which a party to an action may do an act the determination of which is manifestly within the court's discretion, why has it not the inherent power to extend the time limit as first fixed? We confess our entire inability to perceive any reason why it may not do so."

Appellants have offered no sound reason why this rule should not be adopted in this state. Respondent's arguments seem to us sound and logical. We, therefore, hold that the extensions were valid, the consent to reduction properly filed, and the motion for a new trial properly denied.

[5-7] On the merits of the appeal in No. 11079, it is urged that the judgment must be reversed because the evidence shows that respondent was guilty of contributory negligence as a matter of law. The action was tried by the court without a jury. According to the findings, the accident occurred on December 27, 1937, at about 8 p. m. Respondent was then walking across Franklin street in San Francisco in a pedestrian lane. At this point several other streets meet with Franklin street. The traffic signals were in his favor. The automobile which was then being driven by an employee of defendants was likewise proceeding with the traffic signals, but was making a left turn, thus crossing the pedestrian lane in which plaintiff was walking. The respondent testified that while crossing the street he did not look for oncoming cars, but "went by the signal". Appellants contend that this testimony demonstrates that respondent was guilty of contributory negligence as a matter of law, and, in this connection, rely principally upon the rule stated in Flores v. Los Angeles Railway Corp., 15 Cal.App.2d 576, 59 P.2d 856. In that case the pedestrian was struck by a street car at an intersection. The street car had proceeded into the intersection with the traffic signal, but after entering the intersection the signals changed and the plaintiff started across the street and was hit. Plaintiff there had testified that after entering the intersection she had not looked to the right or left. The appellate court held that the plaintiff was guilty of contributory negligence as a matter of law in not seeing the street car. That case is not applicable to the instant case for several reasons. In the first place, in the present case, the automobile was making a left turn across the pedestrian lane—a situation which, in itself, is a warning of danger to the operator of the car. In the second place, the plaintiff testified that he had crossed the center line of Franklin street, and that the automobile was on the wrong side of the street when it hit him. A pedestrian is not required to anticipate the presence of automobiles on the wrong side of the street, nor is he guilty of contributory negligence, as a matter of law, in not keeping a lookout in a direction where automobiles are not to be anticipated. While it is true that the trial court did not state in its findings the exact spot where the accident occurred, if it were necessary, this court, in the exercise of its powers under section 956a of the Code of Civil Procedure, could make such a finding. This case is factually almost identical with the situation involved in Van Antwerp v. Smith, Cal.App., 103 P.2d 446, where an automobile injured a pedestrian, both proceeding in accordance with the traffic signals, and the automobile making a left turn. The court emphasized that there was some evidence that the automobile was on the wrong side of the street, and affirmed an order granting plaintiff a new trial, even though plaintiff had testified that he had not seen the automobile until it hit him. Obviously, under such circumstances, the question of proximate cause was for the trier of the fact. The same rule applies to this case.

The judgment in No. 11079 as modified by the consent to the reduction, is affirmed; the appeal from the order denying the motion to strike the orders made subsequent to the conditional order of January 9, 1939, and denying the motion for a new trial (No. 11089) is dismissed.

We concur: KNIGHT, J.; WARD, J.

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41 Cal.App.2d 119

PEOPLE ex rel. SMITH v. CITY OF WOODLAKE.

Civ. 2563.

District Court of Appeal, Fourth District, California.

Oct. 10, 1940.

Hearing Denied Dec. 9, 1940.

1. Elections 🔑237

Generally, when a proposition is required to carry by a majority of the votes cast at a certain election, the proposition must receive the favorable vote of a majority of all valid votes cast at the election, as distinguished from the votes on a particular question.

2. Municipal corporations ⟹12(8)

The statute, regarding incorporation of municipality, which provided that elections should be conducted in accordance with general election laws, that board of supervisors should canvass votes cast thereat, and that, if it appeared that majority of votes cast were for the incorporation, the board should declare territory duly incorporated, is plain and requires a clear majority of all votes cast at the election for the incorporation to succeed. Gen.Laws 1937, Act 5233, §§ 2, 3.

3. Municipal corporations ⟹12(8)

Where 171 ballots were cast in favor of incorporation of municipality, 163 were cast against incorporation, and 9 ballots regularly cast expressed no choice upon question of incorporation but were cast for candidates for city councilmen of proposed city, the incorporation failed, since statute requires a clear majority of all votes cast at the election for the incorporation to succeed. Gen.Laws 1937, Act 5233, §§ 2, 3.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Proceeding by the People of the State of California, on the relation of Charles T. Smith, against the City of Woodlake, a de facto municipal corporation and claiming to be a municipal corporation of the State of California, to determine the validity of the incorporation. From an adverse judgment, the plaintiff appeals.

Reversed.

Earl Warren, Atty. Gen., Leon French, Deputy Atty. Gen., W. R. Bailey, of Visalia, and T. P. Wittschen, of Oakland, for appellants.

E. I. Feemster and Dickson F. Maddox, both of Visalia, for respondent.

GRIFFIN, Justice.

On October 31, 1939, an election was held within certain unincorporated territory in the county of Tulare for the purpose of determining whether the same should be incorporated as a municipal corporation of the sixth class and for the purpose of voting for officers to fill the various municipal election offices prescribed by law. The controlling statute herein is the Municipal Corporation bill of 1883, as amended, Act 5233, Deering's Gen.Laws 1937, p. 2362 et seq., section 2 of which provides, among other things, for the calling of an election and the giving of notice, and then reads in part as follows: "Thereupon such board shall give notice of an election to be held in such proposed corporation *for the purpose of determining whether same shall become incorporated, and shall provide for the election of such officers* as shall be required in such city. * * * Such notice shall also require the voters to cast ballots which shall contain the words *'for incorporation'* and *'against incorporation,' and also the names of persons voted for* to fill the various municipal elective offices * * *." (Italics ours.)

Section 3 of the act provides: "Such elections shall be conducted in accordance with the general election laws of the state * * * and no person shall be entitled to vote *thereat* unless he shall be a qualified elector of the county * * *. The Board of Supervisors shall meet on the Monday next succeeding such election, and proceed to canvass the votes *cast thereat;* and if, upon such canvass, it appears that the majority *of the votes cast* are for the incorporation, the board shall, by an order entered upon their minutes, declare such territory duly incorporated * * * and shall declare the persons receiving, respectively, the highest number of votes for such several offices to be duly elected to such offices." (Italics ours.)

Following the election the board of supervisors proceeded to canvass the votes "cast thereat" and determined that 343 valid ballots had been cast at said election and that 170 votes were for incorporation, 164 votes were against incorporation and that 9 of said votes expressed no choice on the question of incorporation but had been cast for candidates for city councilmen for the proposed city of Woodlake. At the trial of the instant case, by agreement, all the ballots cast at said election were recounted and reexamined and as a result of said recount the court found that 343 legal ballots were cast at said election, that 171 of such ballots were cast in favor of incorporation, 163 were cast against incorporation, and that 9 of such ballots duly and regularly cast expressed no choice upon the question of incorporation but were cast for candidates for city councilmen of said proposed city at such election. The court then found "that a majority of the votes cast at said election for the purpose of determining whether said proposed city of Woodlake should be incorporated were for the incorporation thereof". It will be seen from the foregoing that neither by the canvass before the supervisors nor by the recount in the superior court did the proposition for incorporation receive a majority of all of the votes cast at said election but did receive a majority of all the votes cast on that particular proposition.

It is agreed by all parties, that the question involved in this case is whether, under the governing statute, incorporation is accomplished by the votes of a majority of those voting on the question of incorporation, or by a majority of all legal votes cast at the election. The problem presented is one of statutory construction.

It is the respondent's contention in this case that the language of the statutory provision under which the election here was held requires the construction that the proposition is carried if it receives the specified majority of the votes actually cast on the proposition. The argument is advanced by respondent that under the act the election was not called for the purpose of electing officers but was called for the purpose of determining whether the proposed city should be incorporated, with provision made for naming persons for the required offices if the same should be incorporated; that no offices existed at the time of the election to which officers could be elected; that hence the purpose of the election was not to elect officers, but to determine the question of incorporation; that if incorporation failed, no officers were elected, regardless of the number of votes cast for them; that the election of officers was therefore a contingent matter and not the purpose for which the election was called. It is also argued that the 9 votes cast only for officers should not, in a legal sense, be considered as "votes cast at such election" or "cast thereat" because the question of who would be officers, if the proposition "for incorporation" should prevail, was a purely subsidiary and incidental question, wholly contingent upon the disposition made of the primary question, for the determination of which the election was called, and should not be regarded as the purpose for which the election was called, citing Howland v. Board of Supervisors, 109 Cal. 152, 41 P. 864; Watson v. Fouch, 55 Cal.App. 765, 205 P. 58; People v. Town of Sausalito, 106 Cal. 500, 39 P. 937; City of Santa Rosa v. Bower, 142 Cal. 299, 75 P. 829; Morgan v. City of Los Angeles, 182 Cal. 301, 187 P. 1050; Law v. City and County of San Francisco, 144 Cal. 384, 77 P. 1014; City of Pasadena v. Chamberlain, 192 Cal. 275, 219 P. 965; City of Long Beach v. Boynton, 17 Cal.App. 290, 119 P. 677; McQuillan's Municipal Corporation, (2d ed.), p. 468, sec. 171.

In reply appellant argues that by the language of the act the board of supervisors is required to canvass the votes *"cast thereat"*, meaning *at the election,* and is not required to canvass merely the votes cast on the question of incorporation, and that incorporation is not accomplished unless the proposal is carried by a majority of the votes *cast at such election* and that if the statute had intended to refer to the matter of incorporation separately it undoubtedly would have used the word "thereon"; that the latter word would then refer to a separate and distinct proposition, while the word "thereat" refers to the election itself; that section 2 of the act requires the board of supervisors to give notice "of an election"; that the statute further provides that such single election shall be not only for the purpose of determining whether the proposed city shall be incorporated but also to elect the required officers and that therefore each of the matters submitted to the voters was as much a part of that single election as was the other; that a vote at the election cast for a member of the council was not only a vote "cast thereat" but it was a proper and valid vote; that the statute requires the supervisors to canvass the votes *cast at the election,* not those *cast for incorporation,* and provides that if a majority *of the votes cast* are in favor of incorporation then only may incorporation be decreed; that if all of the valid votes are considered, the proposition of incorporation did not receive a *majority of the votes cast,* citing Lowry v. Common Council, 66 Cal.App. 45, 225 P. 283; People v. Town of Berkeley, 102 Cal. 298, 36 P. 591, 23 L.R.A. 838; City of South Bend v. Lewis, 138 Ind. 512, 37 N.E. 986, and many of the cases above cited by respondent.

[1] Cases from without this jurisdiction based on different statutes can be found which support either contention herein. 20 C.J., p. 206, sec. 266; 20 C.J., p. 207, sec. 266, notes 38 and 39. It is the general rule that when a proposition is required to carry by a majority *of the votes cast* at a certain election the proposition must receive the favorable vote of a majority of all valid votes cast at the election, as distinguished from the votes on a particular question. 20 C.J., p. 207, sec. 266, note 39; People v. Town of Berkeley, 102 Cal. 298, 36 P. 591, 23 L.R.A. 838. California has been classed among the majority holding to this construction. The case of People v. Town of Berkeley, supra, is cited as a case in

which the identical question here presented was decided. That case involved the reorganization of the town of Berkeley under the Municipal Corporation Bill of 1883. This appears from the opinion of the court (page 307 of 102 Cal., page 593 of 36 P., 23 L.R.A. 838):

"At the election held on May 8th, a majority of all the electors who voted upon the proposition to reorganize were in favor of it, but not a majority of all who voted at the election.

"The provision of the constitution in regard to elections like that under consideration has been quoted, and it will be observed that the words used are, 'whenever a majority of the electors voting at a general election shall so determine.' These words clearly do not indicate that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required. And such was evidently the interpretation placed upon this provision by the legislature when it passed the general municipal incorporation act of 1883. * * *

"This language plainly implies, we think, that a majority of all the electors voting at the election is necessary to carry the proposition to reorganize."

There is no difference in essential meaning between the language of section 4 of the Municipal Corporation Bill, St.1883, p. 93, § 4, which was under consideration in the Berkeley case and the language of section 3 of the same bill under consideration in this case. Section 4 requires, for reorganization, a majority of all electors "voting at such election" while section 3 requires the canvass of the "votes cast thereat", and if the majority of the votes cast "thereat" are in favor of incorporation then only does it carry. The case of People v. Town of Sausalito, supra, contains dicta which is contrary to the holding in the Berkeley case and which appears to be contrary to later decided cases.

In City of Santa Rosa v. Bower, supra, a proposed amendment to the charter was submitted to the electors at a general municipal election. The statute provided that if a majority of the qualified electors "voting thereat" shall ratify the same it shall thereafter be submitted to the legislature for approval. The case turned on the proper construction of the phrase "a majority of such qualified electors voting thereat". [142 Cal. 299, 75 P. 830.] Our Supreme Court unanimously held that even though the proposition received the requisite majority of the votes of the electors voting on that particular proposition, it failed of passage unless it received a majority of all votes cast at the election. In that case the court referred to and approved the case of People v. Town of Berkeley, supra, and stated: "There is no substantial distinction between the phrase construed in that case and the one under consideration here. A majority of the electors 'voting at a general election' is substantially the same thing as a majority of the qualified electors 'voting thereat.' The word 'thereat' in section 8, by grammatical construction, refers to the previous phrase, 'general or special election,' and is exactly the same in meaning as if the sentence had read 'if a majority of such qualified electors voting *at such election* shall ratify the same.'"

In Howland v. Board of Supervisors, supra, relied upon by respondent, two separate and distinct elections were held, one a general election and one for the purpose of submitting a proposition to incur a bonded indebtedness. It was held that since the two elections were separate and distinct the number of votes cast in one did not affect those cast in the other. The case of Morgan v. City of Los Angeles, supra, is in accord with the Howland case. In Law v. City and County of San Francisco, supra [144 Cal. 384, 77 P. 1019], several different proposals were submitted in one bond election. One proposition failed to receive the vote of "two-thirds of the electors voting at [the] special election" but did receive more than two-thirds of the votes of the electors voting on that particular question. The court held that the one proposition failed to receive the requisite number of votes.

The case of City of Pasadena v. Chamberlain, supra, was one where it was attempted to call four special elections in order to submit to the voters four different propositions on which to vote bonds, and to consolidate these four special elections into one special election. The court held that this was in effect one bond election and that each proposition must receive a majority of two-thirds of all votes cast by those voting at the election. Reference is also made to City of Long Beach v. Boynton, supra, and Lowry v. Common Council, supra, wherein the doctrine announced in Law v. City and County of San Francisco, supra, is followed.

[2, 3] The matter of electing officers was an indivisible part of the election. The law required the matters to be submitted at the same time and on the same ballot and under the same call. It would be a strained construction of the law to hold that a valid vote for officers was not a vote cast at the election. To strengthen the position we here assume, it should be noted that the Municipal Bond Act of 1901, under which many of the above-cited cases were decided, was amended, Stats. 1927, chap. 315, p. 527, to provide for the issuance of bonds when authorized by "the votes of two-thirds of all the voters *voting on any such proposition*". If the legislature had intended that the total votes cast at the election here involved should be predicated on the total votes cast on the proposition, they might well have so provided. This should not be accomplished by judicial decision when the statute is clear and unambiguous. The governing statute is plain. It requires a clear majority of all votes cast at the election for the incorporation to succeed. Since that majority was not had, it follows that incorporation failed.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

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41 Cal.App.2d 181

ANDERSON v. GREAT REPUBLIC LIFE INS. CO. et al.

Civ. 12106.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1940.

Rehearing Denied Nov. 6, 1940.

Hearing Denied Dec. 13, 1940.

1. Insurance 🔑44

A liquidation proceeding against delinquent insurance corporation is instituted by the state insurance commissioner as an officer of the state acting in the public interest. Gen.Laws 1931, Act 3739; St.1935, pp. 540–552, §§ 1010–1061.

2. Insurance 🔑44

The equitable powers of the superior court are not limited either by the former statute providing for liquidation proceedings against delinquent insurance corporations or the provisions of the Insurance Code which supplanted such statute. Gen.Laws 1931, Act 3739; St.1935, pp. 540–552, §§ 1010–1061; pp. 497, 552, §§ 4, 1057, 1058.

3. Insurance 🔑44

A proceeding instituted by the state insurance commissioner for conservatorship over a delinquent insurance company is a special proceeding of a statutory nature, and the jurisdiction of the court is limited by the provisions of the statute governing the proceeding. St.1935, pp. 540–552, §§ 1010–1061.

4. Insurance 🔑44

In statutory proceeding by state insurance commissioner for conservatorship over a delinquent insurance company, the duties of the commissioner as conservator are in the nature of those of a "receiver" or "trustee" and the commissioner is a receiver of the assets of the delinquent company with the powers and duties of a receiver and is subject to the jurisdiction of the court to the same extent generally as are all receivers of corporations. Gen.Laws 1931, Act 3739, §§ 6, 10; St.1935, pp. 497, 552, §§ 4, 1057, 1058.

See Words and Phrases, Permanent Edition, for all other definitions of "Receiver" and "Trustee".

5. Constitutional law 🔑81

Police power can never be used as an excuse for unreasonable, arbitrary action or improper discrimination.

6. Receivers 🔑154(2)

Where an application has been made for the appointment of a receiver for a corporation, attorneys' fees and expenses in resisting such application, if made in good faith and upon reasonable grounds, may become a valid claim against the receiver, and whether such attorneys' fees and expenses are to be allowed and, if allowed, the amount thereof, rests in the sound discretion of the court.

7. Receivers 🔑147, 154(2)

The claim of officers of a corporation in receivership or of attorneys employed by such officers to be paid out of funds in hands of receiver is not an absolute right, but it is entirely in the discretion of the court administering the fund to determine the good faith and justification for the application and, if warranted, the amount to be allowed.

8. Insurance 🔑44

In proceeding for conservatorship over a delinquent insurance company, the allowance of fees to attorney who represented the company during the proceeding was not a matter of absolute right, but rested, as in corporate receiverships generally, in the sound discretion of the court in which the proceeding was pending, and such court had no power to grant leave to, and attorney could not, maintain separate suit against company and conservator to recover fees as a matter of law. St.1935, pp. 540–552, §§ 1010–1061.

9. Insurance 🔑44

In proceeding for conservatorship over a delinquent insurance company, wherein attorney who represented company during the proceeding sought attorney's fees, the proper proceeding would have been for court in which proceeding was pending to consider attorney's application for fees and to pass upon the application in the exercise of its sound discretion and, if the application were denied and it appeared that court abused its discretion, for attorney then to have recourse to an appeal from the order denying the fees. St.1935, pp. 540–552, §§ 1010–1061.

10. Insurance 🔑44

In proceeding for conservatorship over a delinquent insurance company, an arbitrary denial to the company of the use for payment of attorney's fees of any portion of company's funds in hands of the conservator, with the result that company could not contract for services of an attorney, would be a denial of "due process of law", and therefore company could employ attorney, notwithstanding the proceeding had already been instituted and company restrained from transacting any business or disposing of any assets and conservator was appointed thereafter. St.1935, pp. 540–552, pp. 1010–1061.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

11. Insurance 🔑44

Where application for attorney's fees by attorney for delinquent insurance company in conservatorship proceeding was denied, attorney's subsequent application, which was for the same compensation but which failed to show what new facts, if any, were relied upon, was not in strict compliance with statute which provides that, where a subsequent application for an order previously denied is made, affidavit should show what new facts are claimed to be shown, and which provides that an order made contrary to the statute may be revoked. Code Civ.Proc. § 1008.

12. Judgment 🔑217

The term "final judgment" cannot be given a hard and fast definition applicable to all situations, since the finality of a judgment depends somewhat upon the purpose for which, and the standpoint from which, it is being considered, and it may be final for one purpose and not for another. Code Civ.Proc. § 577; § 1908, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

13. Judgment 🔑564(1)

Where attorney who represented delinquent insurance company in conservatorship proceeding applied for final and additional attorney's fees for past and future services, and order denying the application was not vacated and leave to renew the application was not granted, the order of denial was a "final judgment" for purpose of operating as "res judicata" as to question of allowance of fees, and hence precluded subsequent action against the company and the conservator to recover reasonable attorney's fees. St. 1935, pp. 540–552, §§ 1010–1061; Code Civ. Proc. § 577; § 1908, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Le Roy Anderson against the Great Republic Life Insurance Company and Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as Conservator of the Great Republic Life Insurance Company, to recover the reasonable value of services alleged to have been rendered by plaintiff as an attorney. From a judgment for plaintiff for $10,000, defendants appeal.

Reversed.

Hearing denied; CARTER, J., dissenting.

Earl Warren, Atty. Gen., John L. Nourse, Deputy Atty. Gen., and John L. Flynn and E. P. Fay, both of Los Angeles, for appellants.

Le Roy Anderson, in pro. per., and Frank L. Kostlan, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by defendants from a final judgment in favor of plaintiff in an action instituted by plaintiff to recover the reasonable value of certain services alleged to have been rendered by him as an attorney. The judgment was for the sum of $10,000 and costs, and the same was ordered by the court to be paid out of funds in the possession of appellant Carpenter, the insurance commissioner of the state of California, as conservator of the Great Republic Life Insurance Company, the corporation named as one of appellants herein.

The services of plaintiff and respondent here in question were rendered as one of the attorneys of record for the Great Republic Life Insurance Company (hereinafter referred to as the "insurance company") in a proceeding instituted by the insurance commissioner of the state of California seeking generally to liquidate the business of said insurance company in the state of California on the ground that the company was insolvent. The proceeding was commenced in the superior court of Los Angeles county on March 6, 1934, and on said date the court on the petition of the commissioner in said proceeding, issued an order to the insurance company to show cause why, among other things, the commissioner should not take over the assets and control the business of the insurance company in the state of California, and issued at the same time a temporary restraining order enjoining the insurance company and its officers from transacting any business or disposing of any of its property. The temporary restraining order also provided that the insurance commissioner should take over the property of the insurance company forthwith.

The insurance company first appeared in the proceeding by its attorney Stephen C. Treadwell on March 17, 1934, when it was stipulated that an order might be entered defining the duties of the insurance commissioner in retaining possession of the property of the company pursuant to the aforesaid order to show cause and restraining order. The stipulation was entered into without waiving the right of the company to a defense upon the merits. The order defining the duties of the insurance commissioner also modified the restraining order to enable the officers of the company to act for it when under the direction and with the consent and approval of the insurance commissioner, and was made by the court on March 17, 1934.

On March 22, 1934, the board of directors of the insurance company authorized Mr. Treadwell to employ associate counsel for the insurance company, and it appears that immediately thereafter Mr. Treadwell engaged respondent. Respondent was substituted as one of the attorneys of record on March 23, 1934, and appears to have continued as such until November 23, 1937.

On application of the insurance company therefor, the court, in the proceeding above mentioned, made its order on May 3, 1934, awarding respondent the sum of $1,000 as "retainer fee" and ordering the insurance commissioner to pay the same out of the funds of the insurance company. This fee appears to have been divided equally with respondent's cocounsel Treadwell.

Thereafter, the insurance company having interposed an answer to a supplemental and second amended petition of the insurance commissioner, which answer admitted that the company's affairs were in a hazardous condition, the court on May 7, 1934, made its order appointing the insurance commissioner as conservator of the assets and business of the company and restraining and enjoining the company, its officers, agents and employees from transacting any further business and from disposing of any property of the company. About July 25, 1934, the insurance commissioner filed a supplemental and third amended petition asking, among other things, for authority to liquidate the business of the company, and issue was joined thereon by answer of the company filed August 13, 1934. Thereafter the answer was amended. It does not appear that the issues raised thereby were ever tried.

On application of the insurance company, the court on October 15, 1934, ordered the insurance commissioner to pay Stephen C. Treadwell, as chief counsel for the company, $6,000 on account of attorney's fees and $1,000 on account of expenses of litigation. The insurance commissioner filed a notice of appeal from said order, and thereafter upon agreement of the parties said appeal was dismissed, the said order for fees and expenses was vacated and a new order was made awarding the company's counsel, including respondent, $4,000 in addition to the $1,000 theretofore allowed, as above mentioned, and $500 as expense money. In its said order the court reserved the right to make further orders in respect to allowance for attorney's fees and expenses of suit. The order was made on October 18, 1934, and the fees were awarded in full payment for counsel's services to that date.

On June 25, 1936, there was filed an application for "additional and final" attorney's fees for counsel for the company in the said proceeding, which application was opposed by the commissioner, and was denied after hearing in department 33 of said court, the matter having been submitted, and a minute order entered thereon on October 7, 1936. Thereafter respondent, for himself alone, filed on February 25, 1937, a petition for leave to sue for his fees and to be relieved from the force and effect of the injunction against suing the insurance company, and the petition was granted. In granting said petition the court appears to have considered the question of the denial of the previous application as a bar to said petition. Respondent then instituted the present action.

The respondent appears also to have filed a separate petition for an order to show cause why additional fees should not be granted, which matter was ordered off calendar.

The record reveals that in the foregoing proceeding the insurance commissioner applied for and was granted an order awarding Mr. Treadwell a fee of $2,900 for certain services rendered by Mr. Treadwell to the commissioner as conservator, from May 15, 1934 to August 1, 1935, which sum did not cover any compensation due Mr. Treadwell as counsel for the insurance company.

Upon the evidence presented in the present action, the trial court found that respondent's services as an attorney at law representing the insurance company in the above mentioned proceeding, from October 18, 1934, up to and including November 23, 1937, were reasonably worth $10,000, and concluded that the order entered by the court in department 33 thereof, as above mentioned, denying respondent's application for attorney's fees did not constitute res judicata as to the action herein, and that respondent was entitled to judgment as above set forth.

It should be noted that the court also found that respondent was not employed, retained or appointed to assist or aid or act as counsel for the insurance commissioner as conservator.

Appellants contend that no services were rendered by respondent of the reasonable value of $10,000; that respondent was paid in full for all compensable services rendered by him; that the court was without jurisdiction to allow fees; and, that under the doctrine of res judicata the instant action was barred by the denial of the previous application for fees, above noted.

Appellants also contend that in any event there is no legal obligation due to respondent and enforceable by plenary action and argue in effect that even if it be assumed that the powers of the court in a proceeding for conservatorship over a delinquent insurance company are analogous to those of a court in an ordinary receivership, yet the matter of the allowance of fees to an attorney for the delinquent insurance company is one addressed to the sound discretion of the court and is not one of absolute right and respondent could not establish a charge as a matter of law against the fund in the hands of the conservator, citing as authority the case of Barnes v. Newcomb, 89 N.Y. 108. The point is well taken and the situation in the Barnes case is identical with that presented here.

In reply to this point respondent argues in substance that the court could properly grant respondent leave to sue for his fees in an independent action while the application for fees remained pending off calendar awaiting the outcome of the suit; that there is no distinction between actions at law and in equity in California, and respondent's action was filed, first, as an equitable action asking the court, in its discretion, to allow a reasonable amount as fees; and second, upon a quantum meruit. In that connection, respondent overlooks the distinction between a matter of absolute right and a matter resting in the discretion of the court and also overlooks the fact that respondent's causes of action as set forth in the complaint herein are all based upon either an express contract or one implied in law and all necessarily assume a legal obligation on the part of the defendants to pay for the services rendered. The judgment of the court allowing respondent the fee as prayed for and ordering the same paid out of the funds in the hands of appellant insurance commissioner was not rendered through the exercise of discretionary power but as the necessary consequence of conclusions of law drawn from the facts found. The court concluded that as a matter of law respondent was entitled to be paid the fees in question by appellants out of said funds.

[1, 2] The proceeding against the insurance company was instituted under the provisions of the act of the legislature entitled "An act to provide for proceedings against and liquidation of delinquent insurance corporations and associations", (Stats. 1919, p. 265; amended 1921, p. 1017; 1931, p. 2375; Act 3739, Deering's Gen. Laws, 1931), which act was supplanted in 1935 by the applicable sections of the Insurance Code. (Secs. 1010–1061, art. 14, ch. 1, pt. 2, div. 1, St. 1935, pp. 540–552.) Such a proceeding is so instituted by the insurance commissioner as an officer of the state acting in the public interest. Mitchell v. Taylor, 3 Cal.2d 217, 219, 43 P.2d 803; Carpenter v. Pacific Mutual Life Insurance Company, 10 Cal.2d 307, 329, 74 P.2d 761. The insurance commissioner's status in this respect was clearly the same under the former act as under the present code. However, it is to be noted that in either case the duties of the commissioner as conservator are in the nature of those of a receiver or trustee. Both the former act and the code expressly so provide. Secs. 6 and 10. Act 3739, Deering's, 1931; sec. 1057, Insurance Code. It is also to be noted that in neither the former act nor in the code are the jurisdictional limits of the court narrowly drawn. Section 1058 of the Insurance Code expressly provides that in any pending proceeding the court in which such proceeding is pending shall have jurisdiction to summarily hear and determine, in such proceeding, all actions or proceedings then pending or thereafter instituted by or against the person affected by the insolvency or delinquency proceeding. There is nothing in the former act to indicate that the jurisdiction of the court thereunder was less broad than under the provisions of the Insurance Code. There is nothing in either act which limits or constrains the exercise of the ample equitable powers of the superior court. Cf. De Forrest v. Coffey, 154 Cal. 444, 449, 98 P. 27.

As far as the question here presented is concerned it makes little difference whether the proceeding was governed by the new law or the old, but section 4 of the Insurance Code, St.1935, p. 497 cited by respondent in his brief, should be borne in mind, it reads as follows: "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible."

[3, 4] There is no express statutory provision for the allowance of fees for the attorneys of a delinquent insurance company in a proceeding of this nature. However, appellants concede that there are some instances in which attorney's fees are allowed by courts of equity in the absence of a contract and in the absence of a statute authorizing such allowance, but argue also that a proceeding of this kind instituted by the insurance commissioner is a special proceeding of a statutory nature and that the jurisdiction of the court is limited by the provisions of the statute governing the proceeding. There can be no doubt as to the validity of such contention, but as pointed out above, under the act by which the said proceeding was instituted the insurance commissioner became a receiver of the assets of the delinquent insurance company with the powers and duties of such receivers within this state. The last sentence of section 6, cited above, which provides for applications for liquidation of delinquent insurance companies, reads: "If, on such application, the court shall direct the insurance commissioner to take possession of the property and conserve the assets of such corporation, the rights and duties of the said insurance commissioner with reference to such corporation and its said assets shall be those heretofore exercised by and imposed upon ancillary receivers of foreign corporations in this state". And section 10 of the same act, above referred to, reads in full, as follows: "In all cases arising under the provisions of this act where not otherwise provided the powers and duties of the insurance commissioner with relation to the property and assets and business of any corporation placed under his control shall be those heretofore exercised by and imposed upon receivers of corporations within this state". There is nothing in the act to indicate that the jurisdiction of the court over the commissioner in the exercise of his duties and powers are any different from the juris-

diction ordinarily exercised over receivers of corporations generally. There is but one exception to be noted, namely, that the court is without power to appoint a receiver, the insurance commissioner taking over that office under the act by virtue of his authority as an officer of the state. It is clear that once the duties are thus assumed the commissioner is subject to the jurisdiction of the court to the same extent generally as are all receivers of corporations. This view is in accord with the principles set forth in State Investment & Insurance Co. v. Superior Court, 101 Cal. 135, 35 P. 549, cited by appellants, which holds that the superior court lacked jurisdiction to appoint a receiver, the statute then in effect providing for the insurance commissioner to assume that office, as does the statute here under consideration.

[5] Appellants also argue in effect that because the said proceeding is an exercise of the police power of the state the liquidation proceeding therefore differs radically from an ordinary receivership proceeding. Police power can never be used as an excuse for unreasonable, arbitrary action or improper discrimination. See Carpenter v. Pacific Mutual Life Insurance Co., supra, 10 Cal.2d at page 329, 74 P.2d 761, for an application of the principles involved under the present Insurance Code. Nor does the fact that the statute under certain circumstances permits the summary seizure of the property of a delinquent insurance company, alter the relationship of the commissioner as a receiver once he has assumed control of the assets. The statute provides in this respect that immediately after such summary action on his part the insurance commissioner must apply to the court for an order directed to the insurance company to show cause why the commissioner should not take possession of its property, thus providing for a hearing of the matter before the court. (Sec. 2a, Act 3739, supra.)

North American Building & Loan Ass'n v. Richardson, 6 Cal.2d 90, 56 P.2d 1221, cited by appellants, in so far as the same is applicable to the questions here presented, merely holds that since the Building and Loan Association Act makes no provision for the advancement or prepayment of costs the allowance of costs in a proceeding under the said Act should follow the customary course and be made dependent upon the determination of the cause on its merits. Such a question is quite different from that of the allowance of fees for resisting the appointment of a receiver, which latter question is one of equity, not one involving a technical statutory or legal right.

Since the act here in question constitutes the insurance commissioner a receiver of the delinquent insurance company with the powers and duties of receivers of corporations in this state, whether the insurance company should be allowed attorneys' fees in defending itself in the proceedings presents a question no different in effect than if raised in connection with corporate receiverships generally. Neither party has cited any California authority in point and a search fails to reveal a California case on the question. However, there appears to be nothing in California law, statutory or otherwise, which precludes an application of the rule laid down in Barnes v. Newcomb, supra, and enunciated in Watson v. Johnson, 174 Wash. 12, 24 P.2d 592, 89 A.L.R. 1527, the latter cited by respondent. That rule may be summarized as follows:

[6, 7] It is a general rule that where an application has been made for the appointment of a receiver for a corporation, attorneys' fees and expenses in resisting such application, if made in good faith and upon reasonable grounds, may become a valid claim against the receiver. Whether such attorneys' fees and expenses are to be allowed rests in the sound discretion of the court, in view of all the facts and circumstances. Note, 89 A.L.R. 1531. If allowed, the question as to the amount thereof is likewise addressed to the sound discretion of the court. The claim of the officers of a corporation or of attorneys employed by them to be paid out of the funds in the hands of the receiver is not an absolute right, but it is entirely in the discretion of the court administering the fund to determine, first the good faith and justification for such application, and second, if warranted, the amount to be allowed. Esarey v. Pierson, 84 Ind.App. 109, 141 N.E. 87. "Even if it turns out that a case is made for the interference of the state, so long as the defense was made in good faith and upon reasonable grounds, there is apparent justice in subjecting the property and fund involved in the litigation to expenses incurred in discharging a general duty cast upon the corporation and its trustees to take all reasonable means for its protection." People v. Commercial Alliance Life Ins. Co., 148 N.Y. 563, 42 N.E. 1044.

See Sims v. Homeseekers Fire Ins. Co., 120 W.Va. 459, 199 S.E. 69. An exhaustive review of the principle and the cases thereon is to be found in O'Malley v. Continental Life Ins. Co., 343 Mo. 382, 121 S.W.2d 834, 838 et seq., a case involving a proceeding against an insurance company similar to the one here. It is interesting to note that the respective contentions of appellant and respondent in that case were substantially the same as those raised in the instant case. The allowance for fees, however, was denied in the O'Malley case on the ground that the evidence showed that even under the rule above stated the allowance was not justified. The Sims case, above cited, upheld the general rule aforesaid but denied the application for fees on the ground that good faith was lacking. The reason for the rule is revealed by the foregoing quotation from People v. Commercial Alliance Life Ins. Co., supra, namely, a duty upon the corporation and its trustees to protect the property and assets of the corporation.

[8] Upon the authorities above cited and the principle therein involved, it is clear that respondent's legal right to the fees sought, and, if said fees were allowed, the amount thereof, was solely a matter addressed to the sound discretion of the court in which the proceeding was pending. As noted above, it appears that respondent made an application so addressed, but also applied for leave to sue without waiting for his application to be passed on. This leave was granted, respondent's application for fees was put off calendar without being passed upon, and respondent proceeded with the present action for his fees. There was no basis for such a suit and the trial court erred in concluding upon the facts that respondent was entitled to his fees and in awarding respondent judgment therefor. As pointed out above, it cannot be argued that in so doing the court exercised discretionary power.

[9] The proper proceeding would have been for the court to consider the application of respondent for fees and to pass upon the same in the exercise of its sound discretion. Should the application then have been denied, and it appeared that the court abused its discretion in such a denial, respondent would then have had recourse to an appeal from the order denying the fees.

The situation in Barnes v. Newcomb, supra, was virtually the same, as appears from the following quotation therefrom (89 N.Y. at page 116):

"In the present case the plaintiff made an application to the Supreme Court, on which application it would have been competent for the court to pass upon the merits of his claims, and afford him such relief as he was entitled to; and in fact the court entertained the application, and made an order referring it to a referee to take proof of the plaintiff's claims and report the facts to the court. But as part of the same order they gave to the plaintiff the alternative privilege of bringing an action. He elected that course instead of going before a referee, and, on the proofs taken before him, appealing to the discretionary powers of the court. By so doing he assumed the burden of establishing that he was entitled to payment as matter of right, enforceable by action, and not resting in discretion. This right of action he has in our judgment failed to make out.

"We think, however, that justice requires that his claim be examined, and the discretion of the court exercised thereon. The court will have full power to determine for what services (if any) he should be allowed, and what, in its judgment, would be a reasonable and fair compensation therefor."

It should be noted that in the Barnes case, as in the instant case, the services for which fees were sought were rendered after the appointment of the receiver. At page 113 of 89 N.Y. in the Barnes case the court states: "We are of opinion that for the services rendered by the plaintiff to the corporation after the appointment of the receiver, an action against the receiver cannot be maintained. The company, or its officers, could not after that date subject the fund in the hands of the receiver to any legal liability."

[10] One of the arguments advanced by appellants should not go unnoticed, because of the implication therein. Appellants argue that since respondent was employed after the insurance company had been restrained from transacting any business or disposing of any of the assets and since the commissioner was appointed conservator of the insurance company shortly after respondent was so employed, the insurance company lacked the capacity to contract and it likewise lacked the capacity to impose a lien or charge upon the assets in the custody of the conservator by authorizing an attorney to render services

to it. If such an argument were valid, the result would be obvious. An insurance company proceeded against by the commissioner would be hamstrung in any effort to defend itself, the hands of its directors would be tied and there would be no effective recourse from unwarranted official action. If this were the case the effect would be to deny the company the right to counsel and hence to due process of law. Since in such a proceeding as this all the funds of the corporation are placed in the hands of the conservator, an arbitrary denial to the corporation of the use of any portion of such funds to pay attorneys' fees amounts to the same thing as a denial of the right to contract for the services of an attorney, the effect of which would be a denial of the right to defend at all.

In passing, comment should also be made as to the emphasis placed by respondent on the case of Matter of People by Beha, 136 Misc. 715, 242 N.Y.S. 100, cited in support of respondent's contention as to the right to maintain the present action, and quoted in full in his brief. The decision there is one by the lower court concerning the report of a referee fixing counsel fees, and the exceptions taken as to the report. It is not the case of an action at law for the fees in question, but is obviously one where a trial court is considering the propriety of an allowance of counsel fees, in the exercise of its discretion in the matter.

While in view of the foregoing, it is not the province of this court at this time to consider the question of the reasonableness of any fee awarded respondent, the application therefore not having been passed upon by the court below in the exercise of its discretion, the effect upon respondent's application of the denial of the prior application should be considered. That question has been here raised by appellants, in contending that the denial of the prior application was res judicata as to the question of allowance of fees to respondent.

In this connection, the trial court found that leave had been granted respondent to renew his application for fees, and respondent so contends on this appeal. The finding is not supported by the record. The minutes as to the order granting respondent leave to sue and placing his application for fees off calendar make no mention of leave to renew the previous application nor do they contain any reference to any order vacating the order denying the previous application, nor does the formal order of the court granting leave to sue contain any such provision. Nowhere in the record is there shown any order vacating the previous order made, or granting leave to renew the previous application. The application for fees which was denied as above mentioned was for "final and additional attorneys' fees" and is apparently intended to cover services rendered from October 18, 1934. The subsequent application covers services rendered over the same period and does not indicate specifically what additional services, if any, were rendered subsequent to the prior application. There is nothing which expressly shows it to be a renewal of the prior application. To all intents and for all purposes it appears to be merely a second and subsequent application of the same nature and for substantially the same services rendered. The minute order denying the previous application reads as follows: "October 2, 1936—Application for attorney's fees comes on for hearing, Eugene P. Fay and John L. Flynn, Deputies Attorney General, appearing for the plaintiff, and LeRoy Anderson, S. C. Treadwell and L. G. Shelton for the defendants. H. A. Benjamin is sworn and testifies for the plaintiff. Matter is submitted. October 7, 1936—Application for attorney's fees heretofore submitted on October 2, 1936. The Court orders said application for attorney's fees denied." There is no indication that the denial of the application was made without prejudice or that the way was left open for further applications. While the record shows that on the subsequent application and application for leave to sue the court was advised as to the order denying the previous application and as to objections that the claim of respondent for fees was barred by that order, yet, as pointed out above, the court took no action regarding the same, other than to grant leave to sue for the fees, and left open the question of the effect of said minute order on the subsequent proceedings. Further, it is important to note that in the previous application respondent specifically prayed for compensation for future as well as past services, since in said application respondent set forth what future services would be required and stated his desire that said services so required be included in the application for fees.

As appears from the foregoing quotation from the minutes of the court in evidence, a hearing was had on the application and the matter was submitted. Respondent's complaint in the instant action fails to show that it is for anything more than the services for which the previous application had been made. This is even more clearly shown by the fact that at the trial respondent testified that he was seeking his final fee and testified in substance that in computing the same at $10,000 he was not considering any services rendered after a time about the middle of 1936; and that he had not itemized his services or allocated the fee in any way. Respondent at the time of the trial also filed a supplement to his complaint to show that the amount sued for covered all services down to the time respondent severed his connection as attorney of record. In short, respondent sought a lump sum as his final fee regardless of what services had been rendered.

[11-13] The situation here presented, therefore, is one in which an attorney for a party to a special proceeding has made application, at a stage thereof, for final compensation for his services, including those to be rendered in the future, and after the court has denied that application, the attorney, several months thereafter, again applies to the court for the same compensation or for leave to sue therefor. In this connection, it should be pointed out that the subsequent application is not in strict compliance with the requirements of section 1008 of the Code of Civil Procedure in that it fails to show what new facts, if any, are relied upon. That section also provides that an order made contrary thereto may be revoked by the judge, justice or commissioner who made it, or vacated by a judge, or justice of the court in which the action or proceeding is pending.

In any event, the order of the court denying respondent's previous application has all the characteristics of a final judgment. The application is most closely analogous to a creditor's claim, such as was considered in De Forrest v. Coffey, supra. At page 453 of 154 Cal., at page 31 of 98 P., the court there stated: "The proceeding, while in the nature of an intervention, is treated as substantially an independent action, from the judgment in which any party aggrieved may appeal." The matter was heard by the court with an opportunity for all issues to be presented and the court decided the question of an allowance of a fee upon the merits thereof. There was nothing further to be done, and the matter was fully adjudicated.

A full discussion of the rule of res judicata as applied to orders of the court is found in Tiffany Productions, Inc., v. Superior Court, 131 Cal.App. 729, 731 et seq., 22 P.2d 275, and said order denying respondent's application for fees meets the test of a final adjudication as therein set forth. Also see Sunkler v. McKenzie, 127 Cal. 554, 59 P. 982, 78 Am.St.Rep. 86. The denial of respondent's application comes within the definition of a judgment set forth in section 577 of the Code of Civil Procedure and the effect thereof is conclusive as set forth in subdivision 2 of section 1908 of said code. Whether the entry of a formal order signed by the judge is necessary and essential to an appeal therefrom has no bearing upon a consideration of the order as res judicata, and it is not necessary here to decide such a question. "No hard and fast definition of 'final' judgment applicable to all situations can be given, since its finality depends somewhat upon the purpose for which and the standpoint from which it is being considered, and it may be final for one purpose and not for another." Howard v. Howard, 87 Cal.App. 20, 25, 261 P. 714, 716, citing Freeman on Judgments, 5th Ed., § 27. The trial court therefore erred in concluding that the denial of respondent's previous application was not res judicata as to the question of the allowance of his fees.

Respondent argues that the foregoing question is moot because after said order was made denying respondent's application, appellants invoked the right of the trial court to make an allowance to respondent's associate counsel for services said counsel had rendered to the insurance company before the order was made. Appellants state that the same was not an application for an allowance of fees but an application for authority to settle and compromise an asserted claim upon which litigation was threatened. Respondent also raises the same question as one of estoppel. It is not possible from the record on this appeal to determine what, if any, connection that matter has with the questions here presented. If it were in fact a compromise on a separate claim it could have no possible bearing.

From the foregoing the conclusion is inevitable, first, that the respondent, being the equivalent of a simple creditor, pursued the correct remedy in his original motion, which, as heretofore noted, was denied; second, that the court was without power to grant leave to sue, and hence by reason thereof respondent acquired no added advantage; third, that the action on the debt in the manner and form instituted by respondent is without legal sanction, and hence the judgment entered thereon was void.

For the foregoing reasons the judgment is reversed.

We concur: YORK, P. J.; WHITE, J.

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40 Cal.App.2d 748

PEOPLE v. MEGLADDERY.

Cr. 2090.

District Court of Appeal, First District, Division 1, California.

Sept. 30, 1940.

Hearing Denied Oct. 28, 1940.

1. Criminal law 🔑972

Under statutes providing for motion in arrest of judgment, trial court's power to grant motion in arrest of judgment is limited to cases where the defect appears on the face of the indictment or information. Pen. Code, § 1004, subd. 1, and §§ 1185–1188.

2. Criminal law 🔑976

Under statute prescribing procedure after a motion in arrest of judgment has been granted, trial judge has the power to adopt the procedure prescribed only when he has arrested judgment in conformity with the provisions providing for arrest of judgment. Pen.Code, § 1004, subd. 1, and §§ 1185–1188.

3. Criminal law 🔑972

Where lack of jurisdiction did not appear on face of indictment, motion in arrest of judgment on ground of lack of jurisdiction was not available to the accused. Pen.Code, § 1004, subd. 1, and §§ 1012, 1185–1188.

4. Criminal law 🔑108(1)

Generally, an accused is answerable only in the jurisdiction where the crime, or some part or effect thereof, was committed or occurred. Pen.Code, §§ 777, 781.

5. Criminal law 🔑105

The question of jurisdiction over the subject matter of an offense can never be waived nor conferred by consent.

6. Criminal law 🔑737(2)

In a criminal action, venue is a question of fact for the jury.

7. Criminal law 🔑564(2)

The prosecution has the burden of proving venue by a preponderance of the evidence and not beyond a reasonable doubt.

8. Criminal law 🔑935(1)

In prosecution for offering a bribe, where evidence was not sufficient to establish jurisdiction of court over offense, court was authorized to grant new trial under the statute on ground that verdict was contrary to the evidence. Pen.Code, § 1181, subd. 6.

9. Criminal law 🔑914

Trial court was authorized to grant new trial on ground that the evidence did not show jurisdiction in the county to try the offense, as against contention that new trial was inappropriate where the evidence showed the particular court had no jurisdiction, since, on another trial, prosecution could attempt to supply deficiency. Pen. Code, § 1179; § 1181, subd. 6.

10. Constitutional law 🔑70(3)

Whether rule making question of venue one for the jury should be changed is for the legislature and not for the courts.

11. Criminal law 🔑561(1), 564(2)

Necessity of proof beyond a reasonable doubt applies only to issue of guilt and not to venue of crime, which need only be established by a preponderance of evidence.

12. Criminal law 🔑1144(18)

On appeal by the state from an order granting a new trial because jurisdiction of court over the offense was not established, every reasonable intendment must be indulged in favor of the trial court. Pen. Code, § 1181, subd. 6.

13. Criminal law 🔑1158(1)

On appeal by the state from an order granting a new trial because jurisdiction of court over the offense was not established, reviewing court cannot substitute its judgment for that of the trial court, and if the evidence, although conflicting, is susceptible of a construction that will uphold the action of the trial judge, then the reviewing court cannot interfere with the order granting a new trial. Pen.Code, § 1179; § 1181, subd. 6.

14. Criminal law 🔑935(1)

In determining the sufficiency of the evidence on a motion for new trial, trial judge is not bound by the rule as to conflicts in evidence, and he may disregard such evidence as he believes to be untrue and may draw inferences therefrom at variance from those drawn by jury. Pen.Code, § 1181, subd. 6.

15. Criminal law 🔑935(1)

On motion for new trial, trial judge in passing on factual questions of local jurisdiction is not bound by rule that a reviewing court will not disturb findings based on conflicting evidence, since such rule applies only to reviewing courts. Pen.Code, § 1181, subd. 6.

16. Criminal law 🔑935(1)

Where there is no conflict in the evidence, and all the evidence on an issue was produced by prosecution, trial court in passing on motion for new trial is permitted to disregard any or all of such evidence. Pen. Code § 1181, subd. 6.

17. Criminal law 🔑935(1)

A defendant tried by jury is entitled to two decisions on the evidence, one by jury and another by trial judge in passing on motion for new trial. Pen.Code, § 1181, subd. 6.

18. Criminal law 🔑935(1)

On motion for new trial in considering sufficiency of evidence to support jury's verdict, trial court is not bound by conflicts in evidence and must consider credibility of witnesses, their manner and appearance in testifying, and weight to be accorded evidence. Pen.Code, § 1181, subd. 6.

19. Criminal law 🔑959

A verdict of a jury should not lightly be vacated on motion for new trial, but the court should pass on the motion only after reviewing the cause. Pen.Code, § 1181, subd. 6.

20. Criminal law 🔑935(1)

Where review of cause on motion for new trial produces conviction of insufficiency of the evidence to support the verdict, trial court must set aside the verdict and order new trial. Pen.Code, § 1181, subd. 6.

21. Criminal law 🔑935(1)

On motion for new trial, trial judge must be satisfied that evidence as a whole was sufficient to sustain verdict of guilty, notwithstanding only evidence admitted at trial was that of prosecution or else must grant new trial as matter of duty. Pen. Code, § 1181, subd. 6.

22. Criminal law 🔑911, 935(1)

On motion for new trial on ground that venue was not established, trial court was not bound by any evidence from which existence of venue could be inferred by jury, but trial court was authorized to weigh evidence to determine whether it supported finding establishing venue, and was not prevented from granting new trial by constitutional provision that new trial should not be granted for stated causes unless, after examination of entire cause, including evidence, court is of opinion that error complained of resulted in miscarriage of justice. Pen.Code, § 1181, subd. 6; Const. art. 6, § 4½.

23. Criminal law 🔑1158(1)

On appeal from an order granting a new trial, order will be affirmed if any ground exists therefor regardless of the reason assigned by the trial court, except that, where unequivocal language of trial court excludes insufficiency of the evidence as a ground for granting the motion, reviewing court will not affirm the order on that ground. Pen.Code, § 1181, subd. 6.

24. Criminal law 🔑1144(18)

Reviewing court must give an order granting a new trial that construction, if possible, which will uphold the trial court, rather than to indulge in another interpretation even though equally reasonable which would result in overruling the trial judge's discretionary powers.

25. Criminal law 🔑1156(2)

Where motion for new trial was based in part on ground that the verdict was contrary to the law and evidence and that the court had no jurisdiction of the offense, and minute order granting the motion recited that it was granted on the sole ground of lack of jurisdiction, and order was susceptible of construction that trial judge meant that he was granting the motion on sole ground that in his opinion evidence was insufficient on the issue of venue, on appeal order granting new trial would not be disturbed, as against contention that motion was not granted on ground of insufficiency of evidence of venue, and consequently that reversal would not interfere with the discretionary powers of the trial judge in granting new trial for insufficiency of evidence. Pen.Code, § 1181, subd. 6.

26. Criminal law ⚷1088(13)

Generally, the opinion of a trial court is no part of the record on appeal and normally will not be considered by the reviewing court, but opinion of trial judge may be considered for purpose of discovering process by which trial judge arrives at his conclusions or when opinion furnishes basis of court's action in its decision.

27. Criminal law ⚷112(1)

Under statute providing that, where acts or effects thereof constituting "or requisite to the consummation of the offense" occur in two or more counties, jurisdiction is in either county, quoted phrase means requisite to completion of offense, to achievement of unlawful purpose, to ends of unlawful enterprise, and word "consummation" draws a distinction between an act or an effect thereof which is essential to commission of offense, and act or effect thereof which, although unessential to commission of offense, is requisite to completion of offense, that is, to the achievement of unlawful purpose of person committing offense. Pen.Code, § 781.

> See Words and Phrases, Permanent Edition, for all other definitions of "Consummation" and "Or Requisite to the Consummation of the Offense".

28. Criminal law ⚷112(1)

Under statute providing that, where the acts or effects thereof constituting or requisite to the consummation of an offense occur in two or more counties, jurisdiction is in either county, essential elements of an offense or its effects are not limited to those acts or effects of acts occurring prior to the instant that the offense becomes sufficiently complete to warrant prosecution. Pen.Code, § 781.

29. Criminal law ⚷112(1)

Where accused was charged with solicitation of a bribe and of asking and agreeing to receive a bribe, and evidence showed that original solicitation and agreement occurred in San Francisco and that money was paid to an attorney in Alameda county, which attorney was acquitted of all complicity in the crime charged, essential elements of crime were committed in San Francisco, but sufficient acts were committed in Alameda county to give that county jurisdiction notwithstanding that the attorney was innocent, since a defendant may commit a crime although not personally present in jurisdiction through an innocent agent. Pen.Code, §§ 68, 653f, 781.

30. Indictment and information ⚷129(1)

An indictment charging accused with soliciting one to offer or join in an offer to bribe the then governor in order to unlawfully influence the governor to grant a pardon to a convict, and charging the asking and agreeing to receive a bribe from certain person to unlawfully influence accused in connection with the pardon, was not inconsistent. Pen.Code, §§ 68, 653f.

31. Criminal law ⚷29

A person may be convicted of two crimes growing out of one transaction when they constitute separate and distinct crimes.

32. Bribery ⚷6(4)

An indictment charging that accused, a private secretary to the governor, asked and agreed to receive from complaining witness a bribe with the intent that accused's action upon a matter then pending and which might be brought before him in his official capacity should be unlawfully influenced, was sufficient to charge an offense, notwithstanding that duty was not specifically conferred upon accused to pass upon matter then pending. Pen.Code, §§ 68, 653f.

33. Bribery ⚷11

Evidence that accused, a private secretary to the governor, asked and agreed to receive from complaining witness a bribe with intent that his action on a matter then pending and which might be brought before accused in his official capacity should be unlawfully influenced, would sustain conviction of asking and agreeing to receive a bribe, notwithstanding that the act for which the bribe was solicited did not fall within the accused's particular function, where he could be asked to perform that act at any time. Pen.Code, § 653f.

34. Bribery ⚷13

Where accused was charged with the solicitation of a bribe with the intent to unlawfully influence the governor in the matter of the application for a pardon, whether the money was solicited for the purpose of corruptly influencing the governor was for the jury, notwithstanding that the governor was not so influenced. Pen.Code, § 653f.

35. Criminal law ⚷407(1)

An out of court accusation denied by the accused is inadmissible.

36. Criminal law ⚷407(1)

Where the conduct of the accused in the face of an accusation is of evidentiary importance, evidence of the conduct of the accused is admissible as showing a consciousness of guilt, and the accusation is admissible to explain that conduct.

37. Criminal law ⚷351(10)

Where accused was charged with soliciting a bribe and asking and agreeing to receive a bribe, testimony concerning a conversation had with accused, which conversation was not merely an accusation and a denial but also a purported explanation containing many false, evasive, and contradictory statements by accused, was admissible. Pen.Code, §§ 68, 653f.

◆

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Mark Lee Megladdery, Jr., was found guilty of soliciting a named person to offer and join in the offer of a bribe and of asking and agreeing to receive from a named person a bribe, and, from an order granting defendant a new trial, the People appeal.

Affirmed.

Earl Warren, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., Cecil Mosbacher, Deputy Dist. Atty., and Cameron W. Wolfe, Deputy Dist. Atty., all of Oakland, for appellant.

Leo R. Friedman, of San Francisco, for respondent.

PETERS, Presiding Justice.

This is an appeal by the People from an order of the superior court of Alameda county granting respondent, Mark Lee Megladdery, Jr., a new trial after a jury had found him guilty of two of the offenses charged in the indictment.

In an effort to secure a reversal of the trial court's ruling, the attorney-general and associate counsel have filed briefs herein totaling four hundred and thirty pages, in which many points are argued and reargued at great length. The main issues presented by this appeal are not complex, and may be simply stated:

1. Does the trial court possess the power, in a criminal case, to grant a new trial upon the ground that the evidence does not show jurisdiction over the offenses charged in the county where the indictment was returned and the trial had?

2. If the trial court has authority to grant a new trial on such a ground, did the trial court, as a matter of law, err in this case in granting a new trial on this ground?

Was the new trial granted on a ground provided by law?

Before directly discussing this point a brief reference to the circumstances surrounding the granting of the motion for a new trial should be made.

Megladdery and Edwin W. Geary were jointly charged by indictment with seven offenses. Count one charged a violation of section 653f of the Penal Code in that the accused on March 1, 1938, in Alameda county, solicited one Clarence Bent "to offer and join in the offer of a bribe in the sum of Two Thousand Dollars ($2,000.00) more or less * * *" to the then governor of this state, with the intent to unlawfully influence Governor Merriam's action in the matter of the application for a pardon of one Clarence A. Leddy.

Count two charged Megladdery and Geary with a violation of section 68 of the Penal Code in that on March 1, 1938, in Alameda county, the accused asked and agreed to receive from Clarence Bent a bribe in the sum of $2,000 with the corrupt intent of influencing Megladdery in his official position as private secretary to the then governer, in connection with the Leddy pardon.

Count three charged Megladdery and Geary with grand theft of $750 from Bent, and count four with the grand theft of $500 from Bent. Count five charged an attempted grand theft of $2,000 from Bent, while count six charged conspiracy to commit grand theft of $2,000 from Bent. Count seven charged a conspiracy to violate section 653f of the Penal Code.

At the conclusion of the prosecution's case counts three and four charging grand theft were dismissed. The other five counts were submitted to the jury. Geary was found not guilty on all five counts. Megladdery was found not guilty as to counts five, six and seven, but found guilty of the offenses charged in counts one and two.

At the conclusion of the prosecution's case respondent moved the court to "advise the jury to find the defendant not guilty", or, in the alternative, that each charge in the indictment be dismissed, on the ground that the evidence failed to establish that the superior court of Alameda county had jurisdiction of the offenses charged in the indictment. When the jury returned the verdicts finding respondent guilty on counts one and two, he objected to the recording of the verdicts on the ground that the verdicts exonerating him on counts five, six and seven, and of the acquittal of Geary on counts one and two, divested the trial court of jurisdiction. At the time of arraignment for judgment, respondent, by written motion, requested the court to set aside the verdicts as to counts one and two "upon the ground that the above Court has no jurisdiction" of the offenses charged. Respondent then moved in arrest of judgment on the ground "that the above entitled Court has no jurisdiction" of the offenses charged in counts one and two. Respondent also made a motion for a new trial on the grounds, among others, that as to each count the verdict was contrary to the evidence and that the court had no jurisdiction. The trial court denied all motions except the motion for a new trial. That motion was granted "on the sole ground of lack of jurisdiction of this Court in the matter of venue of the offenses charged in said first and second counts of the indictment". It is from this order that the state has taken this appeal.

Whether the trial court may grant a new trial on the ground that the evidence does not show jurisdiction in the county to try the offense, depends upon the proper interpretation of section 1181 of the Penal Code. That section specifies the grounds upon which a new trial may be granted. The section expressly provides that a new trial may be granted "only" on the grounds therein set forth. Want of jurisdiction or venue is not specifically named in the section. Subdivision 6 of the section, however, provides for the granting of the motion "When the verdict is contrary to law or evidence." It was apparently under this subdivision that the trial court purported to act in granting the new trial.

In instructing the jury in the present case, the trial judge submitted to the jury the question whether the court had jurisdiction of the offense, along with the question of respondent's guilt. By its verdicts, the jury, of course, found that Alameda county had jurisdiction. It is the theory of respondent that the question of local jurisdiction or venue is one of fact for the jury to determine, and that, on motion for a new trial, the trial judge has the power to determine the sufficiency of the evidence to establish venue in the same manner in which he passes on the sufficiency of the evidence to sustain other elements of the offense. The efficacy of this argument obviously depends upon whether the question of jurisdiction or venue is a question of fact for the jury, or a question of law for the court. If it is a question of fact for the jury, then it would appear that the trial judge may properly grant a new trial under subdivision 6 of section 1181 of the Penal Code, where, in his opinion, the evidence is insufficient to show jurisdiction or venue, but, if the question is one of law for the court, then a motion for a new trial is not the proper method to pass on the issue.

The attorney-general has developed an extended argument to sustain his contention that whether the evidence establishes jurisdiction or venue in the county is one for the determination of the court alone, and in no event should be submitted to the jury. He analyzes various Penal Code sections, advances various arguments of policy, and urges that many improper results will flow from sustaining the contentions of respondent. He concedes, however, that: "Numerous cases from this and other states of the Union" (App.Op.Brief, p. 78) could be cited to show that those courts have "casually" assumed that evidence of venue must be presented to the jury for the jury's consideration, and further concedes that, based on this "casual" assumption, "trial courts generally have instructed juries [as did the court in this case] to pass on the question of venue and to acquit the defendant if the evidence failed to establish venue" (App.Op. Brief, p. 79). But, he urges, none of these cases (and as hereafter shown, they are many) has assigned any substantial reason for its conclusion on this point, and none of them has ever attempted to analyze all of the applicable code sections. He then states (App.Op.Brief, p. 80): "With the utmost confidence in the correctness of our position we submit that the casual assumption to which we have referred is an erroneous one and is supported neither by the statutory law of this state, nor by the requirements of justice. We submit that the correct rule is that although the evidence presented to the jury must contain within it some showing of venue, that *that showing is for the court's consideration and not for the consideration of the jury and that trial courts, in instructing juries to acquit where they are of the opinion that venue has not been established, are placing upon the people of the state a greater burden than the people are required by the statutory law of this state or by the requirements of justice to assume.*" (Italics attorney-general's.)

He urges that the rule of law established by these cases is inherently unsound and should be overruled, and that the doctrine contended for by him should be adopted.

In arguing that the jury may not rightfully pass on the question of venue, and that therefore insufficiency of the evidence on that point cannot be said to render the verdict contrary to the law or evidence within the meaning of subdivision 6 of section 1181 of the Penal Code, the people place great stress on People v. Amer, 151 Cal. 303, 90 P. 698. That case clearly established, as contended by the attorney-general, that a new trial may be granted only on the grounds set forth in section 1181, supra, and that the phrase "contrary to law or evidence" in subdivision 6 is not a catch-all under which any error which may be ground for a reversal may be relied upon to grant a new trial. In that case misconduct of the district attorney was relied upon to grant a new trial before the section expressly made such misconduct a ground for a new trial. It was held that, neither under subdivision 6, supra, nor any other provision of the section as it then read, was this a proper basis for the granting of a new trial. The correctness of respondent's position on this issue does not depend upon refuting these contentions, which are well-established. In fact, respondent concedes they are correct.

In further support of his position, the attorney-general enumerates other remedies which he finds available to a defendant to secure relief for lack of jurisdiction, and contends that these remedies are exclusive. These remedies are:

1. Demurrer to the indictment or information when want of jurisdiction appears on the face of the pleading. Sec. 1004, Pen.Code. This remedy was not available to respondent inasmuch as the defect here charged to exist did not appear on the face of the pleading.

2. Discharge of the jury by the court when it appears that the prosecution has introduced no evidence of venue, and that the court does not have jurisdiction of the offense, the defendant being committed to await a warrant for his arrest from the proper county. Secs. 1113–1115, Pen.Code.

3. Motion in arrest of judgment (secs. 1185–1188, Pen.Code).

4. Appeal.

The existence of the remedy by motion for arrest of judgment, where, as in this case, the want of jurisdiction does not appear on the face of the indictment, is the subject of extended argument by both parties. The attorney-general, contending for the existence of such a remedy, nevertheless contends that even if it does not lie, want of jurisdiction or venue cannot be brought within any of the grounds upon which a motion for a new trial may be granted.

In connection with the discussion of whether a motion in arrest of judgment is available to a defendant under the circumstances here involved, it should be mentioned that, when the motion for arrest of judgment was pending in the trial court, the prosecuting attorney vehemently argued, and apparently convinced the trial court, that a motion in arrest of judgment lies only where the jurisdictional defect appears on the face of the pleading and will not lie where such defect appears only from the evidence. On this appeal, however, the attorney-general, with greater vehemence, argues that the prosecuting attorney was wrong, and that if the facts were as held by the trial court, he had the power to grant, and should have granted, the motion. While it may be true that the attorney-general is not always bound on appeal by the position taken by the prosecuting attorney at the trial, we have here the rather anomalous situation of the prosecuting attorney taking one position before the trial court and convincing that court of the correctness of that position, and of the attorney-general contending before the appellate court that the prosecuting attorney was in error and that the motion should have been granted. This serves to illustrate the confusion surrounding the discussion of this problem.

The motion in arrest of judgment is provided for by sections 1185–1188 of the Penal Code. Section 1185 provides: "A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant, on a plea of a former conviction. It may be founded on any of the defects in the indictment or information mentioned in section ten hundred and four, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced. When determined, the order must be immediately entered by the clerk in the minutes."

Section 1186 provides that the court, any time before judgment is pronounced, may arrest judgment on its own motion "for any of the defects mentioned in the last section". Section 1187 provides that the effect of an order arresting judgment "is to place the defendant in the same situation in which he was before the indictment was found or information filed".

Section 1188 provides: "If, from the evidence on the trial, there is reason to believe the defendant guilty, and a new indictment or information can be framed upon which he may be convicted, the court may order him to be recommitted to the officer of the proper county, or admitted to bail anew, to answer the new indictment or information. If the evidence shows him guilty of another offense, he must be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution. But if no evidence appears sufficient to charge him with any offense, he must, if in custody, be discharged; or if admitted to bail, his bail is exonerated; or if money has been deposited instead of bail, it must be refunded to the defendant or to the person or persons found by the court to have deposited said money on behalf of said defendant; and the arrest of judgment shall operate as an acquittal of the charge upon which the indictment or information was founded."

It will be noted that section 1185 of the Penal Code, supra, provides that a motion in arrest of judgment "may be founded on any of the defects in the indictment or information mentioned in section ten hundred and four, unless the objection has been waived by a failure to demur * * *".

Section 1004 of the Penal Code, thus incorporated, is the section enumerating the grounds for a demurrer. It provides in part:

"The defendant may demur to the indictment or information, *when it appears upon the face thereof* either:

"1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the county; or, if an information, that the court has no jurisdiction of the offense charged therein * * *." (Italics ours.)

[1, 2] Largely in reliance on the provisions of section 1188 of the Penal Code, supra, and in direct opposition to the provisions of sections 1185 and 1004 of that code, supra, the attorney-general advances a long and complicated argument to support his contention that a motion in arrest of judgment for want of jurisdiction may be granted where the want of jurisdiction does not appear on the face of the indictment or information. Respondent argues that, both from the standpoint of interpretation and authority, the trial court's power in this respect, whether on defendant's or its own motion, is limited to cases where the defect appears on the face of the indictment or information. This construction seems in accord with the plain and obvious meaning of the language used in the sections. Section 1188 of the Penal Code, so strongly relied upon by appellant, clearly means (and it seems to us can only mean) that the trial judge has the power to adopt the procedure therein set forth when he has arrested judgment in conformity with either sections 1185 or 1186 of the Penal Code.

In support of its contention that the trial court on such a motion may go beyond the face of the pleading, appellant relies on People v. Hodges, 27 Cal. 340, and People v. Scott, 74 Cal. 94, 15 P. 384. The Hodges case was decided under the provisions of the old Criminal Practice Act, the provisions of which were somewhat different from the present provisions of the Penal Code. In the Scott case, the court, citing sections 1187 and 1188 of the Penal Code, without argument or discussion, states that where a defendant was charged in San Bernardino county with a burglary in that county and the proof shows that the burglary was committed in San Diego county and the fruits thereof taken into San Bernardino county, that the indictment should have set this forth, and then holds that, under such facts, the trial court should have arrested judgment and ordered further proceedings had under sections 1187 and 1188 of the Penal Code. The two cases undoubtedly support the contentions of appellant, but the holding in both cases is not only contrary to the language of the present code sections but is directly and unequivocally contrary to the rule announced in a long series of cases hereafter mentioned. Neither the Scott nor the Hodges case has ever been quoted or cited with approval by any appellate court in this state on the point here involved.

As opposed to these two cases there is a long line of decisions, starting with People v. Indian Peter, 48 Cal. 250, decided in 1874, holding that a trial court is without power to arrest judgment except for defects that could be challenged by demurrer under section 1004 of the Penal Code—i. e., for defects appearing on the face of the pleading. In that case the defendant appealed, contending that his motions for discharge and in arrest of judgment should have been granted for a defect not appearing on the face of the indictment. The court held (48 Cal. at page 252): "It is settled here, that the only grounds upon which a motion in arrest of judgment can be supported are those which are enumerated in the statute; that is, upon certain defects appearing in the indictment upon which the verdict is found. (Penal Code, sec. 1004; Id. Sec. 1185.) The motion in arrest not being based upon any one of the enumerated grounds, was properly denied."

In People v. Johnson, 71 Cal. 384, at page 392, 12 P. 261, at page 264, the court, in discussing whether proceedings before the magistrate could affect the validity of the information, stated: "Moreover, a motion in arrest of judgment must be founded upon defects in the indictment or information appearing on the face thereof. Pen. Code, [secs.] 1185, 1004."

In People v. Tomsky, 20 Cal.App. 672, 130 P. 184, the jury convicted the defendant. At the time fixed for pronouncing sentence the court, of its own motion, made an order setting aside the verdict on the ground that the defendant had entered no plea to the information. The people appealed. The attorney-general argued on that appeal that the order was one in arrest of judgment and was improper because granted on a ground not appearing on the face of the information. At page 676 of 20 Cal.App., at page 186 of 130 P. the court stated:

"But, as stated, the Attorney General vigorously contends that the order is more in the nature of one in arrest of judgment than any other from which an appeal by the people is authorized. If that view of the order were justified, then unquestionably it would have to be reversed for the reason that the ground upon which it was granted is not included among those upon which an order in arrest of judgment may be made. And, for the same reason, we cannot see how it can be viewed as an order in arrest of judgment or as intended to have the effect of such an order.

"Section 1185 of the Penal Code provides that a motion in arrest of judgment 'may be founded on any of the defects in the indictment or information mentioned in section ten hundred and four, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced.' Section 1004 enumerates the grounds upon which the defendant may demur to the indictment or information, when the defects constituting such grounds appear upon the face of the pleading. Section 1187 of said Code provides that the 'effect of an order arresting the judgment is to place the defendant in the same situation in which he was before the indictment was found or the information filed.'

"Thus it will be seen that a motion in arrest of judgment is directed against the sufficiency of the indictment or the information to state a public offense or for any other defects appearing upon the face of such pleading which would subject it, under the law, to the claims of a demurrer, and is entertainable only where the defendant has demurred to the pleading by which he is charged."

The rule announced in these cases has been also announced in many other cases. People v. O'Leary, 77 Cal. 30, 33, 18 P. 856; People v. Gardner, 98 Cal. 127, 128, 32 P. 880; People v. Chaves, 122 Cal. 134, 143, 54 P. 596; People v. Cole, 127 Cal. 545, 549, 59 P. 984; People v. Mead, 145 Cal. 500, 503, 78 P. 1047; People v. Welton, 190 Cal. 236, 238, 211 P. 802; People v. Cordosco, 77 Cal.App. 780, 783, 246 P. 461; 8 Cal.Jur., p. 445, sec. 466. It is well settled in other states that a motion in arrest of judgment can be based only on matters of record, and that defects which appear only by the aid of evidence cannot be the subject of such a motion. It is also well settled that the objection that proper venue has not been proved must be based on the evidence and therefore cannot be urged in arrest of judgment. 16 Cor.Jur., p. 1255, secs. 2782, 2784.

We find nothing in section 1012 of the Penal Code which compels or suggests a contrary construction.

[3] Under these circumstances, upon an analysis of the various pertinent code sections, and giving due weight to the fact that many cases, with and without giving a reason therefor, have so held, we must agree with respondent that the motion in arrest of judgment was not available to Megladdery and was properly denied by the trial court. This holding, however, is not decisive of the problem here presented, which is whether the question of local jurisdiction is a question of fact for the jury or one of law for the court. We turn now to a direct discussion of that problem.

[4, 5] While it is true that a defendant does not have a constitutional right to have his case determined by the jury of any particular county (People v. Richardson, 138 Cal.App. 404, 32 P.2d 433), it is also true that our statutory law has determined, with certain exceptions, that an accused person is answerable only in the jurisdiction where the crime, or some part or effect thereof, was committed or occurred. People v. Wilson, 86 Cal.App. 160, 260 P. 330; secs. 777, 781, Pen.Code. It is an elementary principle of our jurisprudence that the question of jurisdiction over the subject matter can never be waived nor conferred by consent. It seems quite clear to us, that, from the standpoint of logic, the question of jurisdiction, whether it be local or general jurisdiction, is fundamentally and necessarily a question of fact, and that in a criminal case, the burden of proving that fact rests on the prosecution. If this is so, it must follow that the determination of this fact rests with the jury. Where this fact is not proved, the verdict is contrary to the evidence within subdivision 6 of section 1181 of the Penal Code and a new trial may be granted.

The attorney-general concedes that there is a long line of California cases holding in accord with these views. This concession is in accord with the facts. In People v. Fisher, 51 Cal. 319, the Supreme Court reversed a conviction and remanded the cause for a new trial on the ground that local jurisdiction had not been proved. The court held that the question of insufficiency of the evidence to establish venue could be raised under the new trial specification that the verdict was contrary to the evidence. The court stated, at page 320 of 51 Cal.: "The point is made, that it was not proven that the alleged offense was committed in the county of San Joaquin. Upon a careful examination of the bill of exceptions, we find no evidence tending to prove the venue. * * * *One ground of the motion for a new trial is that the verdict is contrary to the evidence;* but the defendant is not required, as in civil cases, to specify the respects in which the evidence is insufficient; and consequently, on the hearing of the motion, *he may rely on the point that the evidence is insufficient to prove any one of the facts in issue.*" (Italics ours.)

In People v. More, 68 Cal. 500, 9 P. 461, the trial court granted defendant's motion to set aside an information charging him with manslaughter on the ground that it did not appear from the evidence taken before the committing magistrate that the crime or any part thereof was committed in Santa Barbara county. The Supreme Court reversed the trial court, and, in pointing out defendant's proper remedy, stated (page 504 of 68 Cal., page 463 of 9 P.): "If it had appeared on the face of the information (which it did not) that the offense charged was committed out of the jurisdiction of the court, the proper mode to take advantage of such objection would have been by demurrer. Pen.Code, § 1004. But in a case like the one we are now considering, where the information is good on its face, defendant should have availed himself of the objection to the jurisdiction under the plea of not guilty; and in that event *it would have been a question for the jury to determine.* Pen.Code, § 1012." (Italics ours.)

The point is also discussed in People v. Smith, 26 Cal.App.2d 189, 190, 79 P.2d 155, where the court, in discussing appellant's contention that the prosecution had failed to prove venue, stated: "If, as contended for by the appellant, the prosecution had failed to introduce testimony from which the jury could find that the offense was committed in the county of Sonoma, as alleged in the indictment, the defendant could have rested without introducing any testimony whatever upon that subject. That he introduced testimony tending to controvert the testimony of the prosecution, was a purely voluntary act on his part, and of course *created only a conflict in the testimony, which presented, first, a question for the jury,* and, if there is sufficient testimony in the record upon which the jury might reach a conclusion that the offense was committed in the county of Sonoma, the verdict cannot be disturbed on the question of venue." (Italics ours.)

In People v. Parks, 44 Cal. 105, the court reversed a judgment of conviction and remanded the cause for a new trial. The prosecution failed to prove local jurisdiction. It was held that it was essential for the prosecution to prove this fact and failure to do so warranted a reversal. The same ruling was made in People v. Roach, 48 Cal. 382. There are many other cases of the Supreme and Appellate Courts holding that the question of venue is one of fact for the jury. People v. Twedt, 1 Cal. 2d 392, 35 P.2d 324; People v. Bringhurst, 192 Cal. 748, 221 P. 897; People v. Botkin, 132 Cal. 231, 64 P. 286; People v. McGregar, 88 Cal. 140, 26 P. 97; People v. Larue, 28 Cal.App.2d 748, 83 P.2d 725; People v. Carter, 10 Cal.App.2d 387, 52 P.2d 294; People v. Marron, 140 Cal.App. 432, 35 P.2d 610; People v. Thorn, 138 Cal. App. 714, 33 P.2d 5; People v. Roland, 134 Cal.App. 675, 26 P.2d 517; People v. Bradford, 84 Cal.App. 707, 258 P. 660; In re Application of O'Connor, 80 Cal.App. 647, 252 P. 730; People v. Coker, 78 Cal.App. 151, 248 P. 542; People v. Meseros, 16 Cal. App. 277, 116 P. 679.

[6-8] From these cases it would appear that it is a settled principle of criminal law in this state (and the same rule exists elsewhere—16 Cor.Jur., p. 530, sec. 997) that venue is a question of fact for the jury, and that the burden rests on the prosecution to prove this fact not beyond a reasonable doubt but by a preponderance of the evidence. People v. Carter, 10 Cal.App. 2d 387, 52 P.2d 294. Since this is so, it follows that failure to prove local jurisdiction falls directly within the meaning of subdivision 6 of section 1181 of the Penal Code.

[9] The attorney-general cites no case to the contrary. He analyzes many Penal Code sections and comes to the conclusion that as a new proposition the question of venue should not be submitted to the jury, but should be for the determination of the court alone. He points out that a new trial, by statutory definition, is "a re-examination of the issue in the same court, before another jury" (sec. 1179, Pen.Code) and urges that a new trial is inappropriate where the evidence shows the particular court has no jurisdiction. This is clearly an unsound argument. The attorney-general concedes that, where there is a failure to show where the crime was committed at all, there is reason to grant a new trial to permit the prosecution to supply this deficiency (App.Op.Brief, p. 105), but contends that, where the evidence shows the crime to have been committed in a county other than the place of trial, a new trial in the county of the original trial is not an appropriate remedy. Even if this were so, a new trial is appropriate in several other situations. For example, where, as in the instant case, there are several acts connected with the alleged offense, venue or jurisdiction may depend upon facts as to which the evidence is conflicting, or upon evidence from which conflicting inferences may be drawn, or the evidence produced on a new trial may vary from that on the first trial. In these various situations, there is as much reason for a new trial on the issue of venue as there is as to other issues where a new trial is granted because the verdict is, in the opinion of the trial judge, contrary to the evidence.

The attorney-general further contends that the dictates of justice require that it be held that the jury has no right to pass on the question of local jurisdiction. It is contended that, if the trial court should pass on the question of venue in any of the several modes constituting what he contends are the exclusive methods, already enumerated in this opinion, or, should the appellate court pass on the question on appeal from the judgment of conviction, the result would be to return the defendant and the people to the status existing before the indictment was returned. In other words, the people would still have the right to prosecute the defendant in another county. Secs. 1115, 1188, Pen.Code. But if the question is submitted to the jury, and it *acquits* the defendant because venue is not established, the acquittal will forever bar a subsequent prosecution. The attorney-general finds in other instances where the jury is to pass upon a question other than the guilt of a defendant, such as former conviction, or jeopardy, or variance between the indictment and proof, the law provides for a special verdict on that ground, rather than a general verdict. See, secs. 1017, 1021, 1151, Pen.Code.

[10] The answer to these arguments, and the other similar arguments advanced by the attorney-general is that, admittedly, from an early date in this and other states, the question of local jurisdiction or venue has been treated by the trial courts and by the appellate courts as a jury question. Apparently, no grave miscarriage of justice has occurred under this rule. In view of the long line of decisions already referred to, it is our belief that if the rule is to be changed it should be done by the legislature and not by this court.

For the reasons already set forth we hold that the question of local jurisdiction is a question of fact for the jury's consideration, and that the trial judge possesses the power to grant a new trial for insufficiency of the evidence on this issue under subdivision 6 of section 1181 of the Penal Code.

Did the trial court err, as a matter of law, in granting the motion for new trials?

The attorney-general divides his argument on this point into three main subdivisions:

1. By what degree of proof and quantum of evidence must venue be established in order to warrant the jury in deciding that venue has been established?

[11] On this point the parties are agreed. Respondent concedes that under the decision in People v. Carter, 10 Cal.App.2d 387, 52 P.2d 294, and cases therein cited, venue in the county need only be established by a preponderance of the evidence, and that the rule requiring proof beyond a reasonable doubt applies only to the issue of guilt. See, also, People v. Montgomery, 32 Cal.App.2d 43, 89 P.2d 184; People v. De Soto, 33 Cal.App.2d 478, 92 P.2d 466; People v. West, 34 Cal.App.2d 55, 93 P.2d 153.

2. After the jury has decided that venue has been established, how weak must the evidence concerning venue be to warrant the trial judge in granting a new trial on the ground that the verdict is contrary to the law or evidence?

This point is integrally connected with the third point urged by the attorney-general.

3. Was the proof of venue in this case so weak as to warrant the trial court in granting a new trial on that ground?

For the purpose of discussing these points, we will assume that there was sufficient evidence in the record to support a finding of venue in Alameda county. That this assumption is in accord with the facts will be demonstrated later in this opinion.

[12-15] On these issues the attorney-general argues that there exists a great limitation on the power of the trial court to grant a motion for a new trial on the ground that the evidence in reference to venue is conflicting. He argues that if the prosecution produces *any evidence* from which the existence of venue can be inferred by the jury, the trial judge is powerless to weigh that evidence on a motion for a new trial; that the mere production of such evidence confers jurisdiction on the court; that the trial judge, even if convinced such testimony is perjured, is bound by it; that wherever "some evidence, however slight, from which it can be reasonably inferred that venue exists" (App.Op.Brief, p. 126) is introduced by the prosecution, article VI, section 4½ of the Constitution steps in to prevent the trial court from granting a new trial on that ground. This last proposition was strongly urged by the attorney-general at the oral argument, it being his contention that when any evidence at all is introduced on this issue the mere fact that the trial court, in exercising his function in passing on a motion for a new trial, does not believe that evidence, or believes the weight of the evidence refutes the evidence relied upon by the people, does not confer upon him the power to weigh that evidence—according to the attorney-general failure of proof on this issue is a mere error in a "matter of procedure" within the meaning of that curative provision of the constitution. Based on these fundamentally unsound premises, the attorney-general then argues the case as if the *defendant* were appealing from an order *denying* his motion for a new trial. He demonstrates that there is evidence in the record from which the jury could find that essential elements of both offenses were committed, or the effects consummated, in Alameda county, and argues that, therefore, the jury verdict must be upheld. This is not the law, and no case and no sound argument is offered to support it. This is an appeal by the *state* from an order *granting* the defendant a new trial. In such a situation every reasonable intendment must be indulged in favor of the trial court. This court, as an appellate court, cannot substitute its judgment for that of the trial judge. If the evidence, even though conflicting, is susceptible of a construction that will uphold the action of the trial judge, then this court cannot interfere with the or-

der granting a new trial. There is no basis for contending that, in passing on the factual question of local jurisdiction, the trial judge does not possess exactly the same powers as he possesses in passing on the other factual issues in the case. It is elementary that, in determining the sufficiency of the evidence on a motion for a new trial, the trial judge is not bound by the rule as to conflicts in the evidence. He may disregard such evidence as he believes to be untrue and may draw inferences therefrom at variance from those drawn by the jury. The rule that the court will not disturb findings based on conflicting evidence applies only to the appellate court. It has no application to a trial judge in passing on a motion for a new trial. People v. Harband, 99 Cal.App. 32, 277 P. 1102.

Somewhat the same argument in reference to the applicability of article VI, section 4½ of the constitution was made by the state in People v. Canfield, 173 Cal. 309, 159 P. 1046, which was also an appeal by the people from an order granting a new trial, and where it was contended that article VI, section 4½ constituted a limitation on the trial court's powers. The court stated (page 311 of 173 Cal., page 1047 of 159 P.):

> "It is contended on behalf of the prosecution that the defendant's statement that he had been engaged in the commission of another crime with Rabild was not a confession of guilt of this offense for which he was on trial; that even if it be regarded as such confession, it was given without coercion; that the proof of alleged alibi was so vague as to be of no value; and that the guilt of Canfield was so conclusively established as to render the court's action in granting a new trial an abuse of discretion. It is asserted, therefore, that under section 4½, art. 6, of the Constitution it is our duty to set aside the order granting a new trial. * * *
>
> "It was for the judge of the trial court to say what had been the effect of the evidence upon the jury, and whether or not the defendant, in view of all of the facts, had been given a fair trial. If the motion for a new trial had been denied, the prosecution might then well have invoked in favor of the conviction the section of the Constitution which provides that no new trial shall be granted in any criminal case on the ground that improper evidence has been admitted, 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' Section 4½, art. VI, Constitution of California. But this section of the Constitution was not designed to take from the trial court and transfer to the appellate courts the high discretion vested in that tribunal. The judge, who presided at the trial of the cause, who heard the testimony, who observed the jurors and had an opportunity also of testing the truth of the defendant's statements by noticing his demeanor, was in a peculiarly favorable position for determining justly the question whether or not the defendant had been accorded a fair trial. We cannot follow the mental processes of the judge. * * * We can hardly manufacture in fancy an hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge. Surely there is no basis in the case before us for the substitution of the discretion of this court for that of the superior court. We must assume that the learned judge of the trial court acted with a full appreciation of his duties and obligations, with the cited section of the Constitution in mind, and that the conclusion which he reached was not governed by any idle nor any mere technical reasons."

[16-21] Even where there is no conflict in the evidence, and all the evidence on the issue was produced by the prosecution, nevertheless, the trial court, in passing on a motion for a new trial, is permitted to disregard any or all of such evidence. The proper rules are set forth and discussed in People v. Cesena, 18 Cal.App.2d 727, 729, 64 P.2d 732, 733. In that case, which was an appeal by the people from an order granting a new trial, there was no conflict at all in the evidence. The attorney-general there argued that under such circumstances there was an abuse of discretion in granting the motion. The court stated: "Nevertheless, it is settled that, in any trial which is had with the assistance of a jury, a defendant is entitled to two decisions on the evidence, one by the jury and another by the trial judge in passing upon a motion for a new trial. Smith v. Royer, 181 Cal. 165, 183 P. 660. In giving consideration to the important matter of the sufficiency of the evidence to support the jury's verdict, the trial court, in ruling on a motion for a new

trial, is not bound by conflicts in the evidence (Moyer v. Dresch, 2 Cal.App. (2d) 655, 38 P.(2d) 849), and the duty is imposed upon it then to consider such additional and not unimportant features as the credibility of witnesses, their manner and appearance in testifying, and the proper weight to be accorded to the evidence. While the solemn verdict of a jury should not lightly be vacated the responsibility nevertheless rests with the court again to review the cause and only after such review to decide the application for a new trial. Olinger v. Pacific Greyhound Lines, 7 Cal.App.(2d) 484, 46 P.(2d) 774. If such review produces a conviction of evidentiary insufficiency to support the verdict, it is the plain duty of the trial court to set it aside and order a new trial. People v. Bacos, 14 Cal.App.(2d) 338, 349, 58 P.(2d) 221. The fact that the evidence submitted during the trial was wholly that of the prosecution and stands uncontroverted by evidence produced on behalf of the respondent can make no difference in the exercise of that supervisory power which the trial court possesses over the verdict of the jury. In such a case the same duty rests upon the judge of satisfying himself that guilt has been established that is imposed upon him in cases where the evidence is conflicting. Even though all the evidence which was produced points in one direction, the court is not required to believe it. The trial judge has the same opportunity afforded to the jury of observing the manner of witnesses, the character of the testimony they give, and of discovering their motives and their interest and of judging their credibility. He should himself be satisfied that the evidence as a whole was sufficient to sustain the verdict. If he is unable to arrive at this conclusion the granting of a new trial is not merely a proper exercise of legal discretion. It is a duty incumbent upon him by virtue of the office which he holds." See, also, People v. Knutte, 111 Cal. 453, 44 P. 166.

[22] These cases, and the sound reasoning upon which they are based, completely refute the broad contentions of appellant.

In his reply brief the attorney-general contends that, if it be conceded that a trial judge possesses broad powers in passing on a motion for a new trial on the ground of insufficiency of the evidence, including insufficiency to show venue, in this case the motion was not granted on that ground. This contention is predicated on the following facts: Respondent's motion for a new trial on each count set forth seven grounds for the granting of the motion. In specification No. 4 it was alleged, "That the verdict is contrary to law," and in specification No. 5, "That the verdict is contrary to the evidence." Specification No. 6 was, "That the court has no jurisdiction of the offense."

The minute order of the trial court granting defendant's motion for a new trial reads in part as follows: "Said motions having been heretofore argued and submitted and the court being fully advised in the law and the premises, now orders that defendant's motion for a new trial as to the first, and as to the second counts of the indictment be and the same is hereby granted on the sole ground of lack of jurisdiction of this Court in the matter of venue of the offenses charged in said first and second counts of the indictment."

[23-25] It is urged that this minute order demonstrates that the trial judge did not weigh the evidence, but determined as a matter of law, that he must grant the new trial. It is argued that it can be inferred therefrom that the trial judge believed that there was no evidence of venue at all, and that venue was lacking as a matter of law. It is further argued that, by granting the motion on the "sole ground of lack of jurisdiction", the trial judge denied the motion on the grounds that the verdicts were contrary to the law or evidence. Assuming that this is a permissible inference from the wording of the minute order, it is not the only inference that can be drawn therefrom. The mere fact that the trial court did not, in its order, use the phrase "insufficiency of the evidence to establish venue", does not necessarily mean that the court did not mean exactly that when it used the expression that the new trial was granted "on the sole ground of lack of jurisdiction of this Court in the matter of venue". That expression could mean that he had weighed the evidence and found the evidence as to jurisdiction insufficient. We are well aware that the rule that on appeal from an order granting a new trial the order will be affirmed if any ground exists therefor regardless of the reasons assigned by the trial court, has an important exception to the effect that if the trial court by direct and unequivocal language *excludes* insufficiency of the evidence as a

ground for granting the motion, the appellate court will not affirm the order on that ground. People v. Flood, 102 Cal. 330, 36 P. 663; Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L.R.A. 124; People v. Palmer, 92 Cal.App. 323, 268 P. 417. But that exception has no application to this case. By granting the motion on "the sole ground of lack of jurisdiction of this Court in the matter of venue" the trial court did not by direct and unequivocal language exclude specification No. 5—that is, that the verdict was contrary to the evidence. It is a possible and reasonable construction of the minute order that what the trial judge said and meant was that he was granting the motion on the sole ground that in his opinion the evidence was insufficient on the issue of venue. Since this is not only a possible but is also a reasonable construction of the order, we are not permitted to indulge in any other interpretation. Under elementary principles we must give the order, if possible, that construction that will uphold the trial court rather than indulging in another interpretation, even though equally reasonable, which would result in overruling the trial judge's discretionary powers.

[26] In an attempt to support his interpretation of the order the attorney-general refers to the statements made by the trial judge at the time the motion for a new trial was granted, and contends that this oral opinion discloses that the order was granted on the theory urged by him. The general rule is that the opinion of the trial court is no part of the record on appeal and normally will not be considered by the appellate court. The general rule is always applied where the opinion of the trial court is used to impeach the findings or judgment. But that rule has its exceptions. The problem was recently considered by the Supreme Court in Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273. In that case it was held that, where the findings did not disclose the process by which the amount of the judgment was reached, and the opinion of the trial court set forth that process and was consistent with the findings, the opinion could be considered by the appellate court After citing cases applying the general rule the court stated the exception (3 Cal.2d at page 750, 47 P.2d at page 278) as follows: "There is another line of decisions in no way inconsistent with the cases just cited which hold that the opinion of the trial judge may be considered for the *purpose of discovering the process by which the trial judge arrived at his conclusions,* or when the opinion furnishes the basis of the court's action in its decision of the case. Estate of Felton, 176 Cal. 663, 667, 169 P. 392, 393, and Coakley v. Ajuria, 209 Cal. 745, 749, 290 P. 33, 34)." (Italics ours.) Under the rule announced in this case, if the oral opinion disclosed, without ambiguity, the mental processes of the trial judge in reaching his conclusion, it could be properly used by the appellate court in interpreting the order subsequently made. The difficulty is that the oral opinion, just like the minute order, is ambiguous—it does not disclose "the process by which the trial judge arrived at his conclusions". The trial judge's statement appears at pages 1332 to 1335 of the reporter's transcript. It would serve no useful purpose to quote it in full. After expressing his reluctance in having to set aside the jury's verdicts, he stated that in his opinion, "I feel that the crime, if committed, the two crimes charged in counts one and two were, if at all, committed in the County of San Francisco". Did he mean that, after weighing the evidence, he was of that opinion, or did he mean, as a matter of law, there was no evidence that the crimes or effects thereof had been committed or consummated in Alameda County? One interpretation is as reasonable as the other. A little later he stated: "I am frank to say I take it as a judge, I can see nothing to do but to grant this motion for a new trial *in view of the evidence,* that is (it) shows lack of jurisdiction." (Italics ours.) Again, does this statement not disclose that the trial judge came to his conclusion after weighing and considering the evidence? From other parts of the statement the appellant concludes that the trial judge mistakenly believed that there was no evidence at all that the crimes had been wholly or in part committed in Alameda county. The very fact that the trial judge granted the motion for a new trial, which indicated his opinion that the causes should be tried again, and did not grant some of the other motions made by counsel for respondent during the trial, is some indication that the trial court believed there was a conflict in the evidence on the question of jurisdiction.

From what has been said, it appearing that both the oral statement of the trial court and the minute order are ambiguous, we are compelled to indulge in that interpretation that will result in upholding the action of the trial judge as long as that interpretation is reasonable. We, therefore, conclude this portion of the opinion with the statement that the trial judge acted well within his powers in granting the motion.

Is there evidence in the record, which, if believed, would support a finding of jurisdiction in Alameda county?

In view of the fact that a new trial is contemplated, other contentions of the parties must be considered in order that these controverted matters may be determined for the benefit of the trial court on such new trial. So far in this opinion we have assumed that as to those crimes charged in counts one and two of the indictment so far as venue is concerned, the evidence was conflicting. That assumption is in accord with our views after reading the record. Stated another way, had the motion for a new trial been denied, we are of the opinion that there is sufficient evidence in the record to support the implied finding of the jury that Alameda county had jurisdiction of the two offenses. Respondent contends that under section 781 of the Penal Code a particular county cannot have jurisdiction over an offense unless some act which is a necessary element of the offense is committed in that county, or unless some effect of such an act, which effect is an essential or necessary element of such offense, occurs within the county. Respondent also contends that once the commission of an offense has progressed to the point where prosecution therefor is warranted, no act thereafter committed, and no effect of such act thereafter occurring, is or can be an act or effect which is an essential or necessary element of that offense. Neither contention is sound. The first is refuted by the language of the section. Section 781 of the Penal Code provides: "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

[27] The interpretation contended for by respondent would completely disregard the phrase "or the acts or effects thereof constituting or requisite to the consummation of the offense" contained in the section. Obviously, the phrase, "or requisite to the consummation of the offense", means requisite to the completion of the offense—to the achievement of the unlawful purpose—to the ends of the unlawful enterprise. By the use of the word "consummation" the legislature drew a distinction between an act or an effect thereof which is essential to the commission of an offense, and an act or effect thereof which, although unessential to the commission of the offense, is requisite to the completion of the offense—that is, to the achievement of the unlawful purpose of the person committing the offense.

[28] By his second contention respondent would limit the essential or necessary elements of an offense or its effects to those acts or effects of acts occurring prior to the instant that the offense becomes sufficiently complete to warrant prosecution. Under the interpretation we have already given to the section, this construction cannot be sustained. That the interpretation contended for by the appellant is the correct one is demonstrated by a reference to the cases. In People v. Graves, 137 Cal. App. 1, 29 P.2d 807, 30 P.2d 508, defendant was charged, in Los Angeles county with the crime of *receiving* and *agreeing to receive* a bribe to vote as a supervisor of that county in favor of a certain proposal then pending before the board. The evidence showed that the bribe money was paid to the defendant in San Francisco. Apparently there was no evidence where the agreement to accept the bribe was made. The appellate court held that since the evidence showed the money was given for the vote of appellant, and since that vote was given in Los Angeles, that was sufficient to give Los Angeles jurisdiction. In other words, the dishonest vote was not an essential part of the crimes charged, and the crime was complete before the vote was given, but, nevertheless, it was held, and properly so, that Los Angeles had jurisdiction—the vote was a legal effect of the corrupt agreement, and that gave Los Angeles jurisdiction. This case completely refutes the arguments of respondent on this point.

People v. Boggess, 194 Cal. 212, 228 P. 448, is another case in point. In that case Boggess caused to be filed in the San Francisco office of the commissioner of corporations an application for a permit to sell shares of stock. The filing fee was paid at that time. The application was then forwarded by the deputy commissioner in San Francisco to the Sacramento office of the commissioner to be there investigated by the deputy commissioner assigned the duty by the commissioner to investigate such applications. Boggess was prosecuted in Sacramento county on the charge of filing an application containing false claims and recitations. After conviction on appeal, he contended that, since he filed the application in San Francisco, Sacramento had no jurisdiction. Although the case was reversed on other grounds, it was held that Sacramento county had jurisdiction under section 781 of the Penal Code because the crime was ultimately consummated in Sacramento county. No essential element of the crime was committed in Sacramento—he could have been prosecuted in San Francisco, the crime having been completed there—but one of the effects of the San Francisco acts was the transmittal of the application to Sacramento. This case is also contrary to the contentions of respondent.

Another case equally in point is People v. Anderson, 3 Cal.App.2d 521, 40 P.2d 270. The appeal in that case was from a judgment of the superior court of Sacramento county convicting defendant of robbery. The only ground of appeal was that the robbery occurred in Yolo county. The facts were that the victim, a taxicab driver, received a telephone call in Sacramento county directing him to go to the outskirts of the city of Sacramento and pick up some passengers. These passengers were defendant and his wife who directed the driver to take them to a resort in Yolo county. After entering the last-named county, the robbery occurred. Defendant then took possession of the cab and drove back to Sacramento. The court held that the procuring of the cab in Sacramento and the return to that county gave it jurisdiction. It will be noted that the procuring of the cab was merely an act of preparation and no essential element of the offense of robbery. Although the return of the defendant to Sacramento falls within section 786 of the Penal Code, the court held that factor, constituting an effect of the crime, also fell within section 781 of the Penal Code.

People v. Grubb, 24 Cal.App. 604, 141 P. 1051, is another case equally in point. There the defendant was charged with and convicted in San Francisco of an attempt to commit the crime of pandering. The defendant had approached the prosecutrix in Los Angeles, who was intending to come to San Francisco, and suggested that she stay in San Francisco with a woman friend of his, with whom the prosecutrix could engage in the lodging house business. When the prosecutrix arrived in San Francisco she found she was expected to engage in prostitution. She refused. The defendant was found guilty of an attempt to commit pandering. The appellate court held that the crime comprised a series of acts some of which occurred in San Francisco, and, under section 781, San Francisco had jurisdiction. Clearly the crime was complete in Los Angeles—but it was a continuing transaction. Other cases which hold substantially in accord with these cases are: People v. Twedt, 1 Cal.2d 392, 35 P.2d 324; People v. Mills B. Sing, 42 Cal.App. 385, 183 P. 865; People v. Keller, 79 Cal.App. 612, 250 P. 585; People v. Chase, 117 Cal.App.Supp. 775, 1 P.2d 60; People v. Steffner, 67 Cal.App. 1, 227 P. 690; People v. Thorn, 138 Cal.App. 714, 33 P.2d 5. People v. Ballas, 55 Cal.App. 748, 204 P. 401, cited by respondent, is out of line with the many cases cited, supra, and must be disregarded. There are cases from other jurisdictions that uphold respondent's contentions, but these cases are out of line with the California cases, and are out of line with many well-reasoned cases from other jurisdictions. Of the many cases cited by appellant, People v. Vario, 165 Misc. 842, 2 N.Y.S.2d 611; Burton v. United States, 202 U.S. 344, 26 S. Ct. 688, 50 L.Ed. 1057, 6 Ann.Cas. 362; Palliser v. United States, 136 U.S. 257, 10 S. Ct. 1034, 34 L.Ed. 514, and United States v. Thayer, 209 U.S. 39, 28 S.Ct. 426, 52 L.Ed. 673, are closely in point.

Under the rule announced by these cases we must hold that if any portion of the crimes charged was committed in Alameda county, or if any act requisite to the completion of the offenses or requisite to the achievement or end of the unlawful purpose occurred in Alameda county, that county has jurisdiction.

Applying this test to the facts of this case, there can be no doubt that evidence was introduced by the prosecution which, if believed by the jury, as it apparently was, and by the trial judge, which it apparently was not, would support a finding that Alameda county had jurisdiction. It would serve no useful purpose to recite all this evidence in this opinion. It is sufficient, for the purposes of this opinion, to state that Megladdery, so far as the two counts now involved are concerned, was charged with (1) a violation of section 653f, Penal Code, in that he did solicit one Clarence Bent to offer and join in the offer of a bribe with the corrupt intent to influence the then governor in the matter of a pardon for one Clarence Leddy, and (2) a violation of section 68 of the Penal Code by asking and agreeing to receive from Clarence Bent a bribe, with the corrupt intent of influencing Megladdery in his position as private secretary to the then governor in the matter of the Leddy pardon. Note that count one charges the *solicitation* of a bribe, and the person supposed to be bribed was the governor, while count two charges the *asking* and *agreeing to receive* a bribe (not the receiving of it) and the person involved was Megladdery. So far as venue in Alameda county is concerned, whether such venue exists depends upon the participation of Geary, jointly indicted and tried with Megladdery, but found not guilty of all charges. There can be no doubt that the evidence introduced by the prosecution, if believed, tended to show that the essential elements of both crimes charged were committed by Megladdery in San Francisco. The original solicitation and agreement occurred in Bent's liquor tavern in San Francisco sometime in February, 1938. Megladdery was a patron of that tavern. Bent and Megladdery casually discussed the fact that Bent had a friend, Leddy, who was in San Quentin convicted of the crime of murder. Later the same evening Megladdery asked a waitress in the tavern, Mrs. Marr, if she thought Bent would be willing to give $1,000 for Governor Merriam's campaign if he, Megladdery, could get a pardon for Leddy. She said she would ask Bent, which she did. Bent told her that if Megladdery could get the pardon it would be worth $2,000 to him. Mrs. Marr so reported to Megladdery. Bent and Megladdery then discussed the matter alone. Bent testified that he told Megladdery that if Megladdery could obtain a pardon for Leddy he would put $2,000 into Merriam's campaign. Megladdery replied: "All right, I will see you later." Two weeks later Megladdery returned to the tavern and talked with Bent again about the pardon. Bent testified that Megladdery told him that an attorney was necessary, and recommended Geary, an Oakland attorney. Bent went to see Geary on March 1, 1938, the date set forth in the indictment as the date the crimes were committed. Megladdery's name was on the office door together with that of Geary. Bent testified that he told Geary that Megladdery had sent him to see him about the Leddy pardon. During the conversation Geary telephoned both Frank Cochran, another secretary of Merriam's and Megladdery. Geary's and Bent's stories differ as to what was said by each other, and what was said by Geary to the two secretaries. At any rate, Bent on that date paid Geary $750 in cash and received from Geary a receipt reciting payment "on acct. of Atty. fees in re commutation of sentence". Bent testified that he informed Geary of the understanding with Megladdery, and told him the $750 was part of the $2,000 agreed upon. Geary testified he had no knowledge of the Bent-Megladdery agreement; that, according to his understanding, Bent came to him upon the suggestion of Megladdery with the object of securing legitimate services of Geary as attorney in seeking a pardon for Leddy. Geary claims the $750 payment was on account of attorney fees for that legitimate purpose and was not part of the $2,000 agreed upon, of which he had no knowledge.

Subsequently, Megladdery saw Bent in San Francisco. Bent told him about seeing Geary and the payment of the $750 to him. Megladdery said that was all right but that he, Megladdery, needed some money. Bent then paid Megladdery $500 in San Francisco, and Megladdery gave him a receipt written on the back of Megladdery's official card reading as follows: "Received from Clarence Bent $500 Merriam campaign. Mark Lee Megladdery". Bent told Megladdery at that time that this meant he had paid $1,250 of the $2,000 agreed upon, leaving a balance of $750. Megladdery approved this statement of the account. There were other transactions in San Francisco and Sacramento not necessary to here recount. Some time later Megladdery saw Bent in San Francisco and told him to see Geary and get the money back he had paid to him. On April 5, 1938, Bent again visited Geary in Oakland. Again there is a dispute as to what the conversation was, but both Geary and Bent testified that Geary returned $500 of the $750 received, Geary retaining $250 as a fee for services rendered. Thereafter, in San Francisco and in Sacramento, Bent kept asking for the pardon and Megladdery kept asking for more money. The matter was delayed until near the end of the year when Bush, of the board of prison terms and paroles, visited Bent and secured a statement from him.

[29] It is clear from the above short recital of the facts that, although, according to the prosecution's evidence, both crimes charged in counts one and two of the indictment were committed, as to their essential elements, in San Francisco, under section 781 of the Penal Code as interpreted above sufficient acts were committed in Alameda county to give that county jurisdiction, if that testimony was believed by the jury and trial judge. This is so although Geary was found by the jury to be innocent. The rule is elementary and needs no supporting authority that a defendant may commit a crime although not personally present in the jurisdiction. This may be done through an agent—even an innocent agent. So far as the charge of *soliciting* a bribe is concerned, if Bent is to be believed, Geary (even though innocent) was acting as the agent of Megladdery in renewing or repeating the solicitation in Alameda county. So far as the asking and agreeing to receive a bribe is concerned, again the case is one where the "effects . . . requisite to the consummation of the offense" occurred in Alameda county within the meaning of section 781. Clearly, if Bent is to be believed, acts requisite to the achievement or end of the unlawful purpose occurred in Alameda county. If Bent's story on the new trial is believed by both the court and jury, the evidence will be sufficient to sustain the verdicts.

Respondent's seven grounds, independently of the question of venue, urged in support of the granting of the motion for a new trial.

In addition to the question of venue, respondent urges seven other grounds upon which the motion for a new trial could have been granted. These will be considered in the order urged by him.

[30, 31] 1. It is first urged that the verdicts of guilty on the two counts are inconsistent. It is contended that count one charges Megladdery with soliciting Bent to offer or join in an offer to bribe the then governor, in order to unlawfully influence *the governor* to grant a pardon to Leddy, while count two charges the asking and agreeing to receive a bribe from Bent to unlawfully influence *Megladdery* in connection with the Leddy pardon. There is no inconsistency between the two counts. In People v. Werner, 29 Cal.App.2d 126, 84 P.2d 168, relied upon by respondent, the facts were that the complaining witness was under indictment. The Werners attempted to obtain from him $2,500 under representations that the money would be used to bribe the chief deputy district attorney who was to prosecute the case. One count charged the defendants with having solicited the complaining witness to offer or join in an offer to bribe the chief deputy district attorney. This count was predicated on the theory that the representations were made by the defendants in good faith and that the money would be used for the purposes represented. The defendants were also convicted under another count of an attempt to commit grand theft. This count was predicated upon the theory that the representations were made in bad faith and that the $2,500 was to be converted by defendants to their own use. The appellate court held that the defendants could have had the intent to commit either of the crimes, but could not, by the same acts, have had the intention to commit both crimes—the two intents were necesssarily inconsistent. But that is not this case. This case falls under the rule, mentioned in the Werner case, supra, that a person may be convicted of two crimes growing out of one transaction when they constitute separate and distinct crimes. Here Megladdery was charged with, and the evidence if believed would have been sufficient to convict him of, two separate crimes—soliciting a bribe for the purpose of influencing the governor, and asking and agreeing to receive a bribe to influence his own official actions. The same acts were intended to corrupt both officials.

2. Respondent next contends that the trial court erred in instructing the jury as to when Alameda county has jurisdiction. The instruction in question is not as clear as might be desired. It somewhat confused the question of venue over the crimes charged in the conspiracy counts (counts 6 and 7) and the crimes charged in counts 1 and 2. As to whether the instruction is sufficiently confusing to have warranted the trial court in granting the motion for a new trial need not now be decided. Inasmuch as Megladdery was acquitted of the conspiracy charges, the same complaint will not arise on the new trial.

3. It is next urged that the second count of the indictment does not state a

public offense, and that respondent's demurrer to that count should have been sustained. The demurrer was based on the theory that count two of the indictment does not allege what the official duties of Megladdery as private secretary to the governor were, and does not allege that he had any duties at all in connection with pardons. So far as pertinent here, count two reads as follows: "that the said Mark Lee Megladdery, Jr. was then and there an executive and ministerial officer, employee and appointee of the State of California and was then and there the duly appointed, qualified and acting private secretary to the Governor of the State of California; that while the said Mark Lee Megladdery, Jr. was such executive and ministerial officer, employee and appointee of the State of California, as aforesaid, the said Mark Lee Megladdery, Jr. and Edwin W. Geary did then and there ask and agree to receive from one Clarence Bent a bribe, to-wit, Two Thousand Dollars ($2,000.00), more or less, lawful money of the United States, upon an agreement and understanding and with the corrupt intent that the opinion and action of the said Mark Lee Megladdery, Jr. upon a matter then pending and which might be brought before the said Mark Lee Megladdery, Jr. in his official and public capacity as aforesaid, should be unlawfully influenced thereby in the manner following, to-wit, that the said Mark Lee Megladdery, Jr. as such executive and ministerial officer, employee and appointee would approve, recommend, obtain and procure for one Clarence A. Leddy, a pardon from the Governor of the State of California and would use his influence to persuade the Governor of the State of California to grant a pardon to the said Clarence A. Leddy."

[32] Respondent contends that the crime of asking for, or agreeing to receive, a bribe can only occur when the act sought to be influenced is an act imposed by law as an official duty of the public officer involved, and that it is necessary to allege that the law imposed upon the defendant such official duty. This is a much too broad statement of the rule. It is sufficient to charge and prove that the subject matter upon which the bribe was to operate existed and could be brought before the public officer in his official capacity. The fact the duty is not specifically conferred upon the officer by statute is immaterial. People v. Markham, 64 Cal. 157, 30 P. 620, 49 Am.Rep. 700; People v. Mechler, 75 Cal.App. 181, 242 P. 503; Harris v. Superior Court, 51 Cal.App. 15, 196 P. 895; People v. Vincilione, 17 Cal. App. 513, 120 P. 438; Krichman v. United States, 2 Cir., 263 F. 538; United States v. Birdsall, 233 U.S. 223, 34 S.Ct. 512, 58 L.Ed. 930.

The indictment charges Megladdery with being an executive and ministerial officer of the state, that is, the private secretary to the governor, and that in that capacity he asked and agreed to receive from Bent a bribe with the intent that his action "upon a matter then pending and which might be brought before" him in his official capacity should be unlawfully influenced. This sufficiently charged the offense.

[33] 4. It is next urged that the evidence is insufficient to establish the charge set forth in count two of the indictment. This contention is largely based on the arguments urged in support of the contention that the indictment was defective, and for the same reasons is without merit. In addition, respondent points out that Governor Merriam testified that at no time that Megladdery was his private secretary was it ever a part of his duties to investigate, recommend, grant or procure pardons for any person—that it was the duty of another secretary to assist him with pardon applications. Obviously, the official duty of assisting the governor in this regard was imposed on the department of which Megladdery was a member and, if requested to do so, Megladdery could have performed the work of the secretary assigned to the duty of passing upon applications for pardons. That is all that is required under the above-cited cases. Any other rule would permit public servants to be false to their trust and still escape liability on the highly technical ground that the particular act for which the bribe was solicited, because of interdepartmental division of work, did not fall within the officer's particular functions, although he could be asked to perform that act at any time.

5. It is next urged that an instruction embodying respondent's theory in reference to the charge in count two was improperly refused. This contention is without merit for the reasons set forth in the discussion of points four and five.

[34] 6. It is next urged that the evidence was insufficient to warrant respondent's conviction on count one. This is the

count that charges Megladdery with soliciting Bent to offer or join in an offer of a bribe to the governor in the matter of the Leddy pardon. It is urged that nowhere in the record is there any evidence that Megladdery intended that Bent should bribe Governor Merriam, or that Bent ever understood that Governor Merriam was to be bribed. This is largely a matter of intent which must be gathered from the surrounding circumstances. Only Governor Merriam had the power of extending clemency to Leddy. The money was solicited not for Megladdery directly, but for Merriam's campaign fund. Megladdery guaranteed to Bent that if the contribution was made, the pardon would be granted. It is not charged that Merriam was corruptly influenced, simply that the money was solicited by Megladdery with that intent. From all of these and other circumstances, the jury could have inferred that the money was solicited to corruptly influence Governor Merriam, although there is no evidence that at the time he had any knowledge of the activities of Megladdery and Bent.

[35-37] 7. The next and last point urged is that the court erred in refusing to strike out certain testimony given by the witness Earl Warren. Warren was permitted to testify over respondent's objections concerning a conversation had with Megladdery on January 3, 1939. It is charged that the conversation was in the nature of an accusatory statement, that Megladdery denied the accusation, and that, therefore, it should not have been admitted. It is, of course, the rule that an out-of-court accusation, denied by the accused, is inadmissible. People v. Teshara, 134 Cal. 542, 66 P. 798; People v. Weber, 149 Cal. 325, 329, 86 P. 671; People v. Zoffel, 35 Cal.App.2d 215, 95 P.2d 160. But the proffered testimony here was not merely an accusation and a denial, but also a purported explanation by Megladdery. This statement contained many false, evasive and contradictory statements. The rule is clear that a statement by the defendant made in answer to an accusatory statement, containing not only a denial but also false and evasive statements, is admissible. The reason that a denied accusatory statement is refused admission is that the issue involved is the conduct of the accused in the face of the accusation. Where the accusation is denied, the accusation, which is merely admitted to explain the conduct of the accused, has no evidentiary force. But where the conduct of the accused in the face of the accusation is of evidentiary importance, such as where false and evasive replies are made together with a denial, the conduct of the accused is admissible as showing a consciousness of guilt and the accusation is admissible to explain that conduct. Such is this case. People v. Miller, 19 Cal.App.2d 708, 66 P.2d 448; People v. Zabriski, 135 Cal.App. 169, 26 P.2d 511; People v. Scott, 84 Cal.App. 642, 258 P. 638.

Conclusion.

In concluding this opinion we think it is proper to state that by affirming the order of the trial court, this court has not relied on technical rules to condone a miscarriage of justice, as contended by the attorney-general. It is a fundamental and sound doctrine of criminal law, adopted in order to prevent miscarriages of justice, that the trial judge has the power, and it is his duty, to weigh the evidence and to act as a thirteenth juror. As already pointed out, he has the power, and it is his duty, to override the verdict of the jury when, in his opinion, the evidence offered on some element of the prosecution's case is not convincing to him. In this case we must hold that the trial judge in the proper exercise of that function weighed the evidence, and, so far as it dealt with jurisdiction in Alameda county is concerned, found it was not sufficient to convince him. That is a matter solely within his power. This court is not permitted to overrule that discretion.

The order appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

16 Cal.2d 410

CASNER v. DAILY NEWS CO., Limited, et al.

S. F. 16076.

Supreme Court of California.

Oct. 15, 1940.

Rehearing Denied Nov. 13, 1940.

1. New trial ⇨159

Where trial court made no order disposing of motion for new trial, the motion was denied without court order. Code Civ.Proc. § 660.

2. Appeal and error ⇨110

Order denying motion for new trial was not appealable.

3. Appeal and error ⇨870(6)

Propriety of order denying motion for new trial could be inquired into on appeal from judgments entered in the case. Code Civ.Proc. § 956.

4. Dismissal and nonsuit ⇨81

Where an order vacating order of dismissal was entered, the cause of action stood as one pending and undetermined in the court, and procedure to be followed was a trial de novo. Code Civ.Proc. § 616.

5. Judgment ⇨197

Where defendants filed motions for directed verdict, but plaintiff dismissed without prejudice before motions were ruled on, and jury was dismissed, and subsequently defendants' motions to vacate order of dismissal were granted, and motions for directed verdicts were granted, judgment entered on the orders granting defendants' motions for directed verdicts were void because of absence of verdicts on which to base the judgments. Code Civ.Proc. § 616.

6. Appeal and error ⇨1074(1)

Where defendants filed motions for directed verdicts, but plaintiff dismissed without prejudice before motions were ruled on and jury was dismissed, and subsequently defendants' motions to vacate orders of dismissal were granted, error in causing judgments to be entered for defendants was prejudicial and resulted in a "miscarriage of justice", where there was no stipulation waiving a trial de novo or consenting to use of the record in the first trial, since judgments determined the issues that had not been tried. Code Civ.Proc. § 616; Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

7. Appeal and error ⇨356

Where notice of appeal was filed 78 days after entry of order vacating order of voluntary dismissal obtained by plaintiff, the appeal was required to be dismissed as not timely taken. Code Civ.Proc. § 939.

8. Appeal and error ⇨803

Where appeal from order vacating an order of voluntary dismissal obtained by plaintiff was not timely taken, the order remained in effect. Code Civ.Proc. § 939.

EDMONDS, J., and GIBSON, C. J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Cannie Casner against the Daily News Company, Limited, the Market Street Railway Company, and others, to recover for the wrongful death of plaintiff's husband from injuries sustained when run over by a street car after being thrown into its path by automobile. From judgments in favor of the named defendants plaintiff appeals.

Reversed.

For prior opinion, see 98 P.2d 537.

Rehearing denied; GIBSON, C. J., and EDMONDS, J., dissenting.

Freidenrich & Selig, Glikbarg, Wolf & Selig, Philip Barnett, and Francis Gill, all of San Francisco, for appellant.

William M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondents Market Street Ry. Co. and John Bartlett.

George M. Naus, and Donald Seibert, both of San Francisco, for respondents Daily News Co. Ltd., and William Cohn.

PER CURIAM.

Two appeals are here for disposition: (1) An appeal from a judgment for the defendant Market Street Railway Company, entered June 30, 1937, and (2) an appeal from a judgment for the defendant Daily News Company, Ltd., entered July 2, 1937.

Motions to dismiss these appeals on the ground that they were taken too late were denied. Casner v. Daily News Co., Ltd., 12 Cal.2d 402, 84 P.2d 1032. In the opinion on those motions, referring to the judgments appealed from herein, it was said at pages 405 and 406, of 12 Cal.2d, at page 1033 of 84 P.2d: "Whatever irregularity or illegality may have attended the action of the trial court in ordering the entry of judgments on a directed verdict after the discharge of the jury (questions which are, of course, not here decided), it is clear that the judgments so entered effectively terminated the trial proceedings in favor of the defendants * * *." It was held that the appeals had been taken in time and inferentially that they could not be disposed of on their merits on the motions to dismiss.

On the merits of the appeals it is clear that said judgments were erroneous and that the opinion of the District Court of Appeal, First Appellate District, Division Two, 98 P.2d 537, prepared by Mr. Justice Sturtevant, correctly disposes of the questions involved. That opinion is adopted as the opinion of this Court, as follows:

"As the surviving widow of Mark Casner, the plaintiff commenced an action for damages for his wrongful death. The complaint alleges that he was struck by an automobile owned by the defendant Daily News Company, thrown on the track of the defendant Market Street Railway Company and run over by one of its streetcars. The plaintiff sued both corporations. The trial was commenced in April, 1937, before the court sitting with a jury. After all parties had rested each defendant made a motion for a directed verdict. Before the motion was ruled upon the plaintiff moved to dismiss the action without prejudice. This motion was granted, whereupon and on the same day, April 7, 1937, the jury was discharged. On April 26th the defendants respectively served and filed notices of motion to vacate the order of dismissal and for orders that their motions for a directed verdict be granted. These motions were granted on June 28, 1937. A formal judgment for the defendant Market Street Railway Company, and against the plaintiff was, on written direction of the trial judge, filed on June 29th, and entered on June 30, 1937. Also a formal judgment for the defendant Daily News Company was, on like written direction of the trial judge, filed July 1 and entered on July 2, 1937.

[1] "On July 16, 1937, the plaintiff served and filed a notice of intention to move for a new trial, specifying all the statutory grounds. No order of the trial court disposing of this motion appears of record. It was therefore denied without order of the court under the provisions of section 660 of the Code of Civil Procedure.

[2, 3] "On September 14, 1937, the plaintiff filed a notice of appeal: (1) From the order of June 28, vacating the order of dismissal of date April 7, 1937; (2) from the judgment entered June 30; and (3) from the judgment entered July 2, 1937. The notice also specified an appeal from the order denying the plaintiff's motion for a new trial. As the order denying the motion for a new trial was not an appealable order, no further notice need be taken of the attempted appeal therefrom. However, its propriety may be inquired into on an appeal from the judgments. Sec. 956, Code Civ.Proc.

[4] "It is clear that no order directing a verdict was made and no verdict was rendered. When the order vacating the order of dismissal was entered, the effect was that the cause of action then stood as one pending and undetermined in said court. The procedure that should have been followed thereafter is set forth in section 616 of the Code of Civil Procedure. That section provides: 'When prevented from giving verdict, the cause may be again tried. In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.' By following such procedure the cause could have been completely determined on its merits.

[5] "However, instead of following the procedure so provided, the trial court heard motions for directed verdicts, granted the same, and caused judgments to be entered on said orders in favor of the defendants. The effect of a judgment rendered under similar circumstances was under consideration in Vitimin Milling Corp. v. Superior Court, 1 Cal.2d 116, 33 P.2d 1016. At page 119 of 1 Cal.2d, at page 1018 of 33 P.2d the court said: 'In the first place, it appears without dispute that, although a motion for a directed verdict as to the petitioner was made and noted by the minute order as "granted," no instruction to return a verdict was submitted to the jury; no request was made by the petitioner for an instruction to the jury to return a verdict; and no verdict was returned either by the jury, by the court, or at all, and there is no showing or intimation that the jury in this case would have refused to return a verdict for the petitioner, if it had been in-

structed so to do. That the court has the power to direct the jury to return a verdict in a proper case cannot be questioned. Nor is it disputed that the return of a verdict in such a case is a ministerial act. A verdict in any case must be in writing. Section 618, Code Civ.Proc. When the verdict is rendered, an entry thereof must be made in the minutes of the court. Section 628, Code Civ.Proc. As to these requirements there is no distinction between a verdict returned by the jury after deliberation and one returned by direction of the court. In each case the verdict serves as a basis for the entry of a judgment thereon. In the absence of a verdict entered as required by law, there is no finality to the proceedings. The order merely granting the motion for a directed verdict is not an appealable order. Section 963, Code Civ. Proc. And we know of no authority in law for the entry of a judgment which would, in the absence of a verdict, in any way constitute a judgment on a verdict. The purported judgment of May 4th was therefore void on the face of the record, and was properly set aside by the respondent judge.' For the same reasons it is clear that the judgments appealed from, that is, the formal judgments entered respectively on June 30, 1937, and July 2, 1937, were void.

[6] "The defendants state several facts that were present in the Vitimin case which they claim distinguish that case from this. Conceding that those facts do distinguish it, nevertheless the clear language contained in that case shows it did not rest on the facts which defendants call to our attention.

"The defendants assert the error, if any, in causing the judgments complained of to be entered, was not prejudicial. Const., art. VI, sec. 4½. However, we think that assertion cannot be sustained. When, on June 28, 1937, the order was made setting aside the order of dismissal, such order became effective at the moment it was entered and thereafter remained in force as an effective restoration of the cause as an action pending and undetermined in said court. Casner v. Daily News Co., Ltd., 12 Cal.2d 402, 405, 84 P. 2d 1032. The procedure to be followed was a trial de novo. Code Civ.Proc. sec. 616. No such new trial was had. No stipulation waiving a trial de novo or consenting to the use of the record in the first trial was entered into. Therefore the judgments appealed from determine issues that have never been tried. Such judgments are a miscarriage of justice. Palmer v. Tschudy, 191 Cal. 696, 703, 218 P. 36.

[7, 8] "On September 14, 1937, the plaintiff filed a notice of appeal from the order made June 28, 1937, vacating the order of dismissal. That is, the notice was filed seventy-eight days after the entry of said order. The appeal from that order was not taken in time. Code Civ. Proc., sec. 939. Therefore said order is still in effect. Casner v. Daily News Co., Ltd., supra. The appeal from that order is dismissed.

"The order denying a motion for a new trial is not an appealable order and the appeal from that order is also dismissed."

The foregoing is entirely in harmony with the holding in Vitimin Milling Corp. v. Superior Court, supra.

The case of Wells Fargo Bank & Union Trust Co. v. Broad, 3 Cal.App.2d 45, 39 P.2d 241, 242, relied on by the appellants, is easily distinguishable. There, at the conclusion of the evidence, the plaintiff moved for a directed verdict on the ground that under the admitted facts it was entitled to judgment. During the argument on the motion the court raised a point on which it concluded that the plaintiff could not recover, discharged the jury, and entered a minute order dismissing the action. About three months thereafter the order of dismissal was vacated on motion and the cause was set down for further hearing. No additional testimony was introduced and the court ordered judgment for the plaintiff as prayed. The facts appear to have been admitted. The order vacating the order of dismissal was held to have been an appealable order and, as no appeal had been taken therefrom, the order had become final. Necessarily the case was then pending and undetermined. The trial court very promptly set it down for further hearing. At the time so set the cause was apparently submitted to the court on the undisputed facts theretofore produced, and judgment was entered in accordance therewith. No motion for a directed verdict appears to have been granted. The District Court of Appeal held that the power of the court to order judgment for the plaintiff "was the same as if it had granted plaintiff's motion for a directed verdict". As no directed verdict had been granted, the case was not subject to the rules laid down in the Vitimin Milling Company case and approved in the present opinion.

Counsel for the defendants charge the District Court of Appeal with a misstatement of the record. It is boldly declared that the statement in the opinion which has been adopted that before the motion for a directed verdict was ruled upon the plaintiff moved to dismiss the action without prejudice is "wrong". The statement so denounced is copied verbatim from our opinion in Casner v. Daily News Co., Ltd., supra, and is a correct recital of the fact. The record shows on pages 308 and 309 of the reporter's transcript that it was during a recess of the court and at an informal conference between the judge and counsel in chambers that the judge stated that he would grant the motions. But upon the reconvening of court with the jury present, the plaintiff immediately and prior to the ruling on the motions for directed verdicts, made the motion to dismiss the action without prejudice, which was granted forthwith.

The judgments are reversed.

EDMONDS, Justice (dissenting)

I dissent.

Ordinarily, a dissenting opinion upon a question concerning procedure only adds uncertainty in a field where the profession's aim should be toward simplification. But the decision of the majority in the present case, it seems to me, gives a plaintiff rights which are not consistent with fair dealing and strikes down long established principles relating to the administration of justice.

The result is reached in this case by the application of the supposed rule that there can be no judgment rendered upon a directed verdict unless the jury actually proceeds, under compulsion of the court, to return the prescribed verdict. This rule is derived from certain language in the case of Vitimin Milling Corp. v. Superior Court, 1 Cal.2d 116, 33 P.2d 1016, quoted in the majority opinion. If on its facts that case were in point, I should be reluctant to question its controlling effect herein. However, as will be seen, not only are the facts of the two cases substantially dissimilar, but the proposition stated in the Vitimin Milling Corp. case is in flat conflict with expressions in prior decisions of this court and the District Court of Appeal, none of which was considered in the opinion. Under these circumstances the unreliability of the case as a precedent, and the confusion engendered in an important phase of our procedural law, justifies a reexamination of the point.

The governing principle received its first clear statement in the leading case of Estate of Sharon, 179 Cal. 447, 460, 177 P. 283, 289: "The direction to render a verdict in favor of one party is the decision by the court upon a question of law. Such decisions are within the exclusive province of the court. In giving a verdict upon such an order, the jurors do not exercise discretion, but act ministerially as the instrument by which the court prepares the record which will support the only judgment that can lawfully be given. They are no more at liberty to refuse obedience than is the clerk when he is directed to do the ministerial act of entering an order or judgment of the court. The verdict so signed by one of the jurors who is appointed as foreman by the court and who signs in obedience to the order, though in form the act of the jury, is really and in law the act of the court."

The square holding of the Sharon case is that since the jury have no authority in the matter, and act only mechanically or ministerially to carry out the order of the court, it is the order of the court which is legally significant and not the act of the jury. The failure or refusal of the jury to act cannot affect the power of the court; and if the jury will not bring in a verdict, the court may give judgment without their assent. The absence of a written verdict in such a case is at most a defect of form; and where the absence is a result of contumacious refusal by the jury, it is not a defect at all, since the court has full power to give the necessary judgment. Subsequent decisions have followed this reasoning and have applied the rule without any question. Thus, in Umsted v. Scofield Engineering Construction Co., 203 Cal. 224, 226, 263 P. 799, the court made a special finding on the basic issue, and entered judgment against plaintiff on the finding, without directing a verdict. We said: "Although the court below did not follow the procedure generally adhered to in such cases and direct the jury to bring in a verdict for the defendant, which would serve as the basis for its judgment, a judgment entered by the court upon the basis of a special finding, where the court is of the opinion that the state of the evidence is such that there is only one judgment which can lawfully be rendered, is to be given the same effect as a judgment entered by the court upon a directed verdict. Without regard to the procedure followed, the determination is, in law, the act of the court." A similar situation was presented in Engelberg v. Sebastiani, 207 Cal. 727, 729, 279 P. 795, 796, where the court ordered that interest be added to the judgment, without submitting the matter to the jury. We declared that "since the jury would be without right to disregard the court's direction, which would leave them no discretion in the matter, it can make no substantial difference to defendant whether interest is added to the judgment by the verdict of the jury rendered pursuant to the direction of the court, or by the court instructing the clerk to enter judgment for the amount of the verdict plus interest".

The District Courts of Appeal, in a number of recent decisions, have spoken unequivocally to the same effect, namely, that the court may enter judgment where a directed verdict is proper, irrespective of whether the jury actually returned the verdict. Seperman v. Lyon Fire Proof Storage Co., 97 Cal.App. 654, 656, 275 P. 980; Reay v. Reay, 97 Cal.App. 264, 275 P. 533; Wells Fargo Bank & Union Trust Co. v. Broad, 3 Cal.App.2d 45, 39 P.2d 241. Many cases from other jurisdictions are to the same effect. See Duluth Chamber of Commerce v. Knowlton, 42 Minn. 229, 44 N.W. 2; Dubuque Fruit Co. v. C. C. Emerson & Co., 201 Iowa 129, 206 N.W. 672; Gammon v. Abrams, 53 Wis. 323, 10 N.W. 479; Marion v. Home Mutual Ins. Assn., 205 Iowa 1300, 217 N.W. 803; see Bee Building Co. v. Dalton, 68 Neb. 38, 93 N.W. 930, 4 Ann.Cas. 508; Kirshenbaum v. Massachusetts Bonding & Ins. Co., 107 Neb. 494, 186 N.W. 529; Schaffer v. Deemer Mfg. Co., 108 Miss. 257, 66 So. 736; Houston v. Holmes, Tex.Civ.App., 262 S.W. 849; Zachary v. City of Uvalde, Tex.Com.App., 42 S.W.2d 417; Consolidated Gold, etc., Co. v. Struthers, 41 Mont. 565, 111 P. 152.

All of these cases recognize that the normal procedure is for the jury to return the directed verdict, and that to enter judgment without it is irregular. But they refuse to give to this formal irregularity the effect of destroying an otherwise proper judgment, and in so deciding they follow the universally accepted doctrine that immaterial errors of form which do not go to the merits of the proceeding may be disregarded in the interest of justice.

The opinion in Vitimin Milling Corp. v. Superior Court does not purport to overrule any of these decisions, and the broad statement of the rule laid down in that case must, in the light of the background of authority and principle, be deemed inadvertent, particularly in view of the peculiar facts of that case and the other independent ground of decision. The proceeding was one in prohibition to restrain the Los Angeles superior court from proceeding further with the trial of an action. The original action was brought against a number of defendants, including petitioner, and went to trial in department 11 of the Los Angeles superior court. On January 18, all defendants moved for directed verdict. The court granted the motion as to petitioner, entered a minute order to this effect, and denied it as to the other defendants. On that same day the jury retired for deliberation, reported inability to agree, and thereupon, by *stipulation,* they were discharged and a mistrial ordered. On January 20 the court signed and filed an order that the motion for directed verdict on behalf of petitioner "be granted". On May 3, the cause came on for retrial as to all defendants before respondent judge in department 16. On May 4, while this retrial was in progress, the judge sitting in the other department (No. 11) signed and filed a judgment for petitioner reciting the prior granting of the directed verdict in its favor. Counsel for petitioner, in the trial in department 16, then objected to any further evidence as to his client, claiming that the judgment in its favor was res judicata. Counsel for plaintiff in the action then moved to set aside this judgment of May 4 on the ground, among others, that the jury had not returned a verdict in favor of petitioner. The court granted this motion and continued the trial until May 22. Thereafter, on May 10, 1933, the judge in department 11 sought to remedy the situation by filing a nunc pro tunc order correcting the original order granting mistrial to read that it was ordered as to all defendants except petitioner. Petitioner, relying upon this nunc pro tunc order, then sought a writ of prohibition in the District Court of Appeal to restrain the trial in department 16. The matter was heard on demurrer, and a peremptory writ ordered. A hearing was granted in this court, and the writ was denied.

The above recital shows the unusual and peculiar complications which were involved in the Vitimin Milling Corporation case, and not in the instant case: for example, the fact that the directed verdict was given only for one defendant among several, and was followed by a discharge of the jury by stipulation of all parties; the fact that two different judges sitting in two separate departments were both attempting to act in the matter at the same time; and the fact that the case did not involve an appeal on the merits, but an application for the extraordinary remedy of prohibition. These differences are important in any attempt to appraise the language of the opinion. A different situation would have presented if the entire matter had, as in this case, been before a single department and judge, without the complicating factor of an attempt by a judge of one department, by a nunc pro tunc order, to interfere with the actual trial of a case in another department. See Williams v. Superior Court, 14 Cal.2d 656, 96 P.2d 334, where this court recently declared that it was beyond the jurisdiction of one department to interfere with another. And entirely different considerations govern the issuance of a writ of prohibition and the determination of an appeal. It was by no means clear that department 16 had no *jurisdiction* to continue in the trial of a case regularly assigned and then in progress, merely because the judge in department 11 belatedly made a nunc pro tunc order clarifying the former confusion in the procedure; and reluctance to issue the extraordinary writ of prohibition in such a situation is understandable and justifiable. This is indeed the important ground for the decision in the Vitimin Milling Corporation case, as the court itself states: "The second reason why the petition herein must be denied is that the respondent court has jurisdiction of the parties, including the petitioner, and of the subject-matter of the action. Pleas of res judicata and estoppel are defensive matter, and the respondent court has jurisdiction to determine the merits thereof when interposed properly by pleading or proof. United Security, etc., Co. v. Superior Court, 205 Cal. 167, 270 P. 184; Baird v. Superior Court, 204 Cal. 408, 268 P. 640; 21 Cal.Jur., p. 583. Any alleged error in ruling upon the plea would be reversible on appeal. This alone would be sufficient ground upon which to deny this petition, but since the other questions are in the case, they have been determined for the guidance of the trial court."

This very language of the Vitimin Milling Corporation case suggests the appropriate result in the instant case. This is an appeal, not a proceeding in prohibition; the merits are before us here, and in an appeal on the merits we are bound, both by our Constitution, art. VI, sec. 4½, and by settled principles of practice, to disregard formal, immaterial errors in the proceedings below and to affirm judgments which are substantially correct.

Quite apart from the foregoing considerations is another and compelling reason for affirmance of the judgment herein. If the ordinary practice had been followed, the court below, after announcing its determination to grant the motions of defendants for directed verdict, would have ordered the jury to return such a verdict, and the jury would have acted accordingly. Defendants made every effort to follow this ordinary practice, and were guilty of no neglect of any kind. How, then, could they lose the benefit of the trial and its successful termination in their favor?

It makes little difference, in this connection, whether we decide that the trial court had actually granted the motions for directed verdict, or signified his intention of granting them, or merely indicated that he looked favorably upon them. Voluntary dismissal by the plaintiff in any of these situations is entirely inappropriate.

If the proposition were baldly stated that a plaintiff may bring a cause to trial, and go through the entire presentation of the case for both sides, and then, suspecting or learning of a probably adverse decision, may with impunity dismiss the suit and commence all over again, it would cause the greatest astonishment among the bench and the bar. The gross injustice to the defendant in such a situation is obvious: he is amenable to an adverse judgment, but a judgment in his favor may be snatched away from him by alert counsel for his opponent after all the effort and expense of a trial. But the injustice to the defendant is not the greatest evil of such a practice; the wasting of the time and money of the people in a fruitless proceeding in the courts is something far more serious.

So obvious is the policy involved that it seems hardly necessary to discuss it; but it should be noted that courts, both here and elsewhere, have expressed themselves strongly on this precise point. In Rutherford v. Peppa, 53 Cal.App. 309, page 311, 199 P. 1111, the court said: "We shall dispose first of the contention of appellant that the court had no power to render a judgment in favor of the defendant in view of the fact that the plaintiff had filed a dismissal of the action before judgment. Section 581, Code of Civil Procedure, relied upon by appellant, provides that the plaintiff may dismiss his action at any time before trial. But in the present case the dismissal was not filed until the plaintiff's evidence was in and defendant had submitted the case, and the court had stated what its ruling would be on the evidence. At that time it was too late for the plaintiff to dismiss his action. Floody v. Great Northern R. Co., 104 Minn. 517, 116 N.W. 107, 932; Judge of Probate v. Abbot, 13 N.H. 21; Cohn v. Rumely, 74 Ind. 120; Walker v. Heller, 56 Ind. 298; Ann.Cas. 1913D, 525, note. The trial court had clearly stated its intention to find for the defendant and had granted the motion for a nonsuit when the plaintiff attempted to dismiss his action. The rule contended for by plaintiff would work a hardship on a defendant and subject him to endless litigation in cases where the trial court had decided that there was no merit in the action. We are therefore of the opinion that the trial court had the power to render a judgment despite the attempted dismissal by the plaintiff, which came too late."

The court in Yarn v. Ft. Dodge, etc., R. Co., 8 Cir., 31 F.2d 717, 720, was even more emphatic: "The practice of first ascertaining the views of the court, after a fair trial, and then dismissing and suing again, if such views are adverse, should not be encouraged. * * * The courts are not organized for the purpose of permitting the plaintiff in an action to experiment with a certain state of facts for the purpose of ascertaining the opinion of the court as to the law applicable to the same and then permit him to withdraw from the scene of conflict and state a new cause of action and mend his licks in another direction. Such policy, if adopted, would be productive of much mischief and should not be tolerated." Many other cases are to the same effect.

I think it is most unfortunate that support should be given to such maneuvers by the present decision of this court.

I concur: GIBSON, C. J.

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41 Cal.App.2d 206

PLECITY et al. v. KEILLY et al.

Civ. 12578.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1940.

1. Appeal and error ⚷786, 1126

Motion to dismiss appeal or affirm judgment on grounds that appeal was taken for delay and questions on which a decision of cause depended were so unsubstantial as not to need further argument was required to be denied, in view of abrogation of court rule authorizing dismissal of appeal, or affirmance of judgment on the grounds relied on in the motion. Rules for Supreme Court and District Courts of Appeal, rule 5, § 3.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Barbara Plecity and others against David I. Keilly and another. From an adverse judgment, the named defendant appeals. On motion to dismiss the appeal or affirm the judgment.

Motion denied.

Harrison Weil and Donald E. Ruppe, all of Los Angeles, for appellant.

A. P. Michael Narlian, of Los Angeles, for respondents.

McCOMB, Justice.

Respondents move to dismiss the appeal or affirm the judgment on the grounds *that the appeal was taken for delay and that the questions on which a decision of the cause depends are so unsubstantial as not to need further argument.*

Prior to November 1, 1939, rule V, section 3 of the Rules for the Supreme Court and District Courts of Appeal (213 Cal. xliii) provided for the dismissal of an appeal or the affirmance of a judgment on the grounds of the present motion. However, September 29, 1939, the judicial council abrogated the section of rule V just mentioned, effective as of November 1, 1939. Taylor v. Parsons, Cal.App., 102 P.2d 1096.

Therefore, the present motion is not well taken and is denied.

We concur: MOORE, P. J.; WOOD, J.

41 Cal.App.2d 226

PEOPLE v. GORDON.

Cr. 3344.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1940.

Hearing Denied Nov. 15, 1940.

Criminal law 🔑507(5)

In prosecution for receiving stolen property, where the principal witness against accused was the thief who stole the property, witness' testimony was not required to be corroborated to sustain conviction, since one who receives stolen property is not an "accomplice" of the thief within the statute requiring corroboration of testimony of an accomplice. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

John A. Gordon was convicted of receiving stolen property, and from a judgment of conviction and an order denying a motion for new trial, he appeals.

Affirmed.

Ames Peterson, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

Hearing denied; CARTER, J., dissenting.

McCOMB, Justice.

From a judgment of guilty of receiving stolen property, after trial before a jury, and from an order denying his motion for a new trial, defendant appeals.

Viewing the evidence most favorable to the People (respondent), the essential facts are:

Defendant purchased a model A 42 hydraulic jack from Perry A. Heywood, who had stolen the same from a service station belonging to the Shell Oil Company. Said Perry A. Heywood was the principal witness against defendant.

Defendant relies for reversal of the judgment on this proposition:

Since the principal witness against him was the thief who stole the property which defendant purchased, such witness was an accomplice, and in order to sustain a conviction the testimony of such witness must under section 1111 of the Penal Code be corroborated.

This proposition is untenable. The law is established in California that one who receives stolen property is not an accomplice of the thief within the rule set forth in section 1111 of the Penal Code requiring corroboration of the testimony of an accomplice. People v. Williams, 7 Cal. App.2d 600, 46 P.2d 796.

No other error being urged or appearing in the record, the judgment and order appealed from are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

HOLLY SUGAR CORPORATION v. McCOLGAN, Franchise Tax Commissioner. *

Civ. 11140.

District Court of Appeal, First District, Division 1, California.

Oct. 23, 1940.

Rehearing Denied Nov. 22, 1940.

Hearing Granted Dec. 19, 1940.

1. Constitutional law 🔑48

In construing a statute, court must give it that construction which will uphold it, if possible.

2. Constitutional law 🔑48

In absence of compelling language to the contrary, court must assume that Legislature only intended to tax that portion of a foreign corporation's business that Legislature constitutionally could tax. St.1929, p. 21, § 7; St.1933, p. 687, § 8(d); St.1931, p. 2226, § 10.

3. Taxation 🔑165

Under Bank and Corporation Franchise Tax Act imposing franchise tax measured by income for preceding year, Legislature intended to tax that portion of income of business of a foreign corporation fairly attributable to business done within state. St. 1929, p. 21, § 7; St.1933, p. 694, § 6; p. 687, § 8(d); p. 870, § 4; St.1931, p. 2226, § 10.

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* Subsequent opinion 115 P.2d 8.

4. Taxation ⚷397

Under Bank and Corporation Franchise Tax Act, a foreign corporation whose principal place of business was in Colorado, but which qualified to do business in California and was engaged in business of growing sugar beets and refining and marketing sugar therefrom, was not entitled to deduct a loss sustained in purchase and sale of stock of a California sugar corporation, in absence of allegation that stock had acquired a situs in California, or that purchase or sale of stock was attributable to or in any way connected with portion of business carried on by foreign corporation in California. St. 1929, p. 21, § 7; St.1933, p. 687, § 8(d); St. 1931, p. 2226, § 10.

5. Taxation ⚷20, 104

A state has no power to tax income of nonresident or income of foreign corporation with its principal place of business elsewhere, when such income is properly attributable to business or property located in another state. U.S.C.A.Const. Amend. 14.

6. Taxation ⚷397

When foreign corporation is engaged in business both inside and outside taxing state, and is engaged in a unitary indivisible business, then taxing state, in arriving at amount of franchise tax measured by income, may treat entire income as a unit, and may apply thereto a formula fairly designed to allocate to taxing state portion of income fairly attributable to business done in that state. U.S.C.A.Const. Amend. 14.

7. Taxation ⚷397

If a foreign corporation, with principal place of business not in taxing state, earns income or suffers a loss from transaction not integrally connected with or attributable to business done in taxing state, such income or loss cannot, in determining amount of franchise tax measured by income, be included in tax base, nor may any portion thereof be allocated to taxing state, nor may a formula be applied that includes it within such formula, but such income must be allocated to that state that has jurisdiction to tax under the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

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Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Holly Sugar Corporation against Charles J. McColgan, as Franchise Tax Commissioner, substituted in the place and stead of Charles G. Johnson, as Treasurer of the state of California, to recover a portion of plaintiff's franchise tax, wherein defendant filed a demurrer. From a judgment for defendant upon sustaining of the demurrer, plaintiff appeals.

Affirmed.

Hearing granted; TRAYNOR, J., not participating.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys.-Gen., for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action to recover from the state a portion of its franchise tax in the amount of $6,100.58, paid under protest. From a judgment entered upon the sustaining of a demurrer to the complaint plaintiff prosecutes this appeal.

The plaintiff is a New York corporation with its principal place of business in Colorado. It is qualified to do business in California and other states. Its principal business consists of growing sugar beets and marketing and refining the sugar therefrom. The action involves the computation of the corporation franchise tax properly due from plaintiff for the taxable year ending March 31, 1935. Under the terms of the act the tax is measured by the income of the preceding taxable year. The problem involved is whether the corporation may properly deduct certain losses arising out of a stock transaction. The complaint alleges that prior to January 1, 1928, plaintiff acquired 4173.4 shares of the capital stock of the Santa Ana Sugar Company, a California corporation, at a cost of $1,808,253. The number of shares so purchased constituted 70 per cent of the total outstanding capital stock of the Santa Ana Sugar Company. After the purchase of this stock the plaintiff "controlled the policies and operations of the said Santa Ana Sugar Company". On May 1, 1928, the Santa Ana Sugar Company paid a dividend of $111,188.24, and thereby reduced, for franchise tax purposes, the cost of the shares of that company to $1,697,064.76. During the fiscal year here under consideration the Santa Ana Sugar Company was completely liquidated and plaintiff received as a liquidating dividend $530,191.17. Thus, the plaintiff suffered a net loss of $1,166,873.59. The franchise tax commissioner refused to consider this loss in computing the tax. It is the contention of appellant that this loss, under the terms of the franchise tax act, should have been deducted from the net profit of its entire business.

So far as pertinent here, the Bank and Corporation Franchise Tax Act, Stats. 1929, p. 19, as it read at the times here pertinent, provided in section 4, Stats. 1933, p. 870, that every financial corporation of the class to which appellant belongs doing business in this state, must pay to the state for the privilege of exercising its corporate franchises in this state "a tax according to or measured by its net income", computed as provided in the act. Section 6, Stats. 1933, p. 694, provided that the term "gross income" as used in the act "includes gains, profits and income derived from the business, of whatever kind and in whatever form paid". Subdivision (c) of this section excludes from gross income that income derived from stock dividends or subscription rights, but provides "but gain may be derived or loss sustained by the shareholders from the sale of such stock or the sale of such rights". Section 7 as originally enacted, and as it read at the times involved herein, provided that the term "net income", as used in the act, "means the gross income less the deductions allowed". Section 8, Stats. 1933, p. 687, sets forth the allowable deductions. Subdivision (d) of this section provides for the deduction of "uncompensated losses". So far as pertinent here, it provides that the taxpayer may deduct "Losses sustained during the taxable year and not compensated for by insurance or otherwise, * * *." The balance of the section provides for so-called "wash sales". Section 10, Stats.1931, p. 2226, provided for the "Computation of tax on intrastate business", and then read:

"If the entire business of the bank or corporation is done within this state, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this state, the tax shall be according to or measured by that portion thereof which is derived from business done within this state. The portion of net income derived from business done within this state, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation. Income from intangible personal property which is not deductible under the provisions of subsection (h) of section 8 hereof shall be subject to allocation.

"If the commissioner reallocates net income upon his examination of any return, he shall, upon the written request of the taxpayer, disclose to him the basis upon which his reallocation has been made."

[1-4] The question thus presented is whether, under this act, the plaintiff being a foreign corporation with its principal place of business in Colorado, but qualified to do business in this state, engaged in the business of growing sugar beets and refining and marketing the sugar therefrom, is entitled to deduct a loss sustained in the purchase and sale of stock of a California corporation, in the absence of an allegation that the stock had acquired a situs here, or in the absence of an allegation that the purchase or sale of the stock was attributable to, or in any way connected with, the portion of the business carried on in California? This is primarily a question of statutory construction. But, in construing the statute we must give it that construction which will uphold it, if possible. In the absence of compelling language to the contrary, we must assume that the legislature only intended to tax that portion of a foreign corporation's business that it constitutionally could tax. When these rules are applied to the problem here presented, the conclusion necessarily follows that the claimed deduction was properly disallowed. Section 10, supra, expressly limits the tax, when the entire business of the corporation is not done in this state, to the income from that portion of its business "derived from business done within this state". In computing the tax due from a foreign corporation with its principal place of business elsewhere, if the income due solely from its California business can be readily ascertained, that is the end of the state's power. But the section recognizes that it may not always be possible to segregate the portion of the income of the business of a foreign corporation with its principal place of business elsewhere, earned in any one state, and provides in such a case for the application of a formula in order to ascertain "the portion of net income reasonably attributable to the business done within this state". Obviously, what the legislature was trying to do, and did do, was to tax that portion

of the income of the business of foreign corporations fairly attributable to business done in this state. That, clearly, is the ultimate aim of the statute. Thus, if a foreign corporation, with its principal place of business outside of this state, ran one business in this state and an entirely different business in another state, the determination of the portion of its income attributable to business done in this state would be a simple matter. No formula would have to be applied. No portion of the foreign income would have to be included to ascertain the ultimate fact—the portion of its income derived from business done in this state. But, if the business were a unitary business, such as where a foreign corporation with its principal place of business elsewhere grows sugar beets in one state and refines and markets the sugar in this state, it is impossible to tell accurately how much of its net profit is due to the activities in the foreign state, and how much to its activities here. In that event the commissioner is authorized to take the entire net income and apply thereto a formula "fairly calculated" to assign to this state "the portion of net income reasonably attributable to the business done within this state". That is exactly what was done in this case to that portion of income of this appellant that could not be segregated. But, where a foreign corporation, with its principal place of business elsewhere, engages in a transaction outside of this state, a transaction independent and separate from its ordinary business, and a transaction that has no connection with its business done in this state and which can readily be segregated therefrom, the profit from such transaction cannot be taxed under section 10, supra, nor can losses be deducted from the income earned in the unitary business. That is exactly the situation here presented. The complaint alleges that plaintiff is a New York corporation with its principal place of business in Colorado, and that the business of this corporation consists of the growing of sugar beets and the marketing and refining of sugar. That, obviously, is a unitary business and the formula principle necessarily would have to be applied to ascertain the portion of net income fairly attributable to business done in California. Then the complaint alleges that the corporation engaged in an entirely separate transaction—it bought the stock of a California corporation, and suffered a loss on this transaction in the taxable year. There is no allegation that the sale of this stock was integrally connected with the ordinary business of the company, or that it was tied up with any portion of its business done in California. Nor is there an allegation that the stock had acquired a business situs in California. So far as the complaint discloses, this was a separate and distinct transaction from its California business. Without such allegations the profits from it could not be taxed, nor can losses sustained be deducted.

[5-7] This construction of section 10, supra, is reasonable and sensible. Moreover, to construe the section in any other fashion would violate fundamental principles of taxation, and would probably render the statute unconstitutional. It is elementary that a state has no power to tax income of a nonresident or income of a foreign corporation with its principal place of business elsewhere, when such income is properly attributable to business or property located in another state. Hans Rees' Sons v. North Carolina, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879. It is also well-settled that when a foreign corporation is engaged in business both inside and outside the taxing state, and is engaged in a unitary indivisible business, then the taxing state may treat the entire income as a unit, and may apply thereto a formula fairly designed to allocate to the taxing state the portion of the income fairly attributable to business done in that state. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165; Bass, Ratcliff & Gretton, Ltd., v. Tax Comm., 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282. But, the converse is equally true. If a foreign corporation, with its principal place of business not in the taxing state, earns income or suffers a loss from other than its unitary business—i. e., from a transaction not integrally connected with, or attributable to, the business done in the taxing state—then such income or loss cannot be included in the tax base, nor may any portion thereof be allocated to the taxing state, nor may a formula be applied that includes it within such formula. Such income must be allocated to that state that has jurisdiction to tax under the Fourteenth Amendment. The taxing state, in such example, has no such jurisdiction. Fargo v. Hart, 193 U.S. 490, 24 S.Ct. 498, 48 L.Ed. 761; Meyer, Auditor of Oklahoma v. Wells, Fargo & Co., 223 U.S. 298, 32 S.Ct. 218, 56 L.Ed. 445; Peo-

ple v. Knapp, 230 N.Y. 48, 129 N.E. 202; California Packing Corporation v. State Tax Comm., 97 Utah 367, 93 P.2d 463.

From what has been said it is clear that the complaint fails to state a cause of action.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

41 Cal.App.2d 70

MORTON et ux. v. MANHATTAN LUNCH CO.

Civ. 11423.

District Court of Appeal, First District,
Division 2, California.

Oct. 8, 1940.

Hearing Denied Dec. 5, 1940.

1. Negligence 🔑32(1)

The ground of liability of an owner or occupant of premises to an invitee for injuries occasioned by unsafe condition of premises is the owner's or occupant's superior knowledge of perilous instrumentality and danger therefrom to persons going upon premises, and when perilous instrumentality is known to owner or occupant and not known to invitee, recovery against owner or occupant for injuries received by invitee is permitted.

2. Negligence 🔑32(1), 66(2), 80, 121(1), 122(1), 134(2)

In action by invitee against owner or occupant of premises for injuries occasioned by unsafe condition of premises, recovery cannot be had when owner or occupant has no knowledge of danger, where invitee has such knowledge, where danger is obvious, or where invitee is guilty of contributory negligence, but it is not necessary to recovery that invitee prove all of such elements or that he prove any one of them by direct and positive evidence, proof of circumstances from which a reasonable inference may be drawn being sufficient.

3. Negligence 🔑134(7)

In invitee's action against occupant of premises upon which occupant operated a restaurant for injuries allegedly sustained in fall while invitee was descending stairway from rest room, proof that dangerous condition of premises was of long standing and was known to occupant supported inference that occupant was negligent.

4. Negligence 🔑121(1), 134(2)

To prove negligence, plaintiff must rely upon application of inferences and presumptions, and inferences constitute a recognized class of indirect evidence which is as satisfactory evidence of ultimate fact to be proved as is direct and positive evidence of such fact.

5. Negligence 🔑134(3)

When uncontradicted evidence fairly and reasonably justifies inference that owner or occupant of premises was negligent in permitting their use by an invitee notwithstanding his knowledge of their dangerous condition, a condition which was not obvious and was not known to invitee, owner or occupant is liable for injury resulting to invitee.

6. Negligence 🔑122(2), 134(11)

Where invitee, in action against occupant of premises for injuries received in fall which occurred while invitee was descending stairway, proved dangerous condition of stairway, that such condition was known to occupant and was not known to invitee, and that condition was not an obvious danger, and there was no evidence of contributory negligence, and invitee proved that fall upon stairs was cause of injuries, invitee was entitled to presumption that she had exercised due care in walking down stairs, and hence inference that occupant's negligence in maintenance of stairway was "proximate cause" of injuries was warranted and justified verdict for invitee.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

7. Appeal and error 🔑996

When jury draws from facts proved the inferences which would support verdict, and when trial judge in denying motion for new trial permits verdict to stand, appellate court cannot disturb judgment by drawing other inferences which to appellate court may seem reasonable.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Edward J. Morton and wife against the Manhattan Lunch Company for personal injuries allegedly received by Mrs. Morton when she fell while descending a stairway on premises upon which defendant operated a restaurant. From a judgment upon the verdict in favor of plaintiffs for $1,750, defendant appeals.

Affirmed.

Victor Hyatt, of Los Angeles, and John H. Fleming, of San Francisco, for appellant.

Ernest I. Spiegl, of San Francisco, for respondents.

NOURSE, Presiding Justice.

The defendant has appealed from a judgment upon the verdict in favor of plaintiff for $1,750.

The defendant was the occupant of premises upon which it operated a restaurant. Plaintiff entered the place for lunch, and, after eating, went up a stairway leading to a mezzanine floor to reach the rest room. This stairway was three feet, six inches wide, equipped with a handrail on each side. The steps were covered with linoleum held in place by brass strips fastened by screws or brads to form a nose for each tread. Some of these brass strips had become worn from use, causing them in places to be elevated above the linoleum about three-sixteenths of an inch. As plaintiff was returning down the stairs her foot caught in some obstruction at about the second or third step from the top, and the resulting fall brought about her injuries.

The defendant and appellant contends that there was no evidence showing any negligence on its part which was a proximate cause of respondent's injuries. The direct evidence of negligence is extremely meager, and the verdict must depend to a large extent upon the inferences coming from this evidence. Proof was made of the dangerous condition of the stairway; that this was known to the owner through knowledge of an employee; was not known to the respondent; and was not an obvious danger. There was no evidence of contributory negligence on the part of respondent. The question is left whether the inferences coming from these facts were sufficient to support the judgment.

[1-3] The liability of the owner or occupant of premises to an invitee for injuries occasioned by the unsafe condition of the premises is fully discussed in 20 Ruling Case Law at page 57. It is there said that: "The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted." Hence, a recovery cannot be had when the owner or occupant has no knowledge of the danger, where the plaintiff has such knowledge, where the danger is obvious, or where the plaintiff is guilty of contributory negligence. Kessler v. Cudahy Packing Co., 38 Cal.App.2d 607, 102 P.2d 362.

It is not necessary to recovery that the plaintiff prove all these elements, or that he prove any one of them by direct and positive evidence. Proof of circumstances from which a reasonable inference may be drawn is sufficient. Hamilton v. Pacific Electric Ry. Co., 12 Cal.2d 598, 602, 86 P.2d 829. Thus proof that the dangerous condition of the premises was of long standing and was known to the owner, or occupant, supports the inference that he was negligent. This inference of negligence is the more forceful when it follows the proof that the danger was not obvious, and was not known to the party injured.

[4-6] Such are the inferences which might well have been drawn here upon the undisputed facts proved. The ultimate fact of negligence is one which cannot be proved by direct and positive evidence. The "fact" of negligence is but an inference drawn from the facts proved, unless it is the result of one of the established presumptions. 20 R.C.L., p. 181. Hence, to prove negligence, the plaintiff must rely upon the application of these inferences and presumptions. These inferences constitute a recognized class of indirect evidence which is just as satisfactory evidence of the ultimate fact to be proved as is direct and positive evidence of that fact. The evidentiary character of an inference such as those mentioned herein is fully discussed in the Hamilton case, supra, and, from the authorities there cited, it must be taken as settled that, when the uncontradicted evidence fairly and reasonably justifies the inference that the owner or occupant of the premises was negligent in permitting their use by an invitee notwithstanding his knowledge of their dangerous condition—a condition which was not obvious and was not known to the invitee—he is

liable for the injury resulting. Having proved by these inferences the negligence of the appellant in the maintenance of the premises, and having proved the fall upon the stairs was the cause of her injuries, the respondent was entitled to the presumption that she had exercised due care in walking down the stairs, and hence the inference reasonably followed that appellant's negligence in the maintenance of the stairway in the manner shown was the proximate cause of the injuries.

[7] It is equally well settled that when the jury draws from the facts proved the inferences which would support the verdict and when the trial judge in denying a motion for new trial permits the verdict to stand, the appellate court may not disturb the judgment by drawing other inferences which to the appellate court may seem reasonable. 10 Cal.Jur., p. 735 et seq.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

41 Cal.App.2d 249

PEOPLE v. GOMEZ.

Cr. 3352.

District Court of Appeal, Second District, Division 2, California.

Oct. 21, 1940.

1. Criminal law ⇨741(6)

The function of the jury is to draw reasonable inferences from circumstantial evidence.

2. Criminal law ⇨1159(2)

If circumstances reasonably justify verdict of jury, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of jury.

3. Homicide ⇨254

Evidence warranted conviction for second-degree murder on ground that death resulted from abortion caused by criminal act of defendant.

4. Abortion ⇨11

Evidence warranted conviction for abortion on ground that abortion was caused by criminal act of defendant.

5. Abortion ⇨6

In abortion prosecution under indictment charging in language of statute that defendant did "use and employ an instrument or other means upon the person", prosecution was not compelled to prove that instrument had been actually used by defendant, but it was sufficient to establish that some means was used by defendant to procure the miscarriage. Pen.Code, § 274.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Maria Lopez Gomez was convicted for abortion and second-degree murder, and she appeals.

Affirmed.

Ward Sullivan, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Appellant was charged in count I of the information with the crime commonly called abortion and in count II with the crime of murder. A jury returned verdicts finding her guilty on count I and guilty of murder in the second degree on count II.

Appellant concedes that the evidence is sufficient to establish that the death of the woman involved resulted from an abortion, but argues that it was not established that the abortion was the result of a "criminal agency"; also that it was not sufficiently established that appellant was responsible for the abortion.

In October, 1939, Jovita Ochoa, accompanied by Maria Jacquez, with whom she was living, went to the residence of appellant and told her that she had not menstruated during the previous month. Appellant told Miss Ochoa that she would charge $25 for an operation but Miss Ochoa replied that she did not have the money and would return as soon as she could raise it. These facts appear from the testimony of Miss Jacquez. Aurora

Egiarte testified that on December 5, 1939, she accompanied Miss Ochoa to the residence of appellant and at that time appellant stated that she would "fix her up" for $35. Miss Ochoa agreed to return the following Monday, December 11. It was also arranged that Miss Ochoa was to stay at appellant's home after the operation, for which an additional charge of $15 would be made. Appellant gave instructions to Miss Ochoa as to how to prepare for the operation. On December 11 Miss Ochoa told Miss Jacquez that she was pregnant and was going to appellant's home to be relieved. She left a note addressed to Miss Jacquez, reading as follows: "Maria: I am going to be at the home of the Mrs. If you can, see me tomorrow in the afternoon, because I do not know how I will be in the morning. Maybe I will not be alleviated. I have no assurance as to that. Only God knows that. Ask God for me that I will come out all right. Good-bye Jovita."

Miss Jacquez returned to appellant's residence on Tuesday, December 12, but was unable to find appellant. On the following day she again called upon appellant and appellant then told her that Miss Ochoa had not been back to see her. On the evening of the same day Miss Jacquez and Miss Egiarte again went to appellant's home to inquire for Miss Ochoa. Miss Jacquez told appellant of the note which had been left by Miss Ochoa and stated that if appellant would not inform her concerning the whereabouts of Miss Ochoa she would turn the note over to the police. To this appellant replied, "no, don't deliver that to the police department; destroy it". Appellant also stated that she had had bad experience with the police and that the best thing for all of them to do was to be "in accord" and say that Miss Ochoa had gone out shopping and had not returned.

A human body was found upon the railroad tracks near Bandini station in Los Angeles at about 8 o'clock in the morning of December 13. The body had been run over by a train and was "in two separate pieces". There was no evidence of blood upon the tracks or ground at or near where the body was found. This body was later identified as that of Miss Ochoa. The autopsy surgeon testified that the uterus showed a recently dilated cervix, that the uterus was relaxed and not contracted and that the uterine canal was about the size to be found in a pregnancy of four months. He found the cause of death to be "exanguination following abortion". He gave the opinion that death had occurred within twenty-four hours from the time the body was found and that the body was dead at the time it was placed upon the railroad tracks. The surgeon further stated that after the expulsion of the fetus under normal conditions the uterus would contract immediately and prevent hemorrhage but that in the present case the uterus had not contracted. He further stated that if a normal body had been placed upon the railroad tracks a great quantity of blood would be found on the ground in the area where the body was struck. The surgeon stated that he could not determine how the abortion had been brought about.

A mirror, compact and lipstick container, which were identified as the property of Miss Ochoa, were found in an incinerator on the premises of appellant. Appellant was not sworn as a witness on her own behalf.

[1-4] It was the function of the jury to draw reasonable inferences from the circumstantial evidence before it. In the recent case of People v. Newland, Cal.Sup., 104 P.2d 778, 780, it is said: "If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." We are satisfied that the inferences drawn by the jury are reasonable and that the verdicts are sufficiently supported not only in the implied finding that death resulted from an abortion but also that the abortion was caused by the criminal act of appellant.

[5] Appellant complains that the prosecution failed to establish by what particular means the abortion was brought about and refers to the information, in which it is charged that appellant did "use and employ an instrument or other means upon the person * * *". The language of the indictment follows the language of section 274 of the Penal Code. It will be noted that this code section provides that one is guilty of the crime therein mentioned who "uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage * * *". The prosecution was not compelled to prove

that an instrument had been actually used by appellant but it was sufficient to establish that some means was used by her to procure the miscarriage, the act not being necessary to preserve life.

The judgments are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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41 Cal.App.2d 260

PEOPLE v. MILLS.

Cr. 398.

District Court of Appeal, Fourth District, California.

Oct. 21, 1940.

Rehearing Denied Nov. 2, 1940.
See 106 P.2d 628.

1. Embezzlement 🔑11(1)

Where manager of co-operative marketing organization was charged with grand theft, in that he unlawfully took money belonging to the organization, gist of offense was embezzlement as defined by statute. Pen.Code, § 503.

2. Embezzlement 🔑44(6)

In prosecution of manager of co-operative marketing organization for grand theft, in which prosecution's theory was that defendant made advances to himself in excess of amounts justified by his crop, evidence not showing that advances by defendant upon his crop were in excess of his authority, that they were out of proportion to advances made to others, or that they were made with knowledge on part of defendant that they were excessive, or were not justified by crop under market conditions as they appeared at that time, did not show a "fraudulent appropriation" of the advances and was insufficient to support conviction. Pen.Code, § 503.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraudulent Appropriation".

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Edward Mills was convicted of grand theft, and he appeals.

Reversed and remanded.

Harden, Hervey & Holt, of San Diego, for appellant.

Earl Warren, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., George F. Holden, Dist. Atty., of Anaheim, and Martell Thompson, Deputy Dist. Atty., of Santa Ana, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of grand theft under eight counts of an indictment, each of which charged that between January 14, 1938, and November 22, 1938, he wilfully, unlawfully and feloniously took a certain sum of money belonging to Anaheim Community Growers. Two counts were dismissed during the trial, and a jury found the defendant guilty on five counts and not guilty on another. He appeals from the judgment and from an order denying a new trial.

Anaheim Community Growers is a co-operative marketing organization, organized in 1928 under section 653dd of the Civil Code. It has since that time been engaged in the business of picking, packing and shipping oranges grown by its members. It is governed by a board of seven directors who elect officers and appoint a manager. The appellant was a director, secretary and manager of the association from 1931 until he resigned on November 22, 1938. In carrying out the purpose for which it was formed the Anaheim Community Growers, through all these years, made advances from time to time to some of its grower members in order to assist them in financing their citrus operations and the production of their orange crops. Such advances were also made through these years to the president, vice-president and other directors, including the appellant, all of whom were grower members and, as such, as much entitled to advances as were other grower members. The amounts so advanced were paid out by the association's checks, which were all signed by the appellant as manager and by either the president or the vice-president.

The president and other directors testified that the board left it to the manager to make these advances as he saw fit; that the appellant, as manager, made a monthly report to the board showing the "lump sum" of such advances which were then outstanding; that the advances made by the appellant were approved in a lump sum at each directors' meeting; and that the names of individuals to whom advances had been made were not reported to the board and were not asked for by the board. The president testified that it was the practice of this and other such mutual associations to make advances in amounts which the crop might be expected to pay back, that the fixing of these amounts was usually done by the manager, and that in determining whether an advance should be made the size and condition of the "potential crop" and the market conditions at the beginning of the season were taken into consideration. He further testified that advances were sometimes made where the crops in question were covered by crop mortgages in favor of other parties and that he himself had obtained advances when his crop was thus encumbered. The vice-president testified that this procedure in making advances was followed throughout the existence of this association, that the same procedure had been followed in its predecessor company, and that he himself had received advances in various years and "considerable advances" in 1938. Both the president and the vice-president testified that at times they signed checks in blank, leaving them with the appellant to be used in making advances and paying obligations of the association. Each testified, however, that he had never found any discrepancy in the amount of money the appellant reported as advanced and that he never knew of an instance where a check was "misused for any purpose other than the purpose they were signed for". The association's regular bookkeeper and an auditor testified that the books were correct and that all of the advances here in question were entered on the books and charged against the respective groves.

The five counts upon which the appellant was convicted relate to advances made to himself as a grower member in connection with five separate orange groves which were owned or controlled by him. While the respective counts charged him with unlawfully appropriating to himself all of the advances made during this season on these respective parcels the People elected to rely upon one advance only in connection with each orange grove and, accordingly the appellant was convicted of taking the amount upon which the People had elected to rely as to each count. The specific advances upon which he was convicted in the various counts are as follows: In count II an advance of $500 on his home place, consisting of 5¼ acres; in count III $1,250 on a 20-acre grove; in count IV $480 on a place containing 54 acres; in count V $500 on a 15-acre grove; and in count VI $2,125 on an orange grove containing 80 acres. While he was charged with taking $20,151.73 in connection with a total of 171¼ acres, he was convicted of unlawfully taking $4,855 advanced in connection with the same acreage, or an average of about $28 per acre.

[1] The main question presented is whether the evidence is sufficient to support the verdict and judgment. While the offense in question is now prosecuted as grand theft the gist of the offense is embezzlement, being the fraudulent appropriation of property by a person to whom it has been intrusted, as defined in section 503 of the Penal Code. The prosecution's theory, as clearly stated during the trial, was that while the appellant had the right to make advances to himself he had made such advances in excess of amounts that were justified by his crops and that "his knowledge of the condition of his account charges him with notice that he wasn't in good faith, but was fraudulently appropriating to his own use". In other words, the contention is that while the appellant was authorized to make advances to himself he knowingly took advances to an extent not warranted by the conditions and thereby fraudulently appropriated money of the association which had been intrusted to him.

Aside from the fact that his responsibility for handling the funds of the association, in connection with these advances, was in a measure shared by the president or vice-president who necessarily signed the checks, and by all of the directors who approved them without examination, it may first be observed that there is no evidence that the appellant exceeded any specific direction or authority given to him. All of the evidence indicates that no limit as to the amount of advances was fixed or contemplated, but that such advances, while left to the discretion of the manager, were to be considered in connection with the amount and quality of a member's crop and the prospective market conditions. Apparently, the advances were supposed to be based largely on what appeared to be the likelihood of repayment from the proceeds of the crop. This fact explains the absence of any evidence to the effect that any limit had been placed upon the appellant's authority to make loans to any member, or to the effect that members were entitled to equal advances in proportion to their acreage.

It seems to be here contended that appellant's guilt was established since the evidence discloses that about one-third of the money advanced that season by this association was advanced to him. There were about 1200 acres of oranges owned by the members of this association, of which the appellant owned or controlled 174¼. In other words, while he owned about one-seventh of the acreage he advanced to himself about one-third of the total amount which was advanced to all grower members. On the other hand, while he owned about one-seventh of the acreage, he was convicted of appropriating for himself about one-twelfth of the total amount advanced to members. There is no evidence as to how many of the growers desired or secured such advances, or of the acreage owned by those members who shared in the advances made. If it be assumed that the members who secured advances held only one-half of the acreage in the association, it would follow that the appellant received only his proportionate share per acre.

However, as we have pointed out, there is nothing in the evidence to the effect that the members were entitled to share in the advances either equally or in proportion to their acreage. Other factors were to be taken into consideration, particularly the amount and prospective value of their crops. Considered from this angle, which is the only one that would support a conviction, there is no evidence to indicate that the appellant received advances which were not warranted by conditions as they then appeared. While it is contended that he should have known that an advance of $100 an acre on his orange holdings was excessive and unjustified, at least to the extent of the $28 per acre on which he was convicted, there is an entire absence of evidence as to the amount, quality and apparent value of his prospective crops of oranges, as compared with those of other members to whom advances were made. What he knew or what he should have done must be judged in the light of conditions at the time and not of subsequent developments. The evidence shows that $3,375 of the $4,855, for the taking of which he was convicted, was advanced during March of that year, and another $980 before the season was far advanced. It appears without conflict that, due to a bad freeze the preceding year, the outlook for favorable prices and market conditions was unusually good during the spring of 1938 and at least up to the middle of that season. These expectations were not realized due to market changes which are not even charged to the appellant.

Not only is there no evidence to show that an average advance of $28 per acre upon which he was convicted, or even of $100 per acre with which he was charged, was not justified by the amount and quality of his crops under the market conditions then appearing, but there is evidence which indicates that such advances were not unknown or unusual in the general course of such business. During that very season, 1938, a bank in Claremont loaned the appellant $15,000 on a crop mortgage covering 45 acres of his groves with a second trust deed on 25 of those acres. One of the directors testified that during that same season, 1938, he received an advance from this association of $1,576 on 15½ acres of oranges when his land was covered by first and second mortgages and the crop was also mortgaged to an outsider. This was an advance of about $100 an acre and this director testified that he considered it proper and right at the time it was made, and that he considered that similar advances were rightfully made. This turned out to be a bad year and the proceeds of this director's crop were insufficient to pay this advance, leaving him indebted to the association in the sum of $872.14, or about $55 an acre. The undisputed evidence is that in 1935, the appellant and another gave a bank a crop mortgage on the oranges then growing on the 80-acre parcel involved in count VI here, securing a loan of $30,000, about $375 an acre, and that the crop of oranges thereon brought enough to pay off this mortgage that season.

While the respondent argues that the appellant received about one-third of the entire amount advanced to its growers by the association that year, it was not shown that such advances were not justified by his prospective crops and the apparent conditions and it is not even here suggested that the prospective value of his crops did not bear a similar relation to the value of all crops upon which advances were made. No contention is made that any part of these advances was used by the appellant for any purpose other than to maintain and retain these groves upon which oranges were to be produced. While portions were used to pay interest and principal on encumbrances on these lands, this is a part of the necessary financing involved in the production of oranges and the evidence shows that advances were customarily made to other grower members for similar purposes. In addition to all of the other matters affecting the reasonableness of the advances the appellant made to himself, under the conditions apparent at the time, a further fact is important. The appellant had a salary coming of $475 a month, which he did not draw during this period but which he left as a further credit upon his advances. This salary amounted to $5,016.16 at the time of his resignation on November 22, 1938. This credit materially affects the apparent situation upon which he acted at the time the advances were made.

[2] At the close of this admittedly bad season it developed that the proceeds of appellant's crops were not sufficient to pay his advances, leaving him indebted to the association. This is also true of many of the other growers, including some of the directors. The only inference justified by the evidence is that in an ordinary or average season the returns from these various crops would have paid the respective advances made. That they did not do so in this year is unfortunate, but it is far from showing that in making advances which at the time seemed justified by conditions and by past experience the appellant is to be charged "with notice that he wasn't in good faith, but was fraudulently appropriating to his own use". We are unable to find any evidence in the transcript which would support the conclusion that the advances taken by the appellant upon his crops were in excess of his authority, that they were out of proportion to the advances made to others, or that they were made with knowledge on the part of the appellant that they were excessive or not justified by the size and quality of his crop under market conditions as they appeared at that time. While many immaterial matters were ingeniously marshalled and presented to the jury as they appeared in retrospect, the real issues as to whether the advances upon which a conviction was sought were justified by the conditions existing at the time they were made were largely overlooked both in the presentation of evidence and in the respondent's arguments to the jury. There is no proof in the record that the advances in question were more liberal, in view of the conditions, than those made to some of the other members, that they were determined or fixed upon any other or different basis, or that they were not justified by the conditions as they then appeared. Whatever else it shows, the evidence fails to show a fraudulent appropriation of the advances for the taking of which he was convicted under the various counts, and the evidence is insufficient to support the judgment.

The appellant raises a number of other points which we regard largely, if not entirely, as possessing no merit. In view of what has already been said, it is unnecessary to discuss these points.

The judgment and order are reversed and the cause is remanded for a new trial.

We concur: MARKS, J.; GRIFFIN, J.

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41 Cal.App.2d 198

PEOPLE v. CRAWFORD.

Cr. 3350.

District Court of Appeal, Second District, Division 2, California.

Oct. 15, 1940.

1. Criminal law ⚷1159(2)

The function of an appellate court is not to determine the weight of evidence, but its duty is confined to a determination of whether upon the evidence presented sufficient facts could have been found by the jury to warrant the inference of guilt.

2. Criminal law ⚷568

Express evidence of a deliberate purpose is not required to establish a criminal motive, but it is sufficient if the circumstances are such as to warrant a reasonable inference of such purpose.

3. Criminal law ⚷552(1)

Commission of a crime may be established entirely by circumstantial evidence.

4. Criminal law ⚷1159(3)

The mere fact that evidence is susceptible of two inferences, one of innocence and one of guilt, does not warrant reversal of a conviction.

5. Criminal law 🔑552(3)

The rule that the circumstances proved by the prosecution must be consistent with guilt and inconsistent with any hypothesis of innocence is a rule for the guidance of the jury and not for court of appeal.

6. Criminal law 🔑1159(2)

An appellate court is bound by findings of jury where it rejects the hypothesis of innocence, if there is substantial evidence to support the finding of guilt as a more reasonable of the two hypotheses.

7. Homicide 🔑250

Evidence sustained conviction for murder.

8. Criminal law 🔑388

In prosecution for murder of occupants of automobile which went over an embankment after defendant allegedly lost control of automobile, evidence that automobile, similar in size and weight to that of defendant and under conditions substantially the same as those which existed on evening of the fatal ride, when permitted to descend mountain grade out of control from point where defendant's flight began, came to a stop without the application of brakes at a point less than a mile from the spot where defendant's automobile plunged over the embankment, was properly admitted.

9. Criminal law 🔑388

Whether evidence of experiments will be received or rejected lies within the sound discretion of the trial court so long as substantially the same conditions obtain in the experiment as existed in the original act.

10. Criminal law 🔑388

Where evidence regarding experiment tends to aid rather than confuse the jury, there is no abuse of discretion in admitting such evidence.

11. Homicide 🔑309(5)

In murder prosecution where defendant requested the court to advise the jury that, if they entertained a reasonable doubt regarding whether the killing was deliberate and premeditated, they must find defendant not guilty, failure to instruct jury with reference to manslaughter was not error, since the requested instruction removed from jury's consideration any question of a crime less than that of murder.

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Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Laurel Harvey Crawford was convicted of murder, and he appeals.

Affirmed.

William W. Larsen, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant appeals from the judgment after verdict by a jury, on four counts of murder. After denial of his motion for a new trial, he was sentenced to life imprisonment on each count, the sentences to run consecutively. He takes this appeal from the order denying him a new trial as well as from the judgment. If the findings of the jury are not supported, defendant was the unfortunate victim of a most extraordinary accident but if they were founded upon a rational consideration of substantial evidence, defendant is guilty of a most heinous crime,—the murder of the wife who loved him, of his own three children of tender years and of a confiding friend.

The contentions of defendant are as follows: (1) That the evidence is insufficient to support the verdict and the judgment; (2) that the trial court erred in admitting testimony concerning the result of certain experiments conducted by the prosecution witnesses; (3) that the trial court erred in failing to instruct the jury upon its own motion that defendant might be convicted of the lesser offense of manslaughter.

In the early evening of December 11, 1939, defendant invited his friend Ralph Barnett to join him and his wife and three children for a ride up Angelus Crest Highway, the road leading to Mount Wilson, to a point where they might look over the lights of the cities below. Defendant drove his 1937 Chevrolet sedan. Upon the return down the mountain about 7:30 p. m. of the same day, the car left the road and came to rest about 1000 feet below. Defendant remained upon the edge of the highway but all the other occupants of his car were found dead in the chasm below. The body of Mrs. Crawford was discovered at a point 350 feet below the road, and the bodies of the two daughters, Alice and Helen, aged 16 and 8 respectively, were about 50 feet below the body of their mother; the body of Barnett lay 200 feet below the bodies of the girls while the corpse of the little son Paul, aged 10 years, lay 100 feet below that of Barnett. Just what the defendant did during the night after his car went over the embankment must be left to inference for no eye beheld him. However, on the following morning, two members of the county road crew came upon defendant beside the Mt. Wilson road. He told the crew members that his car had gone off the grade at 7:30 o'clock the previous evening and that all of his family had been killed in the wreck. He stated that he had lost control of his car about three miles above the point where it went over the embankment because the brakes were not functioning and because of other mechanical defects. But, he stated that just before his car plummeted from the highway, he had almost acquired control of the car when his wife seized the steering wheel and caused the car to be precipitated into the abysmal gorge. As he saw it leaving the embankment, he "jumped * * * and slid out of the car" and landed on the bank. He suffered no injury. The car was in a reasonably good mechanical condition prior to the tragedy. Moreover, it was established that a motor car of approximately the same size and weight as the defendant's sedan, by starting down the mountain grade at the same point where the Chevrolet began its flight, according to defendant's story, would have come to a full stop without the use of brakes less than one mile above the point where the Chevrolet went over the embankment.

The autopsy revealed that the cause of the death of Helen was a circular depressed fracture of the skull and concussion of the brain with accompanying hemorrhage. Death came to both Alice and Paul from identically the same sort of blow, each suffering a crescent shaped wound above the left eye causing a concussion and hemorrhage. Mrs. Crawford received a crescent shaped laceration in the center of her forehead and concussion and hemorrhage which caused her death. Barnett received three crescent shaped wounds upon his forehead and another on his nose and he died of concussion and hemorrhage. The crescent shaped wounds received by these victims were of such striking similarity and of such a character that a reasonable person might conclude that they could have been caused by blows from the large flat end of a hammer of the type which constitutes a part of the standard equipment of the 1937 Chevrolet sedan.

Before proceeding further to consider severally the strands that have been woven into a web that now enmeshes the defendant, we pause to contemplate the motive that has been ascribed for so diabolical a deed. Its very sordidness almost compels its rejection. During 1938 and 1939 defendant obtained a number of life insurance and accident policies upon his wife and children. Because of the double indemnity feature of most of the policies, in case of death by accident to the insured, defendant, as beneficiary, would receive a total of $30,500. The policies upon his children were the maximum amounts allowable by the insurance company on their lives. He had applied for a $20,000 accident policy on the life of his wife but obtained an accident policy for only $5,000, the maximum amount to be allowed by the company. In 1938 he had rejected a policy in the amount of $8,000 upon the life of his wife because the company refused to grant double indemnity for accidental death. In 1939 he obtained an additional policy upon her life in the sum of $2,000 with the double indemnity feature. He declared from the witness stand that he was an "ardent believer in insurance". While he was thus ardently engrossed in obtaining insurance contracts on the members of his family, his wife was assisting in their support by performing domestic service for others. He testified also that in 1938 he computed the amount of money he would receive if his family were to be accidentally killed and also estimated the amount of monthly income he would receive if such insurance money were invested in annuities. In November, 1939, he discussed the plan of entering into the automobile business with two men and stated to them that he expected to have about $30,000 available for the investment. On December 8, just three days before his family were sent to their doom, he signed a contract for the purchase of a new automobile and advised the salesmen that he would have cash available in the amount of the purchase price in less than 90 days.

It is obvious that the evidence was necessarily of a circumstantial nature for the defendant was the sole survivor; there were no eyewitnesses. His explanation of the events was irrational. In addition to many inconsistencies in his testimony, there was much evidence that indicates that his version of the tragedy was wholly and patently false. He was driving a modern automobile with synchronized mesh transmission and hydraulic brakes. The car had been driven approximately 27,000 miles and was in good mechanical condition a few days before the fatal ride. Defendant stated to the officers that his brakes were of absolutely no use to him in his endeavor to bring the car under control. But he had made all boulevard stops while going 35 miles per hour after leaving his home and the proof is that at a distance 40 feet from the precise point where his car left the road, there were skid marks made by automobile tires which demonstrated that not only were his brakes in good mechanical order but that he applied them and they held. He testified that by reason of defective brakes and carburetor, his car was out of control for a distance of almost three miles before the crash. But he must have remembered that he had driven up the same road in high gear. Prosecution witnesses, using cars of approximately the weight and size of the Chevrolet sedan had caused their cars to roll down the grade in neutral without applying any brake from a point 2.9 miles above the place where the car rolled off into the canyon. In both instances the cars came to a stop of their own accord on an up-grade at a point less than a mile above the scene of the wreck. Defendant testified that because the carburetor of his Chevrolet was out of adjustment, his car obtained a speed of 50 miles an hour before he could shift into second gear. But if his brakes were in good condition, his attempt to charge his failure to stop to his inability to use compression is as incomprehensible as his failure to let the car coast in neutral, which, at least, might have allowed the car to stop on said up-grade. Moreover, with all of his explaining, he gave no rational explanation of his wildly coasting down the left side of a mountain grade,—the side where danger lay.

Defendant's story that he was able to escape from a car traveling 50 miles an hour as it went over the embankment without receiving a serious scratch or bruise and without damage to his clothing or to his spectacles imposes a severe strain upon one's credulity.

A further evidence of defendant's irresponsibility in his utterances and in his testimony concerns his youngest daughter. He claimed that she was alive when he found her but that she died before 12:30 a. m., five hours after the car leaped from the mountain grade. But the embalmer who examined the child's body at 8:30 a. m. (the morning after the wreck) testified that at that time her corpse was still warm and that lying on the mountain side on a cold night her body would not have retained any warmth more than three hours. A period of twelve hours elapsed from the time of the wreck to the time defendant reported the tragedy to the two men of the road crew; yet in that period at least four automobiles had passed the scene of the crime, within which time the defendant walked almost three miles up the mountain road where help was available and then retraced his steps to a point about a mile and a half below the wreck in order to get a drink of water. But at no time during those twelve hours did he make any attempt to obtain help. Pressed for an explanation as to his failure to report the events of the night, defendant merely stated that "it was no use * * * they were all dead any way". Further evidence of his effort to conceal the truth is found in the proof that at the time of his first encountering the members of the road crew, he had a flash light in his hip pocket. He maintained at first that he had found the flash light after daylight as he came up the mountain side. Later he stated that he had found it near the body of his boy. But on other occasions he maintained that it was "near the road" and at another time his explanation was that the flash light must have been thrown from the car and was uninjured because it had been wrapped in a turkish towel.

At first he related to the road crew that the blanket and coat of one of the children which he carried around his shoulders were found by him at about four hours after the wreck; but in court he testified that he had found them after daylight.

His statements with respect to the insurance were conflicting. He first stated that he had no insurance on any member of his family. Subsequently, however, he stated he did have just enough insurance on them to cover the cost of burial. But, upon further questioning, he acknowledged the actual amount of the insurance.

It is thus disclosed that many of defendant's extrajudicial statements as well as those made before the jury were proved to be false and that his version of the tragedy was a fabrication of a perverted mind. Not only do his statements disclose wilful falsehoods in his narrative concerning each incident in the grewsome affair but the very wounds upon the heads of his victims were a circumstance which, in connection with the other evidence, might readily and justifiably have led the jury to believe that in order to accomplish a cold-blooded murder of his wife and innocent children, he was to descend so low as to beat the last vestige of life from them with the flat edge of a hammer.

[1-3] These are such circumstances as warranted the jury in arriving at the conclusion that the defendant had committed wilful, deliberate, premeditated murder of his own offspring and their mother. People v. Durborrow, 130 Cal.App. 615, 20 P.2d 708; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631. In the Perkins case the court emphasized the principle that it is not the function of the appellate court to determine the weight of the evidence. Its duty is confined to a determination of whether or not upon the evidence presented sufficient facts *could not have been found by the jury* to warrant the inference of guilt. Express evidence of a deliberate purpose is not required to establish a criminal motive. It is sufficient if the facts and circumstances are such as to warrant a reasonable inference of such purpose. People v. Dale, 7 Cal.2d 156, 59 P.2d 1014. Indeed, the commission of the crime itself may be established entirely by circumstantial evidence. People v. Green, 13 Cal.2d 37, 87 P.2d 821.

[4-7] Defendant here contends that when all the facts and circumstances of the case are considered, the inference arising therefrom is just as consistent with his innocence as it is with his guilt. But the mere fact that the evidence is susceptible of two inferences, one of innocence and one of guilt would not warrant a reversal of conviction. People v. Green, supra. As pointed out by the court in the Perkins case, supra, and subsequently approved in the case of People v. Newland, Cal.Sup., 104 P.2d 778, the rule that the circumstances proved by the prosecution must be consistent with guilt and inconsistent with any hypothesis of innocence is a rule for the guidance of the jury and not for a court of appeal. The appellate court is bound by the findings of the jury where it rejects the hypothesis of innocence if there is substantial evidence to support the finding of guilt as a more reasonable of the two hypotheses. Under this rule, the conviction of the defendant herein is amply supported by the evidence.

[8-10] Defendant contends that in admitting testimony concerning the result of certain experiments, the court committed prejudicial error. The testimony referred to is that of witnesses who by using automobiles similar in size and weight to that of the Chevrolet of defendant, when permitted to descend the mountain grade out of control from the point where defendant's flight began, they would come to a stop without the application of brakes at a point less than one mile from the spot where the Chevrolet plunged over the embankment. The point urged by defendant that the cars used by the officers to perform the experiment were of different makes, models and weights from those of the Chevrolet was carefully considered before the evidence was submitted. The court first required that it be shown that the experiments by the officers were conducted with cars of approximately the same weight as the Chevrolet and under conditions substantially the same as those which existed on the evening of December 11th. This foundation having been laid, the court properly admitted the testimony of the officers. People v. Ely, 203 Cal. 628, 265 P. 818; People v. Dyer, 11 Cal.2d 317, 79 P.2d 1071. It is the rule that whether such testimony will be received or rejected lies within the sound discretion of the trial court so long as substantially the same conditions obtain in the experiment as existed in the original act. Where the evidence tends to aid rather than to confuse the jury, there is no abuse of discretion in admitting such testimony. People v. Glab, 15 Cal.App.2d 120, 59 P.2d 195.

[11] Finally, defendant contends that the court committed prejudicial error by its failure to instruct the jury with reference to manslaughter. While defendant neglected to request an instruction defining manslaughter, it has not prejudiced him on this appeal. By his request for another instruction, he eliminated this issue. He asked the court to advise the jury that if they entertained a reasonable doubt as to whether the killing was deliberate and premeditated, they must find defendant not guilty. This instruction utterly removed

from the jury's consideration any question of a crime less than that of murder.

The judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

We concur: WOOD, J.; McCOMB, J.

41 Cal.App.2d 227

ZARING v. BROWN, Public Administrator (HEGARTY et al., Interveners).

Civ. 6398.

District Court of Appeal, Third District, California.

Oct. 18, 1940.

Rehearing Denied Nov. 15, 1940.

1. Frauds, statute of 🔑50(2)

Alleged oral agreement by deceased to bequeath property by will to lodginghouse proprietor in consideration for services rendered was invalid under the statute requiring that an agreement to devise or bequeath property be in writing, where no memorandum of such agreement was ever executed or signed by deceased. Code Civ.Proc. § 1973, subd. 6.

2. Specific performance 🔑86

The remedy for breach of alleged agreement to will to lodginghouse proprietor property of a deceased, in consideration for personal services rendered, was a suit in quantum meruit for value of such services.

3. Executors and administrators 🔑431(2)

In suit against estate of a deceased for services rendered deceased by lodginghouse proprietor in consideration of deceased's alleged oral promise to bequeath his property by will to proprietor, it was a necessary prerequisite that a claim for services rendered should be first presented as required by statute. Probate Code, § 716.

4. Frauds, statute of 🔑129(1)

Where a deceased during his lifetime orally promised lodginghouse proprietor to bequeath to her his property in consideration for services rendered, execution of a holographic will two and one-half years before death of deceased bequeathing property to proprietor, which instrument was revocable and was either lost or destroyed, and in which no reference was made to oral agreement, was not such performance of oral agreement as would relieve it from provisions of the statute requiring that agreements to bequeath property be in writing. Code Civ.Proc. § 1973, subd. 6.

5. Wills 🔑302(6)

Testimony of only one witness that lost holographic will was dated in the handwriting of testator was insufficient to establish fact that a valid holographic will was ever executed. Probate Code, § 350.

6. Specific performance 🔑86

A suit in equity to enforce an oral contract to will property in consideration of the unprofessional care and attention which a lodginghouse proprietor rendered a deceased could not be maintained, since services rendered were susceptible to pecuniary compensation, and hence there existed a clear remedy at law in a suit on quantum meruit for reasonable value of services.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Kate A. Zaring to establish a trust in Ben H. Brown, Public Administrator as administrator of the estate of Robert H. Barry, deceased, based on deceased's alleged executed agreement to bequeath property of the estate by will to plaintiff, wherein Mary Ellen Hegarty and others intervened. From an adverse judgment, plaintiff appeals.

Affirmed.

James W. Bell, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, of Los Angeles, for respondent Public Administrator.

Mathes & Sheppard and George R. Richter, Jr., all of Los Angeles, for interveners and respondents Hegarty.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment rendered against her in a suit to establish a trust in the public administrator, as representative of the estate of Robert H. Barry, deceased, based upon an alleged executed agreement to bequeath the property of his estate by will to the plaintiff in consideration of services performed in maintaining and caring for the deceased during his lifetime.

The complaint alleges that the plaintiff is a widow who conducted a rooming house in Los Angeles, where Robert H. Barry resided, for several years prior to his death; that he was fifty-seven years of age, and an invalid as the result of paralysis; that he possessed stocks, bonds and money of the aggregate value of $15,000; that in August, 1934, he orally agreed with plaintiff to bequeath to her his entire estate by will in consideration for her personal care and attention during the remainder of his life; that she fully performed that service until the time of his death on March 9, 1937; that pursuant to said oral agreement Mr. Barry did, in October, 1934, execute and exhibit to plaintiff his holographic will wholly written, dated and signed by him by the terms of which he bequeathed all of his property to her; that the testator retained said will, and after his death it could not be found and that the plaintiff has no knowledge as to whether the will was subsequently revoked or destroyed.

The public administrator filed his answer to the complaint, denying the material allegations thereof and specifically pleaded that the action was barred by the provisions of section 1973, subdivision 6, of the Code of Civil Procedure, and by the statute of limitations.

By leave of court, six nieces and nephews of the deceased filed in said action their answer and complaint in intervention, denying the material allegations of the complaint, alleging that the deceased died intestate possessed of stocks, bonds and money of the aggregate value of $15,000; that they are his only heirs and therefore entitled to inherit the entire estate. The complaint in intervention then asserted that plaintiff's suit was barred by both the provisions of the statute of frauds and the statute of limitations. For failure to answer the complaint in intervention the defaults of the plaintiff and the public administrator were duly entered prior to the time of trial. No judgment by default was, however, rendered pursuant to section 585 of the Code of Civil Procedure. All parties participated in the trial without objection. Oral and documentary evidence was adduced.

Over the objection of the respondents the plaintiff was permitted to testify to the oral agreement of Mr. Barry to bequeath to her his entire estate in consideration for her care and attention during his lifetime. Two witnesses, one of whom is the son of plaintiff and the other her nephew, testified that in October, 1934, two and a half years before his death Barry exhibited to them his holographic will by the terms of which he had bequeathed his property to plaintiff. One of the witnesses, Clyde Blunt, said that the will was in the handwriting of the testator, but that he could not testify that it was dated. He signed the document as a witness at the request of the testator. The other witness testified that the instrument was wholly written, dated and signed by the testator. There was no other evidence of the execution of that will. The record is devoid of evidence in compliance with section 350 of the Probate Code that the will was in existence "at the time of the death of the testator". It was not found in his safe deposit box, and no witness testified to having seen it or to having heard of it after it was shown to the son and to the nephew of the plaintiff in 1934. A thorough search for the instrument failed to disclose its whereabouts.

No petition was filed to probate the instrument as a lost will. It is not contended the evidence was sufficient to admit the instrument to probate as a lost will. The complaint was brought against the public administrator in his representative capacity and not otherwise. It sought to establish a trust only in that portion of the estate which remained after the debts and expenses of administration had been first paid. It sought to establish a trust subject to administration of the estate. No claim was presented against the estate as provided by section 716 of the Probate Code.

The court adopted findings against the plaintiff on every material issue involved in the pleadings. It found that Robert H. Barry died intestate March 9, 1937, possessed of personal property in Los Angeles of the value of $13,000, leaving as his only heirs the six nieces and nephews mentioned in the complaint in intervention; that the decedent was never married; that upon proceedings duly had, Ben H. Brown, the public administrator of Los Angeles county, was appointed and qualified as administrator of the estate, the probating of which is now pending in the superior court of that county; that the decedent was not suffering from a paralytic stroke nor was he an invalid as alleged in the complaint; that he was not in need of the personal care or attention of plaintiff; that he did not orally or otherwise agree with plaintiff to bequeath or will to her his property in consideration for her personal care and attention; that the deceased did not execute a will, either in his own handwriting or otherwise, bequeathing to the plaintiff his property or any part thereof; that no such will was exhibited or read to the plaintiff, and that her cause of action is barred by the provisions of section 1973, subdivision 6, of the Code of Civil Procedure. As conclusions of law the court determined that the complaint fails to state facts sufficient to constitute a cause of action; that there was no part performance of the alleged oral agreement sufficient to take the cause out of the statute of frauds; that the interveners were not estopped from invoking that statute, and that the plaintiff is entitled to take nothing by her action. From the judgment which was rendered in accordance with the findings, this appeal was perfected.

[1] The alleged oral agreement of Robert H. Barry to bequeath his property by will to the plaintiff, in consideration for her personal care and attention during the remainder of his lifetime, was unenforceable and invalid. Sec. 1973, subd. 6, Code Civ. Proc. No memorandum of such an agreement was ever executed or signed by the party to be charged.

[2] The plaintiff's remedy for a breach of the alleged oral agreement to will to her the property of the deceased, in consideration for personal services rendered, under the circumstances of this case, was a suit in quantum meruit for the value of such services. De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522; Wax v. Adair, 16 Cal.App.2d 393, 60 P.2d 904; 106 A.L.R. 753, note. This was not a suit for the value of the services performed.

The facts in the late case of De Mattos v. McGovern, above cited, were, in all essential respects, similar to those of the present action. That case determines every material issue of this case adversely to the appellant. The De Mattos case was an equitable proceeding against the administrator and heirs of a deceased person, seeking to enforce specific performance of an oral agreement to will one-third of the property of the promisor in consideration for personal services to be rendered. The complaint alleged that, in compliance with the contract, a will had been actually executed, but that it had not been found, and upon the contrary that it was either lost or destroyed. No claim was filed in the estate. A demurrer was sustained on the ground that the complaint failed to state facts sufficient to constitute a cause of action. From the judgment which was accordingly rendered, an appeal was perfected. That judgment was affirmed.

Three questions were propounded on appeal, as follows: (1) May an executed oral agreement to will property in consideration for personal services be enforced in equity notwithstanding the provisions of section 1973, subdivision 6, of the Code of Civil Procedure? (2) Did the complaint state a good cause of action? and, (3) Was the filing of a claim a necessary prerequisite to the maintenance of the action?

Those questions were all answered adversely to the appellant. The determination of those issues by the court in that case is conclusive on this appeal.

[3] In a suit against the estate for services performed, under the circumstances of this case, it was a necessary prerequisite that a claim therefor should first be presented as required by section 716 of the Probate Code. De Mattos v. McGovern, supra; Morrison v. Land, 169 Cal. 580, 585, 147 P. 259.

[4, 5] The execution of an holographic will two and a half years before the death of the testator, bequeathing the property to plaintiff, which instrument is revocable and was either lost or destroyed and in which no reference was made to the contract, is not such performance of the oral agreement as will relieve it from the provisions of section 1973 of the Code of Civil Procedure. It is not claimed the terms of that will complied with the requirements of the statute. It did not refer to the oral agreement in any manner whatever. It must be assumed, as the court found, that the will was not executed, or it is evident that it was subsequently lost or destroyed by the testator. There was no effort to probate the instrument as a lost will. To do so, it would have been necessary to have proved that it was in existence "at the time of the death of the testator". Sec. 350, Probate Code. No such evidence was adduced. Moreover, that section requires the provisions of a lost will to be established "by at least two credible witnesses" to entitle it to be admitted to probate.

In the present case only one witness testified to the essential fact that the instrument was dated in the handwriting of the testator. The evidence is insufficient to establish the fact that a valid holographic will was ever executed.

In the De Mattos case, supra, the court said that "the execution of the will is not part performance of the alleged contract. Notten v. Mensing, 3 Cal.2d 469, 474, 45 P.2d 198. The right to revoke a will lies with the testator until the time of his death, and, unless limited by an agreement in writing, equity cannot intervene". [25 Cal.App.2d 429, 77 P.2d 523.]

The court specifically held in that case that the contract was invalid under the provisions of sections 1624 of the Civil Code and 1973 of the Code of Civil Procedure, because it was not in writing signed by the party to be charged. Several authorities were cited in support of that conclusion. The court said in that regard:

"An oral agreement to make a will or to leave property by deed in compensation for services rendered, or to be rendered, is not enforceable as such. The remedy is one in quantum meruit for the value of the services rendered. * * *

"There is, however, complete harmony in the cases holding to the rule that, where the oral contract to compensate by will was made in consideration of services rendered or to be rendered, the promisee's remedy is one at law to recover the reasonable value of his services. It is equally well settled that before the promisee may maintain an action for that purpose he must file a claim against the estate. (Morrison v. Land, supra, 169 Cal. 580, page 585, 147 P. 259.)"

[6] Reputable authorities in many jurisdictions, including California, have held that a suit in equity to enforce an oral contract to will property in consideration for ordinary personal services to be performed, which are susceptible of pecuniary compensation, may not be enforced because there is a clear remedy at law in a suit on quantum meruit for the reasonable value of the services. Morrison v. Land, supra; Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146. In the present case the personal services of an ordinary lodginghouse proprietor, performed in the mere unprofessional care and attention which she rendered to a sick man, are readily susceptible of pecuniary compensation. Under such circumstances there is no occasion for equity to intervene.

For the foregoing reasons the judgment is affirmed.

We concur: PULLEN, P. J.; G. S. JONES, Justice pro tem.

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41 Cal.App.2d 234

ROXAS v. GOGNA et al.

Civ. 11144.

District Court of Appeal, First District,
Division 1, California.

Oct. 21, 1940.

Rehearing Denied Nov. 20, 1940.

Hearing Denied Dec. 19, 1940.

1. Health 🔑32

Ordinance requiring lodginghouses already erected or thereafter constructed to be equipped with fire escapes, and providing that person violating ordinance should be guilty of misdemeanor was not ineffective because it did not designate the person upon whom duty to construct fire escapes rested, but the fair intendment of ordinance was that duty rested primarily on the owner who leases building knowing it is to be used for lodginghouse purposes.

2. Negligence 🔑44

Under ordinance requiring lodginghouses to be equipped with fire escapes, notice by public authorities is not a "condition precedent" to liability for damages resulting from violation of the ordinance.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

3. Municipal corporations 🔑120

An ordinance is to be given an interpretation which will uphold it if possible.

4. Municipal corporations 🔑120

An ordinance must be given such reasonable interpretation as to give effect to the obvious intention of the lawmaking body.

5. Negligence 🔑44

Where building leased for lodginghouse purposes was not equipped with fire escapes as required by municipal ordinance, and plaintiff, who was employed as a chauffeur and butler, had been summoned to the lodginghouse by his employer's son, was compelled to jump from second-story window when front stairway caught fire, owners of building were liable for plaintiff's injury.

6. Damages ⚷130(2)

$2,500 general damages for dislocated and fractured foot which resulted in impairment of function of ankle and necessitated use of crutches for three months, required use of cane about 2½ years after accident, and prevented the securing of employment until 14 months after accident, was not excessive.

7. Damages ⚷133

In personal injury action, evidence that before injury plaintiff was earning $50 a month plus room and board, and that he did not secure employment until some 14 months after accident, sustained an award of $550 for loss of wages.

8. Damages ⚷163(1)

In personal injury action, an award of $50 for hospitalization was required to be stricken from judgment, where plaintiff failed to produce testimony that such sum was paid or incurred, or that $50 was reasonable value of hospitalization.

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Personal injury action by Jean Roxas against P. Gogna and others. From an adverse judgment, defendants appeal.

Judgment modified and, as modified, affirmed.

Albert Picard, of San Francisco (Francis McCarty, of San Francisco, of counsel), for appellants.

Robert G. Partridge, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff was injured when he jumped from the second story of a burning lodging house on Pacific street in San Francisco. The lodging house, on the date of the fire, was owned by the two defendants, but was then being leased to a third party not a party to this proceeding. The plaintiff brought this action against the defendant owners on two theories: (1) That the building was not equipped with fire escapes as required by an ordinance of the city and county of San Francisco, and that such ordinance imposed the duty on the owners of the building to install such fire escapes; and (2) that, irrespective of the ordinance, the owners were guilty of negligence in failing to install fire escapes or in failing to provide proper exits from the building. The court, sitting without a jury, awarded plaintiff judgment in the sum of $3,250. From this judgment this appeal is prosecuted.

Appellants make three main contentions: (1) That the ordinance imposes no duty upon the owner of a building when such building is leased to others; (2) that the findings in reference to negligence, independent of the ordinance, are unsupported; and (3) the damages awarded are excessive.

The building in question was erected as a lodging house in 1908. The ordinance was enacted in 1909, and by express terms was made to apply to buildings thereafter erected as well as to those already constructed. The building contained three stories, and was of frame construction with a brick front. The second and third floors were intended to be used for lodging house purposes. The entrance was on Pacific street. There was a wooden stairway four feet wide running from the ground floor to the second floor. At the top of this stairway was a hall. In the front portion of the building on the second floor were two rooms designated in the record as rooms No. 1 and No. 2. Immediately adjacent to room No. 2 was a room used as an office and designated as room No. 3. In this last-mentioned room was a fire door leading to an adjoining hotel. To pass from one hotel to the other, through this fire door, however, it was necessary to first attract some one's attention in the adjacent hotel so that an abutting fire door could be opened. In the rear of the building was a second stairway leading from the second floor to the ground level. This rear stairway, however, had been covered over with a trap door. There was also a stairway leading to the third floor. Defendants became the owners of the property in 1926, and in August, 1933, leased the second and third floors to one Smith for lodging house purposes. Smith was so operating the building in December of 1933 when the fire occurred. The owners knew the rear stairway had been closed over with the trap door.

The plaintiff, who was employed as a chauffeur and butler, had been summoned to the lodging house, on the night in question, by his employer's son. Upon his arrival he was shown into room No. 2. The door to the hall was partially open. A few moments after his arrival he heard someone telephoning the fire department to report that the building was on fire. He ran out into the hallway and discovered that the front stairway was burning, the flames reaching the ceiling. Someone had accidentally caused a lighted oil stove to roll down these stairs. He testified that he could not use the front stairway because of the flames; that he did not know of the trap door in the rear of the building; and that he was afraid to ascend to the third floor because he did not know what he would find there. He returned to room No. 2, to find that a Miss Smith and a Miss Boyd had entered the room. The flames were coming into the room. Miss Smith and then Miss Boyd jumped from the window to the ground—a distance of about fifteen feet. Plaintiff waited until he was burned by the flames and then jumped from the window, sustaining the injuries for which this action was brought. A guest of the lodging house burned to death in the fire.

Miss Boyd, one of the two women who jumped from the window before plaintiff, also brought an action against the owners of the building. The trial court, in that action, found that the mandate of the ordinance was not directed to the owners of the building, and also, on conflicting evidence, found that Miss Boyd was guilty of contributory negligence. On appeal (Boyd v. Cogna, 16 Cal.App.2d 442, 60 P.2d 521) the judgment for defendants was affirmed. On the appeal, this court based its opinion entirely on the ground that the finding of contributory negligence was supported by the evidence. The court expressly declined to pass upon the question as to whether the ordinance placed any obligation upon the defendants as owners. Obviously, on the question of contributory negligence, the decision in that case has no application to the instant case. In the Boyd case the trial court found, on conflicting evidence, that plaintiff was guilty of contributory negligence; in the instant case the trial court, on substantially different evidence, found that the injuries were proximately caused by defendants' negligence and that plaintiff was free from contributory negligence.

The first question presented on this appeal is the question expressly left open in the Boyd case—did the ordinance place a duty on defendants as owners of a leased building to erect the fire escapes required by the ordinance?

The ordinance of 1909 (ordinance No. 1008 N.S.) in section 224 provides that certain types of buildings, including lodging houses of the type here involved, already erected or thereafter constructed "shall be provided and equipped with fire escapes" of a designated type. It is also provided that the board of public works, after approval by the fire wardens, "shall determine the kind, construction, location and number of fire escapes necessary and adequate on all such buildings"; but the next section of the ordinance (sec. 225), following the last-quoted provision, expressly directs that: "Every building used as a hotel, lodging house * * * shall be provided with a portable metallic ladder of sufficient length to extend from second story balcony to sidewalk * * *." No fire escapes were located on the building. It is conceded that no public authority ever directed that fire escapes be placed on this building.

It is to be noted that this section above-referred to does not expressly state who shall be obligated to construct the required fire escapes. Section 302 of the ordinance provides that: "Any person, firm, company or corporation" violating the ordinance "shall be guilty of a misdemeanor", and, further, that any builder or contractor constructing a building in violation of the ordinance, and any architect in charge of construction who permits such a building to be constructed, shall be guilty of a misdemeanor. Other provisions of the ordinance are referred to in the briefs which require certain notices to be furnished the owner of the building by the fire warden and board of public works.

[1] It is appellants' theory that this penal ordinance, inasmuch as it does not mention in section 224 upon whom the duty to construct the fire escapes rests, does not comply with the rules governing the definiteness of a penal ordinance, and is, therefore, completely ineffective. It is conceded by appellants that the city has

the power to require either the owner or the lessee to erect fire protection equipment on buildings, but, it is urged, to be valid such an ordinance must name the person or persons upon whom the duty rests. It is contended that, unless the ordinance designates the person or persons upon whom the duty rests with certainty, the ordinance is uncertain, indefinite and of no legal effect, and that the court has no power to supply the defect by judicial construction. The respondent contends that the fair intendment of the ordinance is that the owner is included within its mandate, and that the only sensible construction of the language is that the duty rests primarily on the owner. We agree with the trial court and with respondent.

The problem of construction thus presented is not a new one. It has been presented to many courts, and the various courts are by no means in accord. This difference of opinion is partially, but not entirely, due to the differences in the wording of the particular statutes under consideration. The cases are collected in an annotation entitled: "Lease of property as affecting owner's liability for failure to provide fire escapes as required by law" in 77 A.L.R. 1273; see, also, Yall v. Snow, 201 Mo. 511, 100 S.W. 1, 10 L.R.A.,N.S., 177, 119 Am.St.Rep. 781, 9 Ann.Cas. 1161; Rose v. King, 490 Ohio St. 213, 30 N.E. 267, 15 L.R.A. 160. This difference of opinion is well illustrated by several cases interpreting an Illinois statute. That statute did not designate in express terms who should construct the fire escapes. The federal court, in McCulloch v. Ayer, C.C., 96 F. 178, held that the person upon whom the duty of providing fire escapes was imposed was not designated in the statute with sufficient certainty to justify the court in imposing liability on anyone. But in Arms v. Ayer, 192 Ill. 601, 61 N.E. 851, page 855, 58 L.R.A. 277, 85 Am.St.Rep. 357, the Illinois Supreme Court reached a contrary conclusion, holding that, although the statute did not expressly state who should install the fire escapes, "the fair and reasonable intendment is that the owner or owners shall perform the duty". The Illinois court predicated this portion of its opinion on its prior decision in Landgraf v. Kuh, 188 Ill. 484, 59 N.E. 501, interpreting a similar statute. In holding that the statute 1885, which required "all" buildings of a designated type to be equipped with fire escapes imposed the duty on the owner of the building even though it was then under lease, the court stated (59 N.E. page 503): "The fact that the buildings are to be provided with fire escapes 'upon or before their completion' indicates that the duty of providing such fire escapes devolves upon the owners of the buildings. The fire escapes are required to be a part of the construction of the building itself. Moreover, the notice commanding such fire escapes to be placed upon the building is required by section 3 to be given to 'the owners, trustees, lessee, or occupant, or either of them'. The injunction being in the alternative, the notice may be given to the one as well as to the other, and therefore to the owner, as well as to the lessee or occupant. We are therefore of the opinion that the appellees were not relieved from liability in regard to the placing of fire escapes upon their building because the fourth floor of the premises, where appellant's intestate was at work at the time of her death, was in the possession and under the control of tenants of appellees, instead of being directly in the possession of appellees themselves."

[2] Cases announcing substantially the same conclusion are Carrigan v. Stillwell, 97 Me. 247, 54 A. 389, 61 L.R.A. 163; McLaughlin v. Armfield, 58 Hun 376, 12 N.Y.S. 164; Yall v. Snow, 201 Mo. 511, 100 S.W. 1, 10 L.R.A.,N.S., 177, 119 Am.St.Rep. 781, 9 Ann.Cas. 1161. These cases, and the cases cited therein, also establish that notice by the public authorities is not a condition precedent to liability under similar statutes.

In addition to McCulloch v. Ayer, supra, the appellants place their main reliance on Maker v. Slater Mill & Power Co., 15 R.I. 112, 23 A. 63; Lee v. Smith, 42 Ohio St. 458, 51 Am.Rep. 839; Schott v. Harvey, 105 Pa. 222, 51 Am.Rep. 201; and Keely v. O'Conner, 106 Pa. 321. The provisions of the statutes in those cases were somewhat different from the provisions of the ordinance here involved. In the Maker case the law required that in every building where twenty-five or more operators were employed, fire escapes should be installed. The court emphasized that, where the owner leased his building, it would be placing an unfair burden on him to require him to comply with the law when he had no control over the number of employees hired by his tenant. In the other three cases the statutory provision required that any owner of any factory or workshop must install fire escapes. The court, as a matter of interpretation, held that the obligation was not on the owner of a building where he did not also own the factory business. It should also be noted that most of the cases relied upon by appellants were distinguished in the cases relied upon by respondent.

[3, 4] It must be conceded that the variance in the cases cannot entirely be explained upon the basis of difference in statutory provisions. Some of the decisions are undoubtedly conflicting in principle. After reading the cases we are of the opinion that those cases cited, supra, that hold that the obligation is upon the owner of a leased building, even though the statute does not expressly so provide, where the owner leases the building knowing it is to be used for purposes that bring the building within the ordinance, are sound. We are required, under elementary principles, to so interpret the ordinance as to uphold it, if possible. We must give the ordinance such reasonable interpretation as to give effect to the obvious intention of the lawmaking body. This ordinance was passed in the exercise of the police power to protect life. The lawmaking body expressly provided that buildings of a certain type should be equipped with fire escapes. Obviously, the fire escapes are a permanent addition to the building. On new buildings they must be erected at the time of construction. The duty to construct them must be held to rest on the owner or the entire purpose of the statute will be evaded. The lawmaking body could reasonably have no other intention.

[5] This analysis is sufficient to dispose of this phase of the appeal. It is not necessary to pass on the question as to whether the findings and conclusions in reference to general negligence are sustainable. There are apparently many cases holding that the operator of a public building at common law was under no duty to construct fire escapes. Whether that rule would go so far as to prevent liability from attaching to an owner, in the absence of statute, not only for failing to construct fire escapes, but where, as here, he leased a building for lodging house purposes, with but one means of egress—the front stairway—with the back stairway effectually closed—we do not now have to determine. The ordinance as herein interpreted is sufficient to impose the duty. The evidence shows a violation of that duty. There is, or can be, no serious contention that respondent was guilty of contributory negligence.

[6] The only other point necessary to be considered is the contention that the judgment is excessive. The trial court awarded $2,500 general damages. The evidence shows that respondent suffered a dislocated and fractured foot. There were two severe fractures. The attending physician was of the opinion that after reduction the patient had "pretty good functional results". He testified that four bones in the foot were displaced outward; that some of the ligaments were involved; that the foot was in a cast for about five weeks; that there is a certain amount of impairment in the functions of the ankle. The plaintiff testified that he was on crutches for three months after the accident; that in May of 1936, about two and one-half years after the accident, he still walked with a cane; that for six months after the accident he could not walk without pain; that until six months before the trial (May of 1936) he could not drive a car without pain; that he first secured employment on February 18, 1935, some fourteen months after the accident; that then he could not take a job driving an automobile and took a job as janitor. Enough has been stated to demonstrate that the award of general damages finds ample support in the record.

[7] Appellants make no attack on an item of $150 allowed for reasonable services of the attending physician, but object to an item of $550 for eleven months' loss of wages at $50 a month. Plaintiff was earning $50 a month, plus room and board at the time of the accident. Appellants contend the evidence shows only three months' incapacitation. That is not so. At the end of three months plaintiff was able to walk, but was unable to perform his usual duties. For six months he suffered severe pain in walking. He did not, in fact, secure employment until February of 1935, some fourteen months after the accident. The award finds ample support in the record.

[8] The only other item of damages objected to is an item of $50 for hospitalization. Respondent failed to produce any testimony that this sum was paid or in-

curred, or that the $50 was the reasonable value of the hospitalization.

For the foregoing reasons it is therefore ordered that the judgment of $3,250 be modified by striking therefrom the sum of $50, thus reducing the same to $3,200. As so modified, the judgment is affirmed, respondent to recover costs on appeal.

We concur: KNIGHT, J.; CONLAN, Justice pro tem.

41 Cal.App.2d 243

PERKINS v. MAIDEN.

Civ. 11427.

District Court of Appeal, First District, Division 2, California.

Oct. 21, 1940.

1. Appeal and error ⇨419(1)

Where order of nonsuit was entered and announced on January 15, 1940, and formal judgment of nonsuit was prepared, signed and entered on January 17, 1940, and notice of appeal recited that appeal was from judgment of nonsuit made and entered on January 17, 1940, record did not contain defect affecting appellate jurisdiction of District Court of Appeal, as against respondent's objection that oral pronouncement of trial court, when entered into the minutes, amounted to order or judgment of nonsuit on January 15, 1940.

2. Appeal and error ⇨1061(3)

In action by administratrix of deceased's estate, to recover $5,000 allegedly delivered by deceased to defendant, entry of judgment of nonsuit was reversible error, where administratrix established a prima facie case on the theory of an express trust by introducing evidence that payments made by defendant to deceased were "interest", and that the $5,000 was to be repaid by defendant.

3. Appeal and error ⇨927(3)

On appeal from judgment of nonsuit, every inference and presumption and every fact proved must be viewed most favorably in behalf of the plaintiff.

4. Trial ⇨54(1)

A recital in judgment of nonsuit that cause of action instituted on March 16, 1939, on note dated October 7, 1920, and due one day thereafter, was barred by 4-year limitation statute, was proper, notwithstanding admission of letter dated November 20, 1935, relating to payments made by defendant, where letter was admitted in evidence for limited purpose of establishing payments on note, and not to toll statute of limitations. Code Civ.Proc. § 337, subd. 1.

5. Witnesses ⇨188(1)

In action by administratrix of deceased's estate to recover $5,000 allegedly delivered by deceased to defendant, exclusion of testimony of both defendant and divorced wife as to communications during marriage by defendant to divorced wife, who was daughter of administratrix and deceased, was not error. Code Civ.Proc. §§ 4, 1881.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Ella Perkins, administratrix of the estate of F. W. Perkins, deceased, against F. Bruce Maiden to recover a judgment for $5,000. From a judgment of nonsuit, the plaintiff appeals.

Reversed and remanded.

Edw. R. Solinsky, of San Francisco, for appellant.

George M. Naus, of San Francisco, for respondent.

STURTEVANT, Justice.

As administratrix of the estate of F. W. Perkins, deceased, the plaintiff sued the defendant to recover a judgment for $5,000. The defendant answered and the action was tried by the trial court sitting without a jury. When the plaintiff had rested her case, on the motion of the defendant the trial court ordered a nonsuit. The plaintiff made a motion for a new trial, the motion was denied, and the plaintiff has appealed.

[1] The order of nonsuit was entered on January 15, 1940, the day it was announced. On January 17, 1940, the defendant prepared a formal judgment of nonsuit, had it signed by the judge of the trial court, and later, on the same day, caused it to be entered. In preparing her notice of appeal the plaintiff recited therein that she appealed "* * * from the judgment of

nonsuit made and entered by the above entitled court in the above entitled action on the 17th day of January, 1940 * * *." The defendant makes a preliminary objection to this hearing claiming the "* * * oral pronouncement of the court when entered into the minutes amounted to an order or judgment of nonsuit on January 15, 1940 * * *" and therefore there is a defect in the record affecting the appellate jurisdiction of this court. We think the objection has no merit. Schrimsher v. Reliance Rock Co., 1 Cal.App.2d 382, 390, 36 P.2d 688.

The plaintiff claims the trial court's order was erroneously made. She makes two different attacks. Each attack is based on a separate set of facts. We will discuss the two attacks separately. In her first attack she claims she had introduced evidence which made a prima facie case to the effect that the defendant was liable to her on an express trust. In that connection she calls to our attention the following facts. In her complaint she alleged: "That on or about the 7th day of October, 1920, in the City of Oakland, Alameda County, State of California, said F. W. Perkins delivered to defendant the sum of $5,000." That allegation was admitted by the defendant's answer. Except as will be noted defendant has not repaid said sum. On January 31, 1934, defendant wrote to deceased: "For some time past I have had difficulty in maintaining the interest rate on your money. As you know in times past, when things were active, money could be used to greater advantage. Money is harder to get now than ever, still inactivity has reduced interest rates everywhere. I have, therefore, had to reduce the interest to $60.00 per month in place of $75.00 per month, as formerly. This will make your check on February 1, 1934, $120.00 in place of $150.00. Also in the future it will be more convenient to pay the $60.00 each month instead of every other month. If this is agreeable to you, kindly send your check book each month to Mrs. Ingham and she will take care of the matter as usual." Under defendant's directions his secretary wrote plaintiff's daughter on November 20, 1935, a letter containing the following passages:

"In reply to Mrs. Perkins' letter, Mr. Maiden directed me to deposit in her account $25.00, duplicate deposit slip for which is herewith.

"Mr. Maiden asked me to inform you that the $75.00 per month which was paid to the Perkins account until January 1, 1934, the $60.00 per month which was paid until January 1, 1935, and the $50.00 per month which was paid from then until now has provided six per cent interest on the Five Thousand Dollars placed with Mr. Maiden; and in addition to this interest, has provided approximately Twelve Thousand Dollars. This means that the Five Thousand Dollars has been repaid twice over with Two Thousand Dollars to spare.

[2, 3] "Mr. Maiden has instructed me to deposit $25.00 each month to Mrs. Perkins' account until he gives me further orders." Numerous payments were made, but no one was shown to be on the principal. On the other hand there are in the record passages in which such payments are by the defendant branded as "interest". Moreover there is direct evidence in the record that the said $5,000 was to be repaid to the decedent. These facts made a prima facie case. The defendant calls to our attention that there are other facts contained in the record. That is true. But the matter before the court is a ruling on a motion for a nonsuit. We are not permitted to argue the inconsistencies. That may properly be done only after all of the evidence of both parties has been presented and both parties have rested. At this time every inference and presumption and every fact proved must be viewed most favorably in behalf of the plaintiff. Gregg v. Western Pacific R. R. Co., 193 Cal. 212, 216, 223 P. 553.

[4] In her second attack the plaintiff contends that she also proved a prima facie cause of action on a promissory note. That note is as follows:

"Oakland, California,
"$5,000.00 October 7th, 1920

"One day after date, for value received, I promise to pay to the order of F. W. Perkins at the Central National Bank of Oakland, at its banking house in Oakland, California, Five Thousand and 00/100 .... Dollars, in U. S. Gold Coin of the present standard, with interest in like gold coin from date until paid at the rate of 12 per cent per annum, payable monthly, and in case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit.
"No....... Due...... F. Bruce Maiden".

In connection therewith she calls to our attention the contents of the letter hereinabove set forth dated November 20, 1935, and also the fact that this action was commenced March 16, 1939. Continuing she claims she has proved a prima facie case and that the statute of limitations was tolled by the letter last mentioned. That claim is not sustained by the record in the following respects. True it is that the plaintiff offered the letter dated November 20, 1935, however, the defendant objected to it as evidence tolling or tending to toll the statute of limitations. At that time both the defendant and Mrs. Ingham, the writer of the letter, were in the courtroom but plaintiff declined to call either to the stand and insisted on her offer of the letter. The trial court admitted the letter in evidence for the limited purpose of establishing payments and not as authority to toll the statute. The ruling of the trial court is not challenged by the plaintiff, the point is not briefed, and the defendant contends the point is not before this court. The defendant further contends that the order of the trial court granting the nonsuit must be reviewed on the evidence that was before the trial court and not on evidence that was excluded, or on evidence that was received for a limited purpose and now sought to be used for a different purpose. In the judgment appealed from the trial court recited that plaintiff's cause of action was barred by the provisions of subdivision 1 of section 337, Code of Civil Procedure. In so far as plaintiff claims a cause of action on said note that ruling was not incorrect.

[5] As the case must be reversed because as we have shown above, the plaintiff established a prima facie case on the theory of an express trust, and as a new trial must be had, it is necessary to discuss certain rulings on the rejection of evidence tendered by the plaintiff. The plaintiff and decedent had one daughter, Winte. The defendant and Winte intermarried in 1920. They were divorced in 1938. The plaintiff called Winte to the stand as a witness in behalf of plaintiff. The latter asked the witness many questions and offered to prove by the witness communications made by the defendant to his wife during the marriage. The defendant objected and all of said objections were sustained. The plaintiff contends that said rulings were erroneous. We think the point cannot be sustained. Section 1881 of the Code of Civil Procedure provides: "Sec. 1881. Confidential communications. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: 1. Husband and wife. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, * * *." The plaintiff calls attention to the last clause, "* * * but this exception does not apply to a civil action or proceeding by one against the other, * * *." She then contends that as she was a daughter and as the plaintiff, as administratrix, was suing in behalf of the estate of the deceased, that such action was in effect a civil action by her against the defendant. Savings Union Bank, etc., Co. v. Crowley, 176 Cal. 543, 169 P. 67. That case we think is not helpful. Mrs. Crowley was suing in her own right. In the present case Ella Perkins is suing in a representative capacity. The record does not present an action by Mrs. Maiden against Mr. Maiden. The statute before us expressly recites that "there are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate * * *". In construing said statute, section 4 of the Code of Civil Procedure provides: "* * * The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice." Giving effect to both provisions, we think the trial court did not err in sustaining the objection of the defendant.

The plaintiff also called as a witness the defendant. She propounded to him certain questions attempting to prove communications made by him to his wife during the period of their marriage. The defendant objected and relied on the provisions of section 1881, supra. The trial court sustained the objection. The reasoning stated in the last paragraph is applicable. That reasoning is reinforced by the statutory recital "* * * nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage * * *".

The judgment is reversed and the cause is remanded to the trial court for further proceedings not inconsistent with what has been said above.

I concur: NOURSE, P. J.

WEST KEY NUMBER SYSTEM

WATSON v. POORE et al. *

LEFFLER et ux. v. WATSON et al.

POORE et al. v. PROW & LEFFLER et al. (KALLMEYER et al., Interveners).

Civ. 12656–12658.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1940.

Hearing Granted Dec. 16, 1940.

1. Fraudulent conveyances 🔑172(2, 3), 176(1)

Where a contract has been entered into to accomplish a fraudulent purpose, a court of equity will not at the suit of one of the parties, while the agreement is still executory, compel its execution or decree its cancellation nor, after it has been executed, set it aside and restore to complainant property which he has transferred for a fraudulent purpose, but, if a contract or deed is made for a fraudulent purpose through undue influence of contractee or grantee in violation of a fiduciary relationship, a court of equity will grant relief to a party least in fault.

2. Fraudulent conveyances 🔑174(3)

Where a grantor in reliance on advice of a grantee in whom grantor reposed confidence conveyed land in order to save himself from his creditors, grantee could not retain land on ground conveyance was made to accomplish a fraudulent purpose.

3. Trust 🔑87

In suit to establish a resulting trust in ten acres of land which defendant allegedly agreed to buy for plaintiffs, terms of agreement between plaintiff and former owner of land in controversy for purchase of another five acres of land were immaterial, where such agreement was independent of any transaction between plaintiff and defendant and was terminated when plaintiff was unable to perform his part of the agreement and when trust deed on land was foreclosed.

4. Vendor and purchaser 🔑186

Purchasers of realty were within their rights in refusing to make final payment to vendor, where vendor was unable to tender purchasers a good and sufficient deed in accordance with terms of contract.

5. Trusts 🔑374

Where plaintiff had contracted to convey two acres of land and thereafter plaintiff was persuaded by defendant to let defendant purchase the property with defendant agreeing to convey two acres of land to plaintiff's grantee and to hold remaining eight acres in trust, in plaintiff's suit to establish a constructive trust in land, court of equity properly refused to eject plaintiff's grantees from the two acres conveyed to them.

6. Release 🔑24(2)

Where a husband and wife conveyed property to defendant as security, and thereafter wife brought divorce action, joined defendant, and judgment awarded her property conveyed and money judgment for rents collected by defendant, which money judgment was paid by defendant, and thereafter husband executed a general release of all claims against defendant, it was not necessary that husband return to defendant amount paid by defendant in satisfaction of wife's judgment as a prerequisite to the repudiation of release.

7. Appeal and error 🔑1011(1)

Where trial court found on conflicting evidence that plaintiff did not read a release before he signed it and that he was induced to sign it by fraudulent statements of defendant, it was immaterial that a contrary finding would have been supported by evidence had trial court believed defendant's testimony.

8. Appeal and error 🔑172(3)

Where defendants did not seek an accounting in trial court, they could not for first time on appeal claim that it was error for the trial court not to order an accounting between the parties.

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* Subsequent opinion 115 P.2d 478.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Three consolidated actions by John T. Watson against Alvin H. Poore and Beulah Poore, husband and wife, and another, to establish a resulting trust, by S. P. Leffler and Nellie E. Leffler, husband and wife, against Jack Watson and Inez Watson, husband and wife, Alvin H. Poore and Beulah Poore, sued as Jane Doe One, and others, to recover for an alleged conspiracy to deprive plaintiffs of land, wherein named defendants filed cross-complaints, and by Alvin H. Poore and Beulah Poore, husband and wife, against Prow & Leffler, a copartnership, and others to eject S. P. Leffler and Nellie E. Leffler from a tract of land, wherein Cornelius Kallmeyer intervened, making Alvin H. Poore, Beulah Poore, and others defendants in intervention. From judgments adverse to Alvin H. Poore and Beulah Poore in each of the three actions, they appeal.

Affirmed.

Hector P. Baida, of Santa Monica (Tanner, Odell & Taft, of Santa Monica, of counsel), for appellants.

B. W. Burkhead, of Los Angeles, for respondent John T. Watson.

Claude A. Shutt, of Los Angeles, for respondents Prow & Leffler, S. P. Leffler and Nellie E. Leffler.

Arthur E. Briggs, of Los Angeles, for petitioner in intervention Cornelius Kallmeyer and respondent Inez Watson.

McCOMB, Justice.

The above-entitled cases were consolidated for trial and for the purpose of this appeal.

(1) In action No. 12656 respondent Watson sought to establish against appellants Alvin H. and Beulah Poore a resulting trust as to 10 acres of land.

(2) In action No. 12657 appellants Poore sought to eject respondents S. P. and Nellie E. Leffler from the 10 acres of land which was the subject matter of action No. 12656.

(3) In action 12658 respondents Leffler sought to establish that respondent Watson and appellants Poore conspired to deprive them of a portion of the land described in actions Nos. 12656 and 12657.

The cases were tried before the court without a jury and the trial court gave judgment in favor of respondents, finding that appellants held the property, which is the subject of the suits, as trustees for Mr. Watson. The evidence is the same in all three cases, and, viewing it most favorably to respondents, the essential facts are:

Cornelius Kallmeyer owned ten acres of land subject to a trust deed which secured Mr. Kallmeyer's note in the sum of $5,000, payable April 1, 1931, to Mr. Hunt. In June, 1927, Mr. Kallmeyer agreed to sell 5 acres of this land to Mr. Watson for $10,000, said respondent to pay $5,000 in cash and assume and agree to pay the note which Mr. Kallmeyer owed Mr. Hunt. In February, 1928, respondent Watson contracted to sell two acres of the land to the respondents Leffler. They went into possession, paid $1,500 in cash, and agreed to pay $5,000 on or before February 3, 1931. In February, 1931, respondents Leffler were ready to pay to respondent Watson the $5,000 which they owed him, but, since he was unable to pay the $5,000 note due Mr. Hunt which had been transferred to the Betsy Warren Estate, he was not in a position to give them a clear title to the property which they had agreed to purchase from him, and the Lefflers refused to pay the balance of the purchase price. Thereafter the Betsy Warren Estate recorded the customary notice of default and election to sell.

Subsequently Mr. Kallmeyer and respondent Watson, in consideration of certain agreements, were given a contract by the Betsy Warren Estate to repurchase the 10 acres for the balance due on the original Kallmeyer note. In July of 1933, appellant Alvin H. Poore promised to loan respondent Watson $1,200 so that he could repurchase the 10 acres. Appellant Poore took the note of Mr. Watson and his wife and mortgages on certain property of theirs as security for the loan. In August, 1933, respondent Watson drew on Alvin H. Poore's account for $1,200 and from that date until November 13, 1933, Messrs. Watson and Kallmeyer tried to complete their purchase of the 10 acres. This they were unable to do because of a disagreement between themselves.

On the last-named date Mr. Kallmeyer sued Mr. Watson for breach of contract. When served with the complaint respondent Watson went to Mr. Poore for advice, explaining to him that he was being pressed by his creditors. Mr. Poore then advised Mr. Watson to let him buy the land for said respondent and that he would convey the two acres to respondents Leffler for $3,000, subject to the trust, and hold the balance of the eight acres pending settlement between Messrs. Kallmeyer and Watson. He also suggested to Mr. Watson that the mortgages previously given to him were not sufficient and that Mr. Watson and his wife should deed property which they owned in El Monte to him in order that he might collect the rents. This was done. Also the $1,200 loaned by Mr. Poore to Mr. Watson was returned to Mr. Poore for the purpose of applying it on the purchase price of the 10 acres.

In January of 1934, Mr. Poore purchased the 10 acres at a probate sale for $6,500. He paid $1,000 down with Mr. Watson's money and the balance was evidenced by a note of Mr. Poore and his wife secured by a trust deed upon the property. The payments on the note were $100 per month and the income from the 10-acre tract was approximately $150 per month.

In August, 1935, Mrs. Watson sued Mr. Watson for divorce and joined Mr. Poore as a party defendant, claiming title to all of the El Monte city property which she had conveyed to Mr. Poore, and seeking to establish a resulting trust in her favor as to the 10-acre tract. Mr. Poore advised Mr. Watson to leave the state until the divorce action was over and that he would be able to save the property for him. This case was tried, resulting in a judgment in favor of Mrs. Watson for divorce, the award to her of all of the property which she had conveyed to Mr. Poore located in the city of El Monte, and a money judgment against Mr. Poore and his wife for $2,553.97 on account of rents collected from the property located in the city of El Monte. It was further decreed that Mrs. Watson had no interest in the 10-acre tract and title was quieted in the Poores as against Mrs. Watson.

After the divorce action Mr. Watson returned to El Monte and Mr. Poore told him that he, Watson, had lost everything and induced him to sign a quitclaim deed to the 10-acre tract and certain other property, and at the same time to sign a general release of all claims which Mr. Watson might have against Mr. Poore, representing to him that it was necessary for him to do this in order to bring to a culmination the divorce suit filed by Mrs. Watson. After obtaining the quitclaim deed and release from Mr. Watson, Mr. Poore settled the money judgment with Mrs. Watson for $2,000 and received a satisfaction of judgment from her.

Appellants rely for reversal of the judgment against them on these propositions:

First: Respondent Watson was not entitled to recover as against the appellants, because he had conveyed his property to appellant Alvin H. Poore for the purpose of defeating and defrauding his creditors.

Second: In any event respondent Watson's interest in the 10-acre tract extended to five acres thereof only, because only five acres were involved in the original agreement between respondent Watson and Mr. Kallmeyer.

Third: There was no privity of contract between appellants Poore and respondents Leffler, whatever rights the Lefflers had, having been eliminated at the trustee's sale by the Warren Estate, since their contract was subsequent to the trust deed.

Fourth: The release executed by respondent Watson to respondent Poore could not be set aside (a) without respondent Watson's paying to appellant Alvin H. Poore $2,000, nor (b) on the ground that it was obtained by fraud and misrepresentation, since the settlement was fully discussed in the presence of respondent Watson's attorney.

Fifth: Even though respondent Watson be entitled to relief, the trial court erred in not ordering an accounting to be taken between the appellants Poore and respondent Watson.

[1] Appellants' first proposition is untenable. The general rule is established in California that if a contract has been entered into to accomplish a fraudulent purpose, a court of equity will not at the suit of one of the parties to the fraud while the agreement is still executory, compel its execution or decree its cancellation nor after it has been executed set it aside and restore to the complainant property or other interests which he has transferred for a fraudulent purpose. Allstead v. Laumeister, 16 Cal.App. 59, 65, 116 P. 296. There is an exception to this rule, which is that if a contract or deed is made for a fraudulent purpose through the undue influence of the contractee or grantee in violation of a fiduciary relationship, abuse of confidence, oppression or fraud, a court of equity will grant relief to a party least in fault who has been led into his act by a violation of confidence, since in such case the parties

are not equally in the wrong. Birney v. Birney, 217 Cal. 353, 359, 18 P.2d 672. In the case just cited our Supreme Court says at page 359 of 217 Cal., at page 674 of 18 P.2d: "As was said in Chamberlain v. Chamberlain, 7 Cal.App. 634, 95 P. 659, one cannot lay a trap for another, secure his confidence, induce him to make a conveyance of his property in expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that the donor too readily yielded to temptation to save himself at the possible expense of his creditors."

[2] The facts of the present cases bring them within the exception to the general rule above stated. Mr. Watson reposed confidence in Mr. Alvin H. Poore, sought his advice, relied upon it, and yielded to the temptations and inducements extended by Mr. Poore to save himself from his creditors. Mr. Poore having thus entrapped Mr. Watson by violating the confidence reposed in him is more at fault than Mr. Watson and may not, therefore, in order to retain the fruits of his own wrong, rely upon the general rule heretofore mentioned.

[3] Appellants' second proposition is likewise without merit. The trial court found upon conflicting evidence that Mr. Poore made the initial payment for the property in question with money belonging to Mr. Watson. The transaction between Messrs. Poore and Watson was entirely independent of any agreement between Messrs. Watson and Kallmeyer, their agreement having been terminated when Mr. Watson was unable to perform the same and the Betsy Warren Estate exercised their rights under the trust deed they held upon the property, which is the subject of this suit. Hence, it is immaterial so far as Mr. Poore is concerned as to the terms of the agreement between Messrs. Watson and Kallmeyer.

[4, 5] Appellants' third proposition is without merit. The Lefflers were within their rights in refusing to make their final payment to Mr. Watson for the land they were purchasing from him, in the absence of his ability to tender to them a good and sufficient deed in accordance with the terms of their contract. Boone v. Templeman, 158 Cal. 290, 297, 110 P. 947, 139 Am.St.Rep. 126; Kerr v. Reed, 187 Cal. 409, 411, 202 P. 142. Therefore, since Mr. Watson was the real owner of the property and the Lefflers were entitled to receive two acres from him upon the payment of the purchase price, the lower court sitting as a court of equity properly refused to eject them from the land and gave judgment in their favor.

Appellants' fourth proposition likewise is without merit.

[6] (a) The trial court found in the action instituted by Mrs. Watson against her husband and Mr. Poore that Mr. Poore had received income from the El Monte property which she had conveyed to him amounting to $3,632 and in that action gave judgment against him in the sum of $2,500. When Mr. Poore paid $2,000 to obtain a release from Mrs. Watson, it was predicated upon an obligation arising from money which he had received that in fact belonged to Mrs. Watson. Mr. Watson did not receive any money from Mr. Poore in return for Mr. Watson's executing the release the trial court set aside. Hence it was not necessary for Mr. Watson to return to Mr. Poore as a prerequisite to the repudiation of the release any money, since he had received nothing from him.

[7] (b) The trial court found upon conflicting evidence that Mr. Watson did not read the release before he signed it, and that he was induced to sign it by fraudulent statements and representations of Mr. Poore. It is immaterial that a contrary finding would have been supported by the evidence, had the trial court believed Mr. Poore's testimony to the effect that Mr. Watson read the release and discussed it with his attorney before signing it.

[8] Appellants' final proposition is devoid of merit. Appellants did not seek by their pleadings or otherwise in the trial court for an accounting, but relied on the theory that they did not owe respondent Watson any sum of money or hold title to any property in trust for him. They may not for the first time on appeal present a different theory of their case and claim that it was error for the trial court not to order an accounting between the parties.

For the foregoing reasons the judgments appealed from are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

41 Cal.App.2d 252

PEOPLE v. MILLER.

Cr. 3335.

District Court of Appeal, Second District, Division 2, California.

Oct. 21, 1940.

Hearing Denied Nov. 19, 1940.

1. Criminal law ⚷741(6)

The rule that where every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain conviction, and question presented is one of law for trial court is applicable only where there is no evidence that a crime has been committed.

2. Arson ⚷37(1)

Circumstantial evidence *held* sufficient to warrant conviction for arson.

3. Arson ⚷31

In prosecution for arson, admitting in evidence statements made by defendant that he had previously collected insurance money after a previous fire, there being no evidence that there had been any fraud in previous fire, was not error, where one of the counts on which defendant was being tried when evidence was admitted charged burning of insured property with intent to defraud insurer. Pen.Code, § 450a.

4. Criminal law ⚷878(4)

Acquittal on count in information charging crime of burning insured property with intent to defraud insurer was not fatally inconsistent with conviction on count charging arson, under evidence warranting inference that defendant set fire to building to destroy his records, since each crime was made up of different elements. Pen.Code, § 450a.

5. Arson ⚷2

One who wilfully and maliciously burns any dwelling house, either the property of himself or another, is guilty of "arson".

See Words and Phrases, Permanent Edition, for all other definitions of "Arson".

6. Witnesses ⚷246(3)

Where prosecution was tried to trial court, defendant could not complain that trial judge asked leading questions of witnesses for prosecution.

7. Witnesses ⚷246(2)

Where prosecution was tried to trial court, trial judge was not bound to tacitly await presentation of such facts as attorneys chose, or were able, to develop, and if during examination of witnesses judge desired to be informed on points mentioned in testimony, it was proper for him to ask questions for purpose of developing facts in regard to such points.

8. Criminal law ⚷254

In prosecution where jury was waived, trial judge could not be charged with error in calling to his aid his own personal experiences with elements involved in case. Code Civ.Proc. § 1875, subd. 8.

9. Criminal law ⚷938(1)

Denial of defendant's motion for new trial on ground of alleged newly discovered evidence was not an abuse of discretion, where alleged newly discovered evidence was purely cumulative, and there was no showing that such evidence could not have been produced at trial if proper diligence had been exercised.

10. Criminal law ⚷945(1)

Question as to effect of newly discovered evidence is addressed to trial court's discretion, especially in cases tried before court without jury.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Isidore A. Miller was convicted of arson, and he appeals.

Affirmed.

Hearing denied; HOUSER, J., dissenting.

Benjamin Elconin, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged in count I of the information with the crime of arson and in count II with the crime of burning insured property with intent to defraud the insurer. Both charges were founded upon the burning on September 5, 1939, of the drug store operated by defendant at 302 South Main street in the city of Los Angeles. The drug store was part of the building used as a "dwelling-house". The second count charged the felonious burning of the merchandise on stock in the drug store. A jury having been waived, the action was tried before the court and defendant was found guilty on count I and not guilty on count II. He prosecutes this appeal from the judgment of conviction and from the order denying his motion for a new trial.

Defendant contends that the evidence is insufficient to support the judgment. In the store in question there was a front room, where merchandise was sold and business generally transacted; back of this room was a prescription room, adjoining which was a room referred to in the evidence as the surgical fitting room; a hallway led from the prescription room to the rear of the building. Defendant locked the store and went home early in the morning of the fire, no other person being in the store at the time. At about 3:30 a. m. the owner of the hotel over and adjoining the drug store was awakened by a guest and was informed that the burglar alarm was ringing in the drug store. He leaned out the window, concluded that there was a fire in the drug store premises and called the fire department. The firemen responded promptly, broke into the premises and in five minutes put out the fire with water. Captain Cordell of the fire department testified that he discovered a fire in a carton of rubbish in one of the rooms, which he called the "stock" room, and also discovered a fire in the surgical fitting room. He testified: "From there I entered into what is marked here on this diagram, 'Surgical fitting room'; this was involved in fire. Across the top of the surgical table, as according to this diagram, along on the ledge of the window in the rear, was some combustible materials which I took to be records, sales slips and things of record of the business there".

"The Court: Were they burning, Captain? A. Yes, they were burning. And to the right there is a cupboard, as indicated on this drawing. There was a fire in the cupboard, and on top of the cupboard, and extended back toward the door, within an approximation of 4 feet from the door."

The officer further testified that there was no connection between these fires and that the substance that was burning inside the cupboard "was not in keeping with an ordinary fire"; that there was a clear blue flame without any appreciable amount of smoke. Officer Wiesinger of the police arson squad testified that he arrived at the scene of the fire about fifty-five minutes after it had been extinguished; that he found piles of empty cartons a few inches from the remains of the fire; that there were three separate fires in the premises.

An officer testified that an extinguished stub of a candle, which had been burned down to a length of one-half of an inch, was found on a magazine in the cupboard; that there were two cotton trails approximately three and four feet long, respectively, four inches wide and about a half an inch thick leading away from the candle in two directions; that the cotton was partly saturated with a volatile liquid which "smelled like gasoline or benzine"; that a ledger was propped up inside the cupboard with the pages open and the pages stuffed with cotton; that there was found on the cotton trail a "residue of cotton that had not entirely burnt"; that the cotton trail "led from the candle inside the leaves of this ledger".

Defendant made statements to the officers which were shown to be untrue. He stated that he kept no candles in the store but candles were found which were similar to the stub of the candle found in the cabinet. He also stated that he had not previously collected insurance from a fire but it was shown that fifteen years earlier he had had a fire in his store and had collected insurance from the loss.

[1, 2] In arguing that the circumstantial evidence presented by the prosecution is insufficient defendant cites the case of People v. Staples, 149 Cal. 405, 86 P. 886, 894, wherein it was held that "where, in a case such as this, every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court". After the filing of defendant's opening brief the Supreme Court filed its decision in the case of People v. Newland, Cal.Sup., 104 P.2d 778, 779, and concerning the Staples case, supra, said: "The holding of the Staples case is to be strictly confined to situations where the reviewing court as a matter of law must conclude that there is no evidence, circumstantial or otherwise, that a crime has been committed, and therefore the evidence of guilt is insufficient." In effect, the Newland case so limits the rule of the Staples case that it is now applicable only where there is no evidence whatever that a crime has been committed. Of course, this is elementary and it is difficult to see how the rule of the Staples case can hereafter be cited for any useful purpose. In the Newland case the court further said: "If the circum-

stances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." It is difficult to distinguish this rule from the rule often referred to in civil cases, that the findings of the trial court will not be disturbed on appeal if there is substantial evidence to support them. We are satisfied that the inferences drawn by the trial judge in the present action are reasonable and that the "circumstances reasonably justify the judgment of the court".

[3] It is contended by defendant that the trial court erred in receiving in evidence statements made by the defendant that he had previously collected insurance money after a fire, there being no evidence that there had been any fraud in the earlier fire. In People v. Bragdon, 103 Cal.App. 20, 283 P. 881, 883, it was held that the admission of such evidence was proper. In that case the defendant was charged with burning barns located upon a ranch for the purpose of defrauding an insurance company. It was held proper to show that previously a fire had occurred on the same ranch, when a hotel was burned, and the defendant had collected and received a sum of money which the insurance company paid on account of the loss of the hotel. The evidence was deemed proper because "the district attorney was attempting to prove that the defendant had a motive for burning the barns". In the present action defendant was being tried on two counts at the time the evidence was received, one of the counts charging the burning of property to defraud an insurance carrier. On the authority of the Bragdon case it must be held that the court did not err in receiving the evidence.

[4, 5] There is no merit in defendant's contention that his acquittal on count II of the information is inconsistent with his conviction on count I. In the first count defendant was charged with the crime of arson, a crime of which one is guilty who wilfully and maliciously burns any dwelling house either the property of himself or another. In the second count defendant was charged with the crime of burning insured property, a crime defined in section 450a of the Penal Code. This crime is made up of elements different from the essential elements of the crime of arson. One is guilty under the terms of this section who wilfully and with intent to defraud an insurer sets fire to merchandise or other personal property. The trial court could properly find defendant guilty of arson and at the same time could find that he did not burn property with the intent to defraud an insurer. A motive for the burning can be found in the fact that defendant's records and books of account had been placed in the immediate neighborhood of the fire. Pieces of cotton had been arranged among the leaves of the ledger. Evidence was introduced showing that a former employee, who had been discharged by defendant, had threatened defendant with investigation by the authorities upon a charge that he had defrauded the state in the matter of his sales tax at the store in question. The following is taken from one of the letters received by defendant from the former employee: "Mr. Miller: Have positive evidence that you have defrauded State of sales tax from store No. 2 A. M. More to follow." It is apparent that the trial court could reasonably have drawn the inference that defendant had set fire to the premises to destroy his records.

[6-8] Defendant complains that the trial judge asked leading questions of some of the witnesses for the prosecution. Even in a jury trial it is within the discretion of the court to permit counsel to ask leading questions. Defendant makes the further complaint, however, that the trial judge, although not actuated by "any wrong motive", so conducted himself "that he was not able to act with judicial fairness nor withhold the formation of his judgment on evidence until it was all in". The complaint seems to be founded on the fact that the judge in asking certain leading questions of witnesses aided the presentation of the prosecution's case and in so doing relied upon his own knowledge concerning such matters as fire, electricity and gasoline. The record before us discloses that the court's action is to be commended rather than subjected to criticism. A jury trial had been waived and the judge was called upon to decide the extremely important question whether the accused was guilty of a penitentiary offense. The judge, and not the lawyers, was in control of the proceedings and there was no duty upon him to passively await the presentation of such facts as the lawyers chose, or were able, to develop. If during the examination of the

witnesses the judge desired to be informed on certain points mentioned in the testimony it was entirely proper for him to ask questions for the purpose of developing all the facts in regard to them. Courts are established to discover where lies the truth when issues are contested, and the final responsibility to see that justice is done rests with the judge. Nor can the judge be charged with error in calling to his aid his own personal experience with the elements involved in the action. It is more to be desired that a judge or juror should have some knowledge of the action of fire, electricity and inflammable materials than that he should be ignorant on these subjects. Jurors are not prevented from using the knowledge which they may have acquired through experience or observation. Cederberg v. Robison, 100 Cal. 93, 34 P. 625. In section 1875, subdivision 8, of the Code of Civil Procedure it is provided that courts may take judicial notice of the laws of nature and in so doing may resort for aid to appropriate books or documents of reference.

[9, 10] The trial court did not abuse its discretion in denying defendant's motion for a new trial. During the trial it was shown that electric wires connecting a floor lamp were burned in two and that the fuse on the circuit was blown, resulting in a short circuit. An expert testified on behalf of defendant that the fire had been caused by the short circuit. Thereafter an expert on behalf of the prosecution testified that "it is impossible to state whether or not the short circuit caused the fire or the fire caused the short circuit". On motion for a new trial defendant presented an affidavit of an additional expert in which the affiant stated that it was his opinion that the fire "was caused solely and proximately by the short of the electric wiring in the said surgical room". Defendant also presented his own affidavit in which he stated that he could not with reasonable diligence have presented this additional testimony at the trial because he was unacquainted with the subject of electricity. The affidavit of the additional expert is purely cumulative. The question as to the effect of newly discovered evidence is from its nature one that is addressed to the discretion of the trial court. Such is the rule in cases tried with a jury and it is with special reason to be followed in cases tried before the court without a jury. Moreover, no showing has been made that the additional evidence could not have been produced at the trial if proper diligence had been exercised.

The judgment and the order denying a new trial are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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41 Cal.App.2d 223

CITY OF LOS ANGELES v. PACIFIC LAND CORPORATION, Limited, et al.

Civ. 12664.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1940.

Hearing Denied Dec. 16, 1940.

1. Navigable waters 🔑37(8)

The Legislature, in enacting an act in 1917 entitled "An act to amend section one of an act entitled 'An act granting to the city of Los Angeles the tidelands and submerged lands of the state within the boundaries of the said city,' approved May 1, 1911", did not grant to city tidelands which were annexed to the city subsequent to passage of the 1911 act and prior to the passage of the 1917 act. St.1911, p. 1256, as amended by St.1917, p. 159; Pol.Code, § 325.

2. Statutes 🔑147

A "grant" by Legislature is a "law" within meaning of provision of Political Code that, where a section or part of a statute is amended, it is not to be considered as having been repealed and re-enacted in the amended form, but the portions which are not altered are to be considered as having been the "law" from the time they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment. Pol.Code, § 325.

See Words and Phrases, Permanent Edition, for all other definitions of "Grant" and "Law".

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the City of Los Angeles against the Pacific Land Corporation, Limited, and others, to quiet title to certain tidelands located within the area of the City of Los Angeles. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Louis A. Babior, Deputy City Atty., all of Los Angeles, for appellant.

Overton, Lyman & Plumb, Irving H. Prince, and Donald H. Ford, all of Los Angeles, Earl Warren, Atty. Gen., and Louis G. Campbell, Deputy Atty. Gen., for respondents Residential Land Corporation, Mountain Park Associates, Los Angeles Mountain Park Co., and Bel-Air Bay Club, Ltd.

O'Melveny, Tuller & Myers and Pierce Works, all of Los Angeles, for respondent California Trust Co.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the granting of their motion for a judgment on the pleadings in an action to quiet title to certain tide lands located within the area of the city of Los Angeles known as the Westgate Addition, plaintiff appeals.

The essential facts are:

In 1911 the legislature granted to the city of Los Angeles the tide lands "within the present boundaries of said city" (Stats. 1911, p. 1256). The act contained among others this provision: "Provided, that said city, or its successors, may grant franchises thereon for limited periods, for wharves and other public uses and purposes, and may lease said lands or any part thereof for limited periods, for purposes consistent with the trusts upon which said lands are held by the State of California, and with the requirements of commerce or navigation at said harbor; * * *."

Thereafter in 1917 the legislature amended the foregoing provision of the 1911 act so far as is material to the present litigation to read as follows (Stats.1917, p. 159): "Provided, that said city, or its successors, may grant franchises thereon for limited periods, *in any event not to exceed thirty years* for wharves and other public uses and purposes, and may lease said lands, or any part thereof, for limited periods, *in any event not to exceed thirty years* for any and all purposes which shall not interfere with commerce or navigation, and are not inconsistent with the trusts upon which said lands are held by the State of California; * * *." (Note the words in italics are not in the 1911 act.)

Section 1 of both acts reads in part thus: "Section 1. There is hereby granted to the city of Los Angeles * * * all the right, title and interest of the State of California * * * in and to all tidelands and submerged lands, * * * within the present boundaries of said city * * *."

In 1916 there was annexed to plaintiff, the City of Los Angeles, an area known as the Westgate Addition, in which is embraced the tide land which is the subject of the present litigation.

[1] This is the sole question necessary for us to determine:

Did the legislature in passing the act of July 27, 1917 (Stats. 1917, p. 159) entitled "An act to amend section one of an act entitled 'An act granting to the city of Los Angeles the tidelands and submerged lands of the state within the boundaries of the said city,' approved May 1, 1911," grant to plaintiff the tide lands lying within the Westgate Addition, which was annexed to plaintiff subsequent to the passage of the 1911 Act and prior to the passage of the 1917 Act?

This question must be answered in the negative. The law is established in California that, where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form, but the portions which are not altered are to be considered as having been the law from the time they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment. Sec. 325, Pol. Code; In re Estate of Martin, 153 Cal. 225, 229, 94 P. 1053; Corporation of America v. Johnson, 7 Cal.2d 295, 305, 60 P.2d 417.

Applying the foregoing rule to the facts of the instant case, the words in section 1 of the 1917 act, "There is hereby granted to the city of Los Angeles * * * all tidelands and submerged lands * * * within the present boundaries of said city * * *" are a reenactment of identical words in the act of 1911. Hence, under the rule just stated, the quoted words refer and relate to the date of the original enactment in 1911 and not to the amended statute as adopted in 1917. Thus, as the tide lands embraced within the Westgate

Addition were not within the boundaries of the plaintiff in 1911, the legislature did not grant said tide lands to plaintiff.

[2] There is no merit in plaintiff's contention that a grant is not a law within the meaning of that word as used in section 325 of the Political Code, in view of the decision of our Supreme Court in People v. Oakland Water Front Co., 118 Cal. 234, 50 P. 305. Mr. Chief Justice Beatty in the case just cited says at page 245 of 118 Cal., at page 308 of 50 P.: "A legislative grant from the public domain is not only a grant, but is also a law; * * *."

Neither do we find any force in plaintiff's argument that the legislative act of 1917 was a new grant. Such argument is refuted by the very title of the act, which reads in part: "An act to amend section 1 of an act entitled * * *, approved May 1, 1911."

In view of our conclusions, it is unnecessary to consider the other arguments presented by plaintiff.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

41 Cal.App.2d 79

In re GUARDIANSHIP OF SHARP et al.

Civ. 6316.

District Court of Appeal, Third District, California.

Oct. 8, 1940.

1. Domicile 🔑5

The residence of an illegitimate unmarried minor follows that of the mother and so remains until another residence is legally gained or established by means other than abandonment of the child.

2. Guardian and ward 🔑8

Where the mother of illegitimate twins was at date of filing of petition for guardianship and for considerable period of time prior thereto a resident of San Joaquin county, superior court of such county was vested with jurisdiction to hear and determine guardianship proceeding, notwithstanding that children were at that time residing in another county in a home in which they were placed by an institution.

3. Guardian and ward 🔑13(7)

Where, at the conclusion of the hearing and after court had indicated its decision in guardianship proceedings, the court directed counsel to "prepare your order", which was done, and order incorporated findings of court on all material facts necessary to sustain the order, order sufficiently complied with statutory requirements, and findings and order were not required to be incorporated in separate documents. Code Civ. Proc. § 632.

4. Guardian and ward 🔑13(8)

Where there was substantial evidence to sustain the findings and order of the court in guardianship proceeding, no prejudice resulted to defendants by reason of not having been afforded an opportunity to submit counter findings.

5. Guardian and ward 🔑13(1)

In guardianship proceedings, court acts for and on behalf of the minor and must necessarily be given considerable latitude in bringing out the facts, and in doing so may take over the examination of witnesses.

6. Guardian and ward 🔑10

In determining who shall have custody of minor child, paramount consideration is determination of what may be for the best interest and welfare of the minor, and such matter rests largely in trial court's sound discretion.

7. Guardian and ward 🔑13(4)

Where mother gave illegitimate twins to sister and husband, who cared for children until mother, on pretext of taking children to her home for visit, turned them over to an institution for adoption purposes and relinquished right to custody of children, evidence warranted finding that mother "abandoned" children and that their best interest and welfare would be served by appointing sister and husband guardians.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandoned".

◆

Appeal from Superior Court, San Joaquin County; Anthony Caminetti, Jr., Judge.

Proceeding in the matter of the guardianship of Oleta Sharp and Oneta Sharp, minors. From an order appointing Thelma Sharp and another as guardians, the Children's Home Society of California appeals.

Affirmed.

O. C. Parkinson, of Stockton, for appellant.

H. C. Stanley and Chester E. Watson, both of Stockton, for respondent.

STEEL, Justice pro tem., delivered the opinion of the court.

This appeal is taken by the Children's Home Society of California from an order appointing the petitioners as guardians of two minor children. The appellant society appeared in response to notice and opposed the petition. The principal question presented is that of jurisdiction.

From the record it appears that Oleta Sharp and Oneta Sharp, twins, were born September 26, 1935, at the home of petitioners Thelma Sharp and Robert Sharp in Texas, the illegitimate children of Vena Lawson, now Vena Thompson, a sister of Thelma Sharp. Approximately a year later the mother came to California in search of employment and located at Stockton. She has since married George Thompson. Shortly after Mrs. Thompson departed from Texas the Sharps also came to Stockton bringing the twin children with them and where they have since resided. During the entire period of time since their birth and up to approximately three months prior to the filing of the petition for guardianship herein the children lived with and were cared for by the petitioners. It is the testimony of Mrs. Sharp that before their birth, her sister Vena Thompson, the mother of the twins, told her that she could have the child when it was born; that petitioner then made arrangements with the doctor to attend her sister and also made the necessary baby clothes; that after the birth the mother, in response to a question by petitioner as to giving her the children, said: "You can have them, and if you don't want them I don't care what you do with them." The testimony shows that the Sharps, after arriving in California, were at times pressed for finances, the husband, Robert Sharp, following the work of seasonal labor and and at times working on WPA projects. In the summer of 1938 the petitioner, Thelma Sharp, asked her sister to supply milk for the children, thus assisting in their support. This request apparently was the forerunner to the difficulties which subsequently arose. The mother thereupon contacted the Children's Home Society in Oakland, which in turn sent a representative to investigate the situation with a view to accepting the children for adoption purposes. After such investigation was made, and without in any way advising the petitioner Thelma Sharp of the proposed plan of placing the children in such Home, the mother, on the pretense of taking the children to her home for an afternoon's visit, took the children from the Sharp home and delivered them over to a representative of the Children's Home Society, together with a Relinquishment in the case of each minor child.

Upon learning what had taken place, the Sharps went to Oakland, accompanied by the mother of the children, in an endeavor to regain their custody. Their efforts in this regard were of no avail and the Sharps then applied to the Home Society for leave to adopt the children. This application was not approved by the society. The children were then placed by the society in a private home in Alameda county with the object of subsequent adoption. In the course of approximately six weeks later the instant proceeding for guardianship was commenced in San Joaquin county.

Directing our attention first to the question of jurisdiction of the San Joaquin county court it appears from the record that when the matter came on for hearing before the court below its jurisdiction was first put in issue and evidence was then received on the question of whether or not there had been an abandonment by the mother of the children. The court found there had been such abandonment and therefore concluded it had jurisdiction to proceed with the hearing. Upon the conclusion of the hearing petitioners were appointed guardians of said minor children.

The appellant, Children's Home Society, contends that the court below was without jurisdiction in this proceeding because the minor children were for a period of some three months prior to the filing of said petition actually residing in Alameda county, and, therefore, jurisdiction would rest with the court of the latter county. In answer to this contention respondents cite In re Guardianship of Vance, 92 Cal. 195, 28 P. 229, as authority for the rule that where a child has been voluntarily placed with another by a parent, with the intent to abandon such child, the residence of such abandoned child is not changed by its surreptitious removal by such parent to another county. In re Hawkins, 183 Cal. 568, 192 P. 30, is cited to the effect that the general rule that "the residence of the father during his life * * * is the residence of the unmarried minor child" (Pol.Code, sec. 52, subd. 4) does not apply when the child is under the age of fourteen years and has been abandoned by the father, for in such case he forfeits the guardianship of the child and can no longer claim its custody; that its residence then becomes the place where it is removed by those who intend to give it a permanent home elsewhere.

Appellant contends in this regard that the rule just stated fits the instant case exactly as the children were residing in Alameda county with persons who intended to give them a permanent home when the petition herein was filed in San Joaquin county. A further examination of the authorities discloses the case of County of Los Angeles v. Superior Court, 128 Cal.App. 522, 18 P.2d 112 (hearing denied in Supreme Court), a case involving jurisdiction in a Juvenile Court proceeding in which the Vance and Hawkins cases, supra, are considered and wherein the court's conclusion, we submit, is determinative of the question of jurisdiction here considered. We quote from the opinion, page 529 of 128 Cal.App., page 115 of 18 P.2d, as follows:

"On the point of law involved there can be no controversy. The residence of an illegitimate unmarried minor follows that of the mother. Blythe v. Ayres, 96 Cal. 532, 560, 31 P. 915, 19 L.R.A. 40; 9 Cal.Jur., p. 839. Such residence cannot be changed by the act of the minor or that of his guardian. Pol.Code, § 52, subd. 6. Abandonment on the part of the parent forfeits the right of guardianship. Civ.Code, § 246, subd. 4; [In re] Guardianship of Vance, 92 Cal. 195, 198, 28 P. 229; In re Hawkins, 183 Cal. 568, 576, 192 P. 30. The two cases last cited were guardianship proceedings brought under section 1747, Code of Civil Procedure (now Probate Code, § 1440 et seq.) which authorizes the Superior Court of each county to appoint guardians of minors 'who are inhabitants or residents of the county.' In each case the rule of the decision was based upon section 246, Civil Code (now Probate Code, § 1407 et seq.), and the parent was held to have forfeited his right to guardianship because of his abandonment of the child. In each case the child was admittedly an 'inhabitant' of the county where the proceeding was commenced. In both cases the court, by way of dicta, added that the 'residence' of the child followed that of those who intended to give it a permanent home. People v. Dewey, 23 Misc. 267, 50 N.Y.S. 1013, and Cannon's Estate, 15 Pa.Co.Ct.R. 312, were cited as authority. But section 52 of our Political Code was not considered in either the Vance or the Hawkins Case, and we do not find a similar provision in the laws of New York or Pennsylvania.

"It is settled law in this state that there can be but one residence, and that that can be changed only by the union of act and intent. Section 52, Pol.Code. It is equally well settled that a residence cannot be lost until another is gained. Id. In this case the residence of the minor was the residence of the mother and that residence was not lost until another was gained. By her abandonment of the daughter the mother forfeited her right of guardianship. Section 246, Civ. Code, now found in section 1409, Probate Code. But this did not relieve her of her obligation to support the child. Section 196a, Civ.Code."

And again the court, interpreting the Juvenile Court Act in contemplation of section 52 of the Political Code, said:

"Such an interpretation brings us to the conclusion that the residence of an illegitimate unmarried minor is the residence of the mother; that this residence cannot be changed by simple abandonment; and that such a minor so abandoned, and for whom no guardian has been appointed, is a resident of the county wherein the mother resides and continues to be such until another residence is gained by some legal means beyond the mere abandonment on the part of the mother."

[1] It therefore appears to be the established rule in this state that the residence of an illegitimate unmarried minor follows that of the mother and so remains

until another is legally gained or established by means other than abandonment of the child.

[2] In the instant proceeding it is without dispute that the mother of the twins was at the date of the filing of the petition herein and for a considerable period of time prior thereto a resident of San Joaquin county, and applying the foregoing rule, the superior court of the latter county was vested with jurisdiction to hear and determine the guardianship proceeding pending therein.

[3, 4] Appellant further urges as error requiring a reversal that findings were not prepared and served as required by the statute. Code Civ.Proc. § 632. At the conclusion of the hearing and after the court had indicated its decision, the court directed counsel to "prepare your order" which was done and wherein was incorporated the findings of the court on all material facts necessary to sustain such order. This was a sufficient compliance with the statute in such a proceeding and the findings and judgment are not required to be incorporated in separate documents. In re Bensfield, 102 Cal.App. 445, 283 P. 112. As to the failure to serve a copy of the judgment before it was presented to the court for signature the Bensfield case, supra, further holds that where no direction is given for the preparation of findings, service thereof is not required. In Miller v. Murphy, 186 Cal. 344, 199 P. 525, a case where findings were ordered prepared and served by the court, it was held that, standing alone, and in the absence of claim or showing of prejudice, such omission to serve the findings would not be sufficient to justify a reversal. An examination of the record here discloses substantial evidence to sustain the findings and order complained of and we find no prejudice resulting to appellant by reason of not having been afforded an opportunity to submit counter findings.

[5-7] Other assignments of error urged upon this appeal include misconduct by the court in its examination of witnesses, insufficiency of the evidence as to the fitness of petitioners as guardians and lack of proof as to abandonment. However as already indicated, the judgment finds ample support to sustain it and the court's conduct of the case, as shown by the record, does not indicate any such misconduct as would be sufficient to warrant a reversal. In guardianship proceedings the court acts for and on behalf of the minor and must necessarily be given considerable latitude in bringing out the facts. In this regard it is not unusual for the court to take over the examination of a witness or witnesses. The paramount consideration is a determination of what may be for the best interest and welfare of the minor and primarily that question rests largely with the trial court in the exercise of a sound discretion. We are unable to say that the conclusion reached by the court below was the result of an abuse of such discretion.

The order appealed from is affirmed.

We concur: THOMPSON, Acting P. J.; TUTTLE, J.

In re BOGUNOVIC. *

BOGUNOVIC v. UNITED STATES DEPARTMENT OF LABOR, NATURALIZATION SERVICE.

Civ. 11421.

District Court of Appeal, First District, Division 2, California.

Oct. 17, 1940.

Hearing Granted Dec. 16, 1940.

1. Aliens 🔑68(6)

District Court of Appeal had jurisdiction of appeal from judgment denying petitioner's application for admission to citizenship in United States.

2. Aliens 🔑60

"Naturalization" is not a "right" but a "privilege" to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes.

See Words and Phrases, Permanent Edition, for all other definitions of "Naturalization", "Right" and "Privilege".

3. Aliens 🔑60, 68(4, 6)

An alien has a right to file his petition for admission to citizenship and to obtain

* Subsequent opinion 114 P.2d 581.

a hearing thereon before a competent tribunal, but he has no right to admission to citizenship except on his establishment of the requisite facts.

4. Aliens 🔑68(5)

In hearing on petition for admission to citizenship, the burden of proof is on the petitioner and any doubt which exists should be resolved against the petitioner.

5. Aliens 🔑62(1)

"Attached to the principles of the Constitution", within statute requiring an alien petitioning for admission to citizenship to be attached to the principles of the Constitution of the United States, means attachment to the principles of free government as exemplified in the Constitution, "attachment" being a stronger word than "well disposed" and implies a depth of conviction which would lead to an active support of the Constitution. 8 U.S.C.A. § 382.

See Words and Phrases, Permanent Edition, for all other definitions of "Attachment to the Principles of the Constitution" and "Attachment".

6. Aliens 🔑68(5)

In passing on petition for naturalization, court is not bound by mere statement of petitioner that he is attached to principles of the Constitution, but the court may admit any evidence which will have any reasonable tendency to show the attitude or state of mind of the petitioner and may consider the willingness or unwillingness of the petitioner to answer frankly all proper questions and his demeanor in answering such questions. 8 U.S.C.A. § 382.

7. Aliens 🔑68(5)

In passing upon petition for naturalization, the scope of examination to ascertain the state of mind of a petitioner is practically unlimited. 8 U.S.C.A. § 382.

8. Aliens 🔑68(6)

In proceeding on application for admission to citizenship, finding of trial court with respect to lack of attachment of petitioner to principles of the Constitution should seldom be disturbed by an appellate court. 8 U.S.C.A. § 382.

9. Evidence 🔑590

A trial court is not always bound by the positive and uncontradicted testimony of a witness, and such rule is particularly applicable where witness is an interested witness and the issue is one involving the attitude or state of mind of the witness.

10. Aliens 🔑68(6)

If the record in a naturalization proceeding shows affirmatively that there is any reason for the trial court to doubt the attachment of petitioner to principles of Constitution, the trial court's finding against petitioner must be sustained on appeal. 8 U.S.C.A. § 382.

11. Aliens 🔑68(5)

In naturalization proceeding, the burden of proof was not on the government to show that petitioner was attached to the principles of communism, but the burden was upon petitioner to show that he was attached to the principles of the Constitution. 8 U.S.C.A. § 382.

12. Aliens 🔑68(5)

In naturalization proceeding, evidence sustained judgment of trial court denying admission to citizenship on ground that petitioner was not attached to the principles of the Constitution. 8 U.S.C.A. § 382.

13. Aliens 🔑68(5)

When a petitioner, seeking admission to citizenship, claims that he is and has been for at least five years attached to the principles of the Constitution, the government has a right to examine petitioner regarding any conduct of petitioner occurring at any time which may have any tendency to cast doubt upon the truth of such claim. 8 U.S.C.A. §§ 382, 399.

14. Aliens 🔑68(5)

In naturalization proceeding, admitting evidence of conduct of petitioner seven years prior to time petition for admission to citizenship was filed was not error. 8 U.S.C.A. §§ 382, 399.

15. Aliens 🔑68(5)

In naturalization proceeding, evidence of petitioner's conduct is admitted merely as an aid to the court in determining whether the petitioner is attached to the principles of the Constitution of the United States. 8 U.S.C.A. § 382.

16. Constitutional law 🔑90, 199, 211, 274

Where evidence raised doubt regarding whether petitioner, seeking admission to citizenship, was attached to principles of communism, decision denying admission to citizenship on ground that petitioner was not attached to principles of Constitution did not deny petitioner's constitutional rights to "freedom of speech," "freedom of press," "due process," "equal protection of the law" or in regard to "ex post facto laws."

8 U.S.C.A. § 382; U.S.C.A.Const. art. 1, § 9; Amends 1, 5, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Freedom of Speech", "Freedom of Press", "Due Process", "Equal Protection of the Law" and "Ex Post Facto Laws".

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Proceeding on the application of Grgo Bogunovic for admission to citizenship in the United States, opposed by the United States Department of Labor, Naturalization Service. From a judgment denying application, the applicant appeals.

Affirmed.

Philip Adams, Wayne M. Collins, James J. Cronin, Jr., Charles R. Garry, and Morris M. Grupp, all of San Francisco, and Clarence E. Rust, of Oakland, for appellant.

Frank J. Hennessy, U. S. Atty., R. B. McMillan, Asst. U. S. Atty., L. R. Mercado, Asst. U. S. Atty., and A. J. Phelan, United States Immigration Naturalization Service, all of San Francisco, for respondent.

SPENCE, Justice.

Petitioner filed his petition in the superior court seeking naturalization. His petition was denied upon the ground that he was "not attached to principles of the government of the United States". Petitioner appeals from the judgment denying his petition.

[1] At the outset, we should dispose of the contention of respondent that this court has no jurisdiction of this appeal. Respondent argues that there is no provision for any appeal in the statutes relating to naturalization and that when naturalization proceedings are instituted in a state court, no appellate court of such state can entertain an appeal in such proceedings. While the statutes relating to naturalization contain no express provision for any appeal and while it was held in the case of United States v. Dolla, 5 Cir., 177 F. 101, 21 Ann. Cas. 665, that no appeal would lie in a naturalization proceeding instituted in a federal court, the last-mentioned case was overruled by the United States Supreme Court in Tutun v. United States, 270 U.S. 568, 46 S.Ct. 425, 426, 70 L.Ed. 738, where it was held that the United States Circuit Court of Appeals had jurisdiction to review the decree of a United States District Court denying a petition for naturalization. That decision was based on section 128 of the Judicial Code of the United States, 28 U.S.C.A. § 225, providing that the Circuit Courts of Appeals shall have appellate jurisdiction to review final decisions of the District Court of the United States "in all cases", with certain exceptions not material to this discussion. It was held that a naturalization proceeding was "a case" within the meaning of that statute. The court there said on page 575 of 270 U.S., on page 426 of 46 S.Ct., 70 L.Ed. 738, "In the state courts judgments granting or denying petitions for naturalization have generally been held to be reviewable on appeal, like other cases." There is some conflict in the decisions of the state courts on the subject but the great weight of authority supports the view which was quoted with approval by the United States Supreme Court in Tutun case. See In re Fordiani, 98 Conn. 435, 120 A. 338; United States v. Hrasky, 240 Ill. 560, 88 N.E. 1031, 130 Am. St.Rep. 288, 16 Ann.Cas. 279; United States v. Gerstein, 284 Ill. 174, 119 N.E. 922, 1 A.L.R. 318; Ex parte Smith, 8 Blackf., Ind., 395; Dean, Petitioner, 83 Me. 489, 22 A. 385, 13 L.R.A. 229; State v. District Court, 107 Minn. 444, 120 N.W. 898, 22 L.R.A.,N.S., 1041; Ex parte Johnson, 79 Miss. 637, 31 So. 208, 89 Am.St.Rep. 665; State v. District Court, 61 Mont. 427, 202 P. 387; State, Rushworth v. Judges of Inferior Court, 58 N.J.L. 97, 32 A. 743, 30 L.R.A. 761; United States v. Breen, 135 App. Div. 824, 120 N.Y.S. 304; In re Naturalization of Vura, 5 Ohio App. 334; Ex parte Granstein, 1 Hill, S.C., 141. Most of the decisions of the state courts adopting a contrary view, including In re Wilkie, 58 Cal.App. 22, 208 P. 144, and State v. Superior Court, 75 Wash. 239, 134 P. 916, Ann.Cas.1915C, 425, were handed down prior to the decision in Tutun v. United States, supra. In the only case touching the subject which has been decided in this jurisdiction since the decision in the Tutun case (In re Hullen, 124 Cal.App. 271, 12 P. 2d 487), the court recognized the fact that the question of whether an appeal would lie to the appellate courts of the state was not necessarily involved for the reason that the appeal there was not, in any event, perfected within the time allowed by law. We therefore conclude upon the authority of the Tutun case and the decisions of the state courts referred to therein with ap-

proval, that this court has jurisdiction of this appeal.

We may now proceed to a consideration of appellant's contentions on this appeal but, before doing so, it appears appropriate to make certain general observations concerning naturalization as much is said in the briefs regarding the question of whether naturalization is a right or a privilege. We believe that the situation is clarified by the decisions of the United States Supreme Court.

[2] In United States v. Macintosh, 283 U.S. 605, at page 615, 51 S.Ct. 570, at page 572, 75 L.Ed. 1302, the court said: "Naturalization is a privilege, to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes." And in Tutun v. United States, 270 U.S. 568, at page 578, 46 S.Ct. 425, at page 427, 70 L.Ed. 738, it was said, "The opportunity to become a citizen of the United States is said to be merely a privilege, and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. Article 1, § 8, cl. 4. The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate. See United States v. Shanahan (D.C.) 232 F. 169, 171. There is, of course, no 'right to naturalization unless all statutory requirements are complied with.' United States v. Ginsberg, 243 U.S. 472, 475, 37 S. Ct. 422 (61 L.Ed. 853); Luria v. United States, 231 U.S. 9, 22, 34 S.Ct. 10, 58 L.Ed. 101. The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent, and he must establish these allegations by competent evidence to the satisfaction of the court. In re Bodek (C.C.) 63 F. 813, 814, 815; In re [an Alien], 7 Hill (N.Y.) 137. In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor."

[3, 4] It thus appears that while an alien has the right to file his petition and to obtain a hearing thereon before a competent tribunal, he has no right to admission to citizenship except upon his establishment of the requisite facts. In this connection it is well settled that the burden of proof is upon the petitioner and that any doubt which exists should be resolved against the petitioner. United States v. Macintosh, 283 U.S. 605, 51 S. Ct. 570, 75 L.Ed. 1302; United States v. Schwimmer, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889; United States v. Manzi, 276 U. S. 463, 48 S.Ct. 328, 72 L.Ed. 654.

[5-10] From the standpoint of the government the most important fact to be established before an alien is admitted to citizenship is that the alien is "attached to the principles of the Constitution of the United States". Sec. 382, U.S.C.A., tit. 8, chap. 9. "Attached to the principles of the Constitution means attachment to the principles of free government as exemplified in that instrument. 'Attachment' is a stronger word than 'well disposed,' and implies a depth of conviction which would lead to an active support of the Constitution." In re Saralieff, D.C., 59 F.2d 436. It therefore may be said that proof of such attachment consists of proof of the attitude or state of mind of the petitioner and that, in passing upon a petition for naturalization, the court is not bound by the mere statement of the petitioner that he bears such attachment. On the contrary the court may admit any evidence which will have any reasonable tendency to show the attitude or state of mind of the petitioner and may consider the willingness or unwillingness of the witness to answer frankly all proper questions and his demeanor in answering such questions. The scope of the examination to ascertain the state of mind of a petitioner is practically unlimited for as was said in United States v. Macintosh, 283 U.S. 605, at pages 616 and 617, 51 S.Ct. 570, at page 572, 75 L.Ed. 1302, "These, at least, are matters which are of the essence of the statutory requirements, and in respect of which the mind and conscience of the applicant may be probed by pertinent inquiries as fully as the court, in the exercise of a sound discretion, may conclude is necessary." It is obvious that a trial court, seeing and hearing a petitioner while giving his testimony, has a far better opportunity than has an appellate court to determine the truth of such testimony and to determine the attitude or state of mind of such petitioner and therefore the finding of a trial court with respect to the lack of attach-

ment of a petitioner to the principles of the Constitution should seldom be disturbed by an appellate court. It is well settled that the trial court is not always bound by the positive and uncontradicted testimony of a witness (Caldwell v. Weiner, 203 Cal. 543, 264 P. 1100; Travis Glass Co. v. Ibbetson, 186 Cal. 724, 200 P. 595; Blanc v. Connor, 167 Cal. 719, 141 P. 217; Davis v. Judson, 159 Cal. 121, 113 P. 147) and this is particularly true where the witness is an interested witness and the issue is one involving the attitude or state of mind of such witness. In any event, if the record in a naturalization proceeding shows affirmatively that there is any reason for the trial court to doubt the attachment of a petitioner to the principles of our Constitution, there can be no question under the authorities above cited that the trial court's finding against such petitioner on this issue must be sustained on appeal.

The main contention of petitioner is that the trial court abused its discretion in denying him admission to citizenship as there was no evidence to sustain the finding of the trial court against him on the issue of his attachment. We find no merit in this contention. It is true that in response to a few leading questions from his own counsel, petitioner testified that he was "well disposed to the good order of the United States", that he had not done "anything detrimental to the best causes and interest of the Constitution, Government and laws of the United States" and did not know anything which he had done for which he could be criticized. We may assume, without deciding, that this was a sufficient prima facie showing that petitioner was "attached to the principles of the Constitution of the United States". It is impossible, however, for an appellate court to ascertain from the typewritten record the demeanor of the witness on the stand or whether that demeanor in itself was sufficient to cast doubt on the truth of petitioner's representation as to his attachment. Furthermore, we find that the record affirmatively shows sufficient facts and circumstances to cast doubt thereon.

It appears that petitioner is about 40 years of age. He was born in Jugoslavia, entered the United States in 1909 and has engaged in farming, residing in Cupertino. He is the secretary of the Cupertino Local of the Croatian Fraternal Union. The record does not disclose the exact nature of this union or lodge. Petitioner states that he has no police record except for a minor traffic violation. The record shows, however, that he was also arrested at one time and paid a fine for stealing fruit from a neighbor's orchard. A reading of the entire testimony shows that petitioner has a fair knowledge of the English language but his answers to certain questions show either a lack of understanding of the questions or an attempt to be vague, evasive or untruthful in his replies. Upon cross-examination, the examiner sought to elicit facts tending to show attachment on the part of the petitioner to the principles of communism rather than attachment to the principles of our Constitution. The petitioner admitted that he subscribed and resubscribed to a weekly newspaper called "Rodnik" over a period of two years; that this paper was a communistic paper, published in this county in the Jugoslavian language and bearing on the front page the statement "Organ Communist Party of the United States of America"; that a fellow lodge member by the name of Nicholas circulated this paper; that on one occasion a bundle of these papers was sent to petitioner by mail but he did not know whether Nicholas circulated the papers contained in said bundle or whether his wife burned them up. While petitioner claimed that he did not know it was a communistic paper when he first subscribed as "the man who subscribed me didn't tell me", he admitted that he discovered that it was a communistic paper as soon as he received it. At one point he explained his continued subscription to the paper thereafter by stating that he was solely interested in a story which ran therein for about a year and a half but afterwards stated, "Well, when I read the paper I want to see both sides, so I think I am entitled to read the paper." When asked the question, "Didn't think anything of it?", he gave the ambiguous reply, "That I want to educate myself to become communist, I didn't think nothing of it to read that paper." At one point he stated, "I really don't remember what it was, what I read in those papers those days" and again when he was asked "* * * you know that that paper taught the overthrow of this government, is that right?", he stated, "Well, I may say that that I read in the paper." It further appears that petitioner had made application for naturalization on a previous occasion. At that time he was requested to appear before the immigration authorities for the purpose of making a statement.

He did so appear but he refused to make any statement on the advice of counsel.

[11, 12] Our view of the record shows that the trial court may well have considered that petitioner had not shown that willingness to submit to examination or that frankness in answering material questions which should characterize the attitude of an alien who is applying for admission to citizenship. Petitioner was represented by counsel who strenuously objected to many proper questions and, when testimony was adduced raising a doubt as to whether petitioner was attached to the principles of communism or to the principles of our Constitution, petitioner failed to offer any testimony expressly disavowing his attachment to the principles of communism. The burden of proof was not upon the government to show that petitioner was attached to the principles of communism. The burden was upon petitioner, as above stated, to show that he was attached to the principles of our Constitution. It is a sufficient answer to petitioner's main contention here to state that the record affirmatively shows a doubt as to whether petitioner had sustained his burden of proof on said issue and therefore, under the authorities above cited, the trial court was justified in finding against him on said issue and in denying him admission to citizenship.

[13, 14] Petitioner further contends that the trial court erred in "admitting evidence of conduct seven years prior to the time the petition was filed". Petitioner objected to many of the questions relating to his conduct upon the theory that under the provisions of the statute (sec. 382, U.S.C.A., tit. 8, chap. 9) the scope of the inquiry was limited to the period of five years immediately preceding the filing of the petition. We believe this contention to be wholly without merit. Said statute provides that no alien shall be admitted to citizenship unless he has resided continuously in the United States for "at least five years" immediately preceding the date of his application and continuously from that time until the time of his admission to citizenship and unless "during all the periods referred to in this section he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States". It is also provided in the statutes that the government may appear in naturalization proceedings and may cross-examine the petitioner and the other witnesses "concerning any matter touching or in any way affecting his right to admission to citizenship". Sec. 399, U.S.C.A. tit. 8, chap. 9. We find nothing in the statutes showing any intention to limit the scope of such cross-examination to a period of five years. When a petitioner claims that he is and has been for "at least five years" attached to the principles of our Constitution the government has the right to examine the petitioner regarding any conduct of petitioner occurring at any time which may have any tendency to cast doubt upon the truth of such claim. United States v. Bressi, D.C., 208 F. 369; In re DeMayo, D.C., 26 F. Supp. 996; In re Kornstein, D.C., 268 F. 172; United States v. Etheridge, D.C., 41 F.2d 762. As was said in United States v. Bressi, supra, at page 372 of 208 F., "His testimony as to being attached to the principles of the Constitution of the United States and his disposition with relation to our theory of government, and his position in and relation to society and beliefs pertaining to organized government, and disposition as to public officers, is the every essence of the inquiry. These are matters of growth and development, and a conclusion as to some of these requirements can only be arrived at by a discovery of the mental relation and bearing as to these functions and institutions; and any condition or practices of the applicant during his previous life would be material as bearing upon the truthfulness of the statement made."

[15, 16] Finally petitioner contends that the decision of the trial court violated his constitutional rights. He cites the first, fifth and fourteenth amendments to the Constitution of the United States and section 9 of article I of said Constitution in their relation to freedom of speech, freedom of press, due process, equal protection of the laws and ex post facto laws. It seems entirely clear, without extended discussion, that there is no merit in petitioner's claim. Even if it be assumed that any person, including any alien lawfully within our borders, has the right under our Constitution to be opposed to the principles of the very instrument under which he claims such right of opposition, it does not follow that an alien who exercises his claimed constitutional right of opposition has any right, constitutional or otherwise, to gain

the status of a citizen. He may apply or refrain from applying for citizenship as he chooses but, if he applies, the burden is upon him to show the primary statutory requirement of attachment to the principles of our Constitution. And if it appears from the testimony concerning his conduct, including his utterances, his publications, his readings or his associations, that he is opposed to the principles of our Constitution or that there is doubt concerning his attachment to such principles, a decision denying him naturalization cannot be assailed upon the ground that the Constitution guarantees to him the right to indulge in such utterances, publications, readings or associations. The real issue upon a naturalization hearing is not whether the petitioner's conduct has been lawful or unlawful. Evidence of the petitioner's conduct is admitted merely as an aid to the court in determining whether the petitioner is attached to the principles of the Constitution of the United States. A decision against a petitioner in such proceedings on the ground of lack of attachment merely amounts to a decision that the petitioner has failed to sustain the burden of proving such attachment. Such decision does not deprive him of any constitutional right.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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41 Cal.App.2d Supp. 959

ARGANBRIGHT v. SEIVENO et al.

No. 100953.

Appellate Department, Superior Court, San Diego County, California.

Oct. 16, 1940.

1. Bankruptcy 🔑433(7)

The statute providing that judgment against discharged bankrupt must be cancelled on application of bankrupt is "mandatory". Code Civ.Proc. § 675b.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

2. Bankruptcy 🔑433(7)

A default judgment obtained subsequent to defendant's discharge in bankruptcy where defendant listed the debt in his petition for discharge was subject to cancellation on defendant's application therefor, notwithstanding that action in which judgment was rendered was filed prior to petition in bankruptcy Code Civ.Proc. § 675b.

Appeal from Municipal Court, San Diego County; Eugene Daney, Judge.

Action by E. E. Arganbright against Martin Seiveno and Joseph Seiveno for medical services rendered. The defendant Martin Seiveno thereafter filed his petition in bankruptcy, was adjudged a bankrupt, and thereafter duly obtained his discharge. Subsequently plaintiff took default judgment against both defendants. Thereafter Martin Seiveno filed a motion in the municipal court for an order directing that the judgment be canceled and discharged of record as to him. From an order of the municipal court refusing to grant such discharge, Martin Seiveno appeals.

Order reversed and municipal court directed to grant the motion.

Herney & Herney, of San Diego, for appellant.

Liggett & Liggett, of San Diego, for appellee.

PER CURIAM.

Plaintiff sued defendants in the Municipal Court on an open book account for medical services rendered. The defendant Martin Seiveno thereafter filed his petition in bankruptcy, listing this debt, was adjudged a bankrupt and thereafter duly obtained his discharge. Subsequently plaintiff took default judgment in the suit against both the defendants. More than one year after the bankrupt Martin Seiveno was discharged from his debts he made a motion in the Municipal Court for an order directing that the judgment be cancelled and discharged of record as to him pursuant to Section 675b, Code of Civil Procedure. From an order refusing to grant such discharge he appeals.

Our attention is called by respondent to the case of Revere Copper Company v. Dimock, 90 N.Y. 33, affirmed in Dimock v. Revere Copper Co., 117 U.S. 559, 6 S.Ct. 855, 29 L.Ed. 994. What was there involved was the construction of Section 1268 of the New York Code of Civil Procedure which then, in so far as we need here refer to it, reads: *"Discharge of a judgment against a bankrupt.* At any time after two years have elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, for an order, directing the judgment to be cancelled and discharged of record. If it appears that he has been discharged from the payment of that judgment, an order must be made accordingly; and thereupon the clerk must cancel and discharge the docket thereof, as if the proper satisfaction-piece of the judgment was filed."

It was held that this statute only applied to judgments that had been entered prior to the discharge. As to any action pending but not reduced to judgment prior to the discharge or action brought on a debt discharged subsequent thereto, it would be necessary for the defendant to plead the discharge and, he not having done so, the defense would have been waived and the judgment could not be cancelled. Subsequently the New York statute was amended. The amendment involved inter alia the deletion therefrom of the words: "If it appears that he has been discharged from the payment of that judgment * * *" and substituting therefor the words: "If it appears upon the hearing that he has been discharged from the payment of that judgment *or the debt upon which such judgment* was recovered * * *."

In construing the amended statute the New York Court of Appeals in Walker v. Muir, 194 N.Y. 420, 87 N.E. 680, 681, said: "When we consider the phraseology of the amended section in connection with the decisions prior to 1899, it is apparent that the only purpose for which the Legislature could have thus amended the statute was to provide a summary method of canceling judgments obtained *after, as well as before,* a discharge in bankruptcy." (Italics ours.)

Our statute (675b Code of Civil Procedure) is substantially identical with the New York Statute as so amended and was in all probability suggested by it. The facts in the instant case are indistinguishable from the facts involved in Walker v. Muir, supra, and it was said in Rukeyser v. Tostevin, 188 App.Div. 629, 177 N.Y.S. 291, 292; "There can be no doubt that section 1268 [New York Code of Civil Procedure] (now section 150 of the Debtor and Creditor Law [Consol.Laws, c. 12]) applies to the case under consideration, and that it is mandatory upon the court to grant an order canceling and discharging the judgment of record, where it appears that the debt upon which the judgment was recovered had been discharged."

[1,2] We think that our Section 675b, Code of Civil Procedure, is mandatory, from which it follows that the trial court should have granted the motion and entered an order that the judgment be cancelled and discharged of record.

The order appealed from is reversed and the Municipal Court is directed to grant the motion and make and enter an order that the judgment be cancelled and discharged of record.

16 Cal.2d 441

CITY AND COUNTY OF SAN FRANCISCO et al. v. LINARES, Secretary of Board of Park Com'rs.

S. F. 16429.

Supreme Court of California.

Oct. 28, 1940.

1. Dedication 🔑58

Where city and county of San Francisco, as successor to town of San Francisco, acquired land which town had acquired as result of a dedication by public authority, and land, which had been used as a Union Square, had been conveyed to town by deed conveying land "as a public square", the city and county held land by virtue of a "dedication" by the public, and deed did not deprive city and county of right to change character of use of land so long as contemplated use was not inconsistent with enjoyment by public of land for park purposes.

2. Municipal corporations 🔑721(3)

Under charter of city and county of San Francisco, board of park commissioners of the city and county had power to execute a 50-year lease of subsurface space beneath Union Square for purpose of erecting therein a public automobile garage and parking station, notwithstanding temporary suspension of surface use during construction of station, and permanent use of small portion of surface for entrances and exits. Const. art. 11, §§ 8, 8a, 8½.

3. Mandamus 🔑84

The city and county of San Francisco were not deprived of right to prosecute mandamus proceeding to compel respondent, as secretary of board of park commissioners of the city and county, to publish call for bids and receive sealed proposals for a 50-year lease of subsurface space beneath Union Square for purpose of erecting therein a public automobile garage and parking station by fact that respondent served as secretary of board and at pleasure of board.

In Bank.

Original mandamus proceeding by the City and County of San Francisco, a municipal corporation, and the Board of Park Commissioners of the City and County of San Francisco, against Gerald J. Linares, as secretary of the Board of Park Commissioners of the City and County of San Francisco, State of California, to compel respondent, as secretary, to publish a call for bids and to receive sealed proposals for a fifty-year lease of the subsurface space beneath Union Square for purpose of constructing therein a public automobile garage and parking station, wherein, during oral argument, permission was granted to A. G. Curtis, as a taxpayer, to present a motion to intervene.

Application to intervene denied and peremptory writ issued.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for petitioners.

Royal E. Handlos, of San Francisco, for respondent.

Livingston & Livingston, of San Francisco, amici curiae.

M. Mitchell Bourquin and Charles J. Wiseman, both of San Francisco, for A. G. Curtis, a taxpayer.

SHENK, Justice.

This is an application for the writ of mandamus to compel the respondent, as Secretary of the Board of Park Commissioners of the City and County of San Francisco, to publish the call for bids and to receive sealed proposals for a fifty-year lease of the subsurface space beneath Union Square, for the purpose of erecting and constructing therein a public automobile garage and parking station.

As a return to the alternative writ the respondents have filed a general demurrer to the petition.

The Town of San Francisco, predecessor of the City and County of San Francisco, acquired title to this property prior to the admission of California into the Union. Acting under the authority of a resolution by the ayuntamiento or town council of San Francisco, John W. Geary, its first alcalde, on January 3, 1850, executed a deed conveying to the Town of San Francisco the title to the land "bounded northerly by Post Street, easterly by Stockton Street, southerly by Geary Street, and westerly by Powell Street, the same being laid down on a map of the Town of San Francisco, as surveyed by William M. Eddy, Town Surveyor, as a 'public square'." The deed further confirmed "unto the said Town of San Francisco as a public reserve, forever, the said piece or parcel of land bounded and described as above".

The prior ownership of these and other lands by the pueblo of San Francisco and the authority of its officers, duly authorized, to convey title for common use, or for special purposes, or in full ownership in the grantee, was confirmed in 1860 in the case of Hart v. Burnett, 15 Cal. 530.

Since the execution of the deed of January 3, 1850, the property has been devoted exclusively to the uses of a public park or square. Under the present and prior provisions of the charter of the city and county, it has been under the management and control of the Board of Park Commissioners of the City and County. Section 41 of the charter provides as follows:

"Section 41. The commissioners shall have the complete and exclusive control, management, and direction of the parks, squares, avenues, grounds and recreation centers, now or hereafter placed under the charge of the commission, including exclusive right to erect and to superintend the erection of buildings and structures thereon, except as in this charter otherwise provided.

"The commissioners shall not lease any part of the lands under its control nor permit the building or maintenance or use of any structure on any park, square, avenue or ground, except for recreation purposes, and each letting or permit shall be subject to the approval of the board of supervisors by ordinance, *but the commission may lease to the highest responsible bidder for a term not to exceed fifty years and upon such other terms and conditions as it may determine, sub-surface space under any public park and the right and privilege to conduct and operate therein a public automobile parking station, provided that the said construction, when completed, and the operation will not be, in any material respect or degree, detrimental to the original purpose for which said park was dedicated or in contravention to the conditions of any grant under which said park might have been received. The revenues derived from any such lease shall be credited to the park fund.*

"The commission shall have power to lease any stadium or recreation field under its jurisdiction for athletic contests and exhibitions and may permit the lessee to charge an admission fee."

The city and county is asserting its power through the Board of Park Commissioners to proceed with the leasing of the subsurface of Union Square in accordance with the foregoing charter provision and particularly the portion thereof which we have italicized. The questions presented are whether the power to proceed as proposed is properly vested in the Board of Park Commissioners and whether the limitations on the exercise of that power arising under the deed have been observed.

In the adoption of section 41 of its charter, the City and County of San Francisco acted under a constitutional grant of power so to do. Const., secs. 8, 8a, 8½, art. XI. In thus dealing with its own lands, the city and county was not restricted by any constitutional provision. The express grant of power to the Board of Park Commissioners must, therefore, be taken as complete and adequate for the purpose intended, unless the terms of the grant to the Town of San Francisco in 1850 were such as to thwart that purpose.

It will be noted that the language of section 41 of the charter clearly recognizes that the title to Union Square is held by the city and county subject to the right of the public to the perpetual use of the land for park purposes.

It will also be noted that the Town of San Francisco acquired the property, not as the grantee of a private party or individual, but as the result of a dedication by a public authority. The rule of construction is not the same in both instances. In Slavich v. Hamilton, 201 Cal. 299, 257 P. 60, 61, wherein the question of the right to construct a Veterans' memorial hall in a public park was involved, it was said: "The uses to which park property may be devoted depend, to some extent, upon the manner of its acquisition, that is, whether dedicated by the donor, or purchased or condemned by the municipality. A different construction is placed upon dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less strict construction is adopted. Harter v. San Jose, 141 Cal. 659, 75 P. 344; Spires v. City of Los Angeles, supra [150 Cal. 64, 87 P. 1026, 11 Ann.Cas. 465]."

In the Spires case, the city of Los Angeles, as successor to the Pueblo of Los Angeles, held "Central Park" under a dedication by the public as "a public place forever for the enjoyment of the community in general". In approving the use of the land for library purposes and with reference to the foregoing words of dedication, the court said at page 66 of 150

Cal., at page 1026 of 87 P., 11 Ann.Cas. 465:

"This was comprehensive language, and in construing the grant, or rather the extent of the terms of the dedication, no narrow and strict construction should be applied to limit the city in the uses to which the property dedicated may be devoted, as long as they are such as tend to further and promote the enjoyment of the people under the general dedication of [the land] for their benefit. And that the establishment of a public library, to which the visitors to the park have access, is consistent with such public enjoyment, and tends to enlarge it, we have no doubt.

"As matter of public knowledge, we are aware that the erection of hotels, restaurants, museums, art galleries, zoological and botanical gardens, conservatories, and the like in public parks is common, and we are not pointed to any authority where it has been regarded as a diversion of the legitimate uses of the park to establish them, but, on the contrary, their establishment has been generally recognized as ancillary to the complete enjoyment by the public of the property set apart for their benefit."

[1] In Spinks v. City of Los Angeles, 220 Cal. 366, 31 P.2d 193, 194, it appeared that West Lake Park had been dedicated by the city charter in 1888 for park purposes, with the specific provision that this and other public parks should "forever remain to the use of the public as such park or parks, inviolate and no part of said lands or real property shall ever be used or occupied for any other purpose". The charter provision was amended in 1917 by adding the following: "Provided, however, that the Board of Park Commissioners may, with the approval of the Council, given by ordinance * * * authorize the opening, establishment and maintenance of streets or other public ways in or through such parks; * * *" In passing upon the power of the city to lay out a street across the park, and in construing the charter amendment, this court said: "Where a tract of land is donated to a city with a restriction upon its use—as, for instance, when it is donated or dedicated solely for a park—the city cannot legally divert the use of such property to purposes inconsistent with the terms of the grant. A less strict construction is adopted as to dedications made by the public. (Slavich v. Hamilton, 201 Cal. 299, 303, 257 P. 60). The case here is not one of the type first referred to, in which a donor transfers property to a municipality for a fixed and definite purpose defined in the grant, and where the rule of strict construction is to be applied." With the foregoing rules in mind, it must be concluded that the City and County of San Francisco holds Union Square by virtue of a dedication by the public and that there is nothing in the terms of the original grant which would deprive the city and county of the right to change the character of the use of the land so long as the contemplated use is not inconsistent with enjoyment by the public of the land for park purposes.

It appears from the petition that the perplexing problem of relieving traffic congestion in San Francisco has been the subject of much study and investigation. In the consideration of that problem as it existed in the so-called triangle district, it has been concluded by the public authorities and by the Street Traffic Advisory Board of the City and County of San Francisco that the construction of the public garage under Union Square will afford some relief.

Attached to the petition are a copy of the resolution of the Board of Park Commissioners, the call for bids, the proposed lease, the specifications for the finished surface of Union Square, a surface plan, a perspective, and elevations of Union Square. The resolution of the board discloses that the board has found and determined that the construction of a public automobile garage and parking station, when completed as proposed, and the operation thereof, will not be, in any material respect or degree, detrimental to the original purpose for which said park was dedicated, or in contravention of the conditions of any grant under which said park was received.

During the construction of the proposed garage and parking station in the subsurface of the square, it is apparent that there will be a temporary deprivation of a park use. This deprivation is brought about by reason of the necessary disturbance of the surface while the work is going on. The period of construction is estimated to be about ten months. After construction the plan contemplates the restoration of the surface to its previous condition as a public park, with attractive landscaping and the usual public park facilities and conveniences. The only deviation from a complete restoration of the surface to use as a public park will be the permanent entrances and exits to and from the subsurface area on Post and Geary streets. In this connection it appears that the present area of the park surface is 113,437½ square feet. The proposed surface use for ingress and egress will occupy 7424 square feet, or approximately six and one-half per cent of the park surface.

It is the contention of the respondent that in the foregoing respects the construction and operation of the proposed improvement will be in a "material respect or degree, detrimental to the original purposes for which said park was dedicated" and in contravention of the grant under which the park property was received, and therefore unlawful. While it is true that during construction there will be an interference with the surface use, this interference will not be permanent and will continue only for a period of about ten months. Such a temporary interference would appear to be an unavoidable incident in carrying out the purposes of the plan. Likewise, the permanent use of about six and one-half per cent of the area of the square for ingress and egress is unavoidable and should not block the proceedings. The underground garage and parking station would be useless without an entrance and exit.

In Harter v. San Jose, 141 Cal. 659, 75 P. 344, the question of the power of the city to execute a lease for twenty-five years covering two and one-half acres of land in Alum Rock Park for hotel purposes was involved. The city charter authorized such a lease. The park was about 400 acres in area. The plaintiff sought to enjoin the execution of the lease on the ground that the construction of the hotel would "deprive plaintiff and the residents of said city of the free use of said park contrary to the terms of grant under which the city held the land", which was solely for public park purposes. The court refused to construe the grant against the proposed hotel use, calling attention to the fact that the dedication was, as here, not by private parties but by the public. See, also, Humphreys v. San Francisco, 92 Cal. App. 69, 268 P. 388.

[2, 3] We are satisfied that it is clearly within the charter powers of the Board of Park Commissioners to execute such a lease as the one proposed and that neither the temporary suspension of surface use during construction nor the permanent use of the small portion of the surface for entrances and exits would justify the court in denying the relief sought. Furthermore, the fact that the respondent serves as secretary of the board and at the pleasure of the board does not deprive the petitioner of the right to prosecute the proceeding. See Golden Gate Bridge District v. Felt, 214 Cal. 308, 5 P.2d 585.

During oral argument, permission was granted to A. G. Curtis, as a taxpayer, to present a motion to intervene in the proceeding. In his petition he reiterates the contention of the respondent that the surface of the park will be withdrawn from public use for ten months during construction and that approximately six and one-half per cent of the surface of the park will be permanently withdrawn from public use, all of which it is alleged would be inconsistent with the uses to which the public square was dedicated. These contentions have been passed upon adversely in this opinion. There are no other allegations of fact presented in the application to intervene which would justify an order granting the same. The application is therefore denied.

Let the peremptory writ issue as prayed.

We concur: GIBSON, C. J.; CURTIS, J.; YORK, Justice pro tem.; MOORE, Justice pro tem.

EDMONDS, Justice (concurring).

I concur in the decision in so far as it concerns the city's title but I am so strongly opposed to the procedure by which a question of great public interest is conclusively decided, that I take this occasion to express my views concerning it.

The petitioners are the City and County of San Francisco and its Board of Park Commissioners, but the taxpayer who sought to intervene and is denied a hearing asserts that they are not the real parties in interest. He alleges that the plan to construct the garage was conceived, planned and promoted by private parties; that these parties have already formed a corporation known as the Union Square Garage Corporation to carry out the project; that the corporation has arranged to finance itself partly by the selling of private securities and partly by securing a loan from a governmental agency; and that it has induced the Board of Park Commissioners to take the present proceedings. This taxpayer also alleges that the private corporation will have the exclusive use and operation of the garage for a period of fifty years; that it will reap considerable profit therefrom; and that the city will receive no benefit except a moderate rental for the use of the premises during the term of the lease.

Although these allegations have nothing to do with the legal question concerning the authority of the city to lease the park premises, unquestionably the Secretary of the Park Commission, against whom the proceeding was brought, has refused to call for bids upon the proposed lease for the sole purpose of securing a judgment of this court approving the project. To accomplish this the city and its Park Commissioners have sued an appointed employee of the latter for the asserted purpose of compelling him to perform a purely ministerial act. The taxpayer charges that for these reasons the proceeding is a collusive one. Certainly it is not brought in such form as to allow a full and fair judicial examination of the merits of a project which will involve the expenditure of many thousands of dollars of public funds and have a great effect, for better or for worse, upon the growth of San Francisco's downtown area.

I concur: CARTER, J.

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16 Cal.2d 311

McKAY et al. v. RETAIL AUTOMOBILE SALESMEN'S LOCAL UNION NO. 1067.

S. F. 16016.

Supreme Court of California.
Oct. 14, 1940.

Rehearing Denied Nov. 9, 1940.

1. Torts 🔑10

Workmen may negotiate together and exert various forms of economic pressure on employers, such as strikes, boycotts, both primary and secondary, and picketing, if they act peaceably and honestly.

2. Constitutional law 🔑90
Torts 🔑10

Picketing peaceably and truthfully is lawful means of advertising organized labor's grievances to public and right guaranteed by Constitution as incident of free speech.

3. Injunction 🔑101(3)

The law requires that concerted action by union workers against employers be peaceful, and violence or acts amounting to physical intimidation will be enjoined.

4. Torts 🔑10

Conduct of labor union in placing picket around employer's place of business and of persons acting for it in congregating there in numbers and announcing their intention to maintain picket until their demands are complied with is not per se unlawful.

5. Injunction 🔑118(3)

By words "compel" and "coerce" in complaint, alleging that defendant labor union's members announced their intention to maintain picket around plaintiffs' employer's place of business until such employer "compels" plaintiffs to join union and that defendants conspired to carry out boycott and picket and to "coerce" and penalize any members violating either, merely charged that compulsion or coercion, though peaceful, was unlawful, which was only a conclusion.

6. Pleading 🔑48

The drastic sanctions of equity may not be invoked without detailed showing of specific facts justifying such relief.

7. Injunction 🔑118(1)

The rule that drastic sanctions of equity may not be invoked without detailed showing of specific facts justifying such relief applies to suits for injunctions in labor controversies.

8. Torts 🔑10

One is not "intimidated" or "coerced," in sense of "unlawful compulsion," by being induced to forego business relations with one person rather than lose benefit of more profitable relations with another.

See Words and Phrases, Permanent Edition, for all other definitions of "Intimidated", "Coerced", and "Unlawful Compulsion".

9. Torts 🔑10

Coercion of employer to yield to his employees' demands by fear that, if he does not, he will be unable to obtain such employees as will enable him to carry on his business properly, is not the kind of "coercion" of which courts can take notice.

See Words and Phrases, Permanent Edition, for all other definitions of "Coercion".

10. Threats 🔑1(1)

Threats to do only what party making them has legal right to do are not unlawful.

11. Injunction 🔑118(3)

In nonunion employees' suit against employer and labor unions for injunction against interference with plaintiffs' employment relations by picketing, boycotting, etc., the complaint, alleging no threats of violence, stated no cause of action.

12. Master and servant 🔑338

Members of labor union or group of affiliated unions may refuse to work in same shop or on same job with other workmen, irrespective of whether such other workmen have united or organized themselves into separate trade union.

13. Injunction 🔑101(1)

Competition for work being lawful activity, whether competitors be labor unions or such unions and individuals, equity court may not interfere therewith by restraining use of any lawful form of concerted action used in struggle.

14. Master and servant 🔑338

Labor union members may bring such lawful pressure to bear as is within their control to induce nonunion employees to join union.

15. Torts 🔑10

The term "labor dispute" is broad one and properly applicable, in absence of statutory definition, to any controversy reasonably related to employment and to purposes of collective bargaining.

See Words and Phrases, Permanent Edition, for all other definitions of "Labor Dispute".

16. Injunction 🔑118(3)

In nonunion employees' suit against employer and labor unions for injunction against interference with plaintiffs' employment relations by picketing, boycotting, etc., allegations of complaint that unions were conspiring to fine, coerce, and penalize any of their members violating either boycott or picket meant no more than that such members, by contract and pledge, bound themselves to join in any unified action affecting their interests, in which there is no more "coercion" than in compelling performance of any contract.

17. Trade unions 🔑6

Craft labor unions are not precluded from consolidating to obtain industrial bargaining unit.

18. Trade unions 🔑6

Separate labor organizations may join forces in labor controversies for the purpose of obtaining a closed shop.

19. Torts 🔑10

The fact that some labor union members, picketing employer's premises as concomitant of strike for purpose of organizing closed union shop, are not employees of such employer does not render their conduct unlawful.

20. Injunction 🔑9

A court should not use its coercive implements, such as injunction, to aid one party in economic struggle wherein other party has substantial interest, to further which it is employing means not unlawful in themselves.

21. Master and servant 🔑338

Labor union members' conduct in picketing and boycotting employer's premises as concomitant of strike for purpose of organizing closed union shop is justified as much against complaint of nonmember employees as that of employer.

22. Master and servant 🔑338

Labor unions' actions in striking, picketing, boycotting, etc., peacefully, for purpose of organizing closed union shop, do not constitute unlawful interference with nonunion employees' rights under state Labor Code. St.1937, p. 208, §§ 920–923.

23. Injunction 🔑118(3)

In nonunion employees' suit to enjoin labor unions from interfering with plaintiffs' employment relations, allegations of complaint that defendants conspired to cause damage to plaintiffs and their employer, who sought no relief and was alleged in complaint to intend to discharge plaintiffs, if they did not join union, unless defendants were restrained, stated no cause of action for threatened damage to employer or for damage to plaintiffs by loss of their jobs or absolute denial of their right to work.

24. Injunction 🔑101(1)

The fact that employees, suing employer, who made no appearance, and labor union for injunction against interference with plaintiffs' employment relations by striking, picketing, etc., for purpose of organizing closed union shop, had established their own labor organization to bargain collectively with employer did not render defendant unions' attempt to unionize plaintiffs or interfere with their employment relations improper, as a group of employer's workers are not entitled to equitable protection from injury as result of true jurisdictional dispute between rival unions.

25. Injunction 🔑101(1)

A labor union may not have protection of equity against lawful competitive activities of rival union.

26. Injunction 🔑118(2)

In employees' suit to enjoin labor unions from interfering with plaintiffs' employment relations, averments of complaint that plaintiffs had organized and designated three of their number as committee to bargain with employer in accordance with National Labor Relations Act and that employer recognized such committee as employees' bargaining agent did not sufficiently show that plaintiffs had organized bona fide independent labor union, in absence of showing in complaint that National Labor Relations Board certified plaintiffs' organization as bargaining agent or that employer was engaged in interstate commerce. National Labor Relations Act, 29 U.S.C.A. § 151 et seq.

27. Injunction 🔑118(2)

In employees' suit to enjoin labor unions from interfering with plaintiffs' employment relations, allegation of complaint that plaintiffs formed labor organization in accordance with National Labor Relations Act was mere legal conclusion. National Labor Relations Act, 29 U.S.C.A. § 151 et seq.

28. Master and servant 🔑15, 16

The statute, declaring employer's interference in his employees' collective bargaining processes contrary to public policy of state, means that employee organizations, formed subservient to employer's will chiefly to forestall unionization of his plant by independent labor unions, are unlawful. St. 1937, p. 208, § 923.

29. Master and servant 🔑16

The functional weakness of collective bargaining organization of employees in single department of employer's business is not itself proof of employer domination of such organization, but is factor which should lead court to scrutinize carefully all circumstances surrounding its formation in determining question of its legality. St.1937, p. 208, § 923.

30. Constitutional law 🔑70(3)

The remedy for establishing better labor relations lies with Legislature, not courts, so far as contests peaceably conducted for purposes legitimately connected with welfare of labor as a whole are concerned.

CURTIS and SHENK, JJ., and MARKS, Justice pro tem., dissenting.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action by James F. McKay and others against Retail Automobile Salesmen's Local Union No. 1067 and others to enjoin interference with plaintiff's employment relations. From orders dissolving a temporary restraining order and denying an application for a preliminary injunction, plaintiffs appeal.

Affirmed.

Prior opinions, 89 P.2d 426; 90 P.2d 113.

Rehearing denied; SHENK, CURTIS, and HOUSER, JJ., dissenting.

I. M. Peckham and Sol A. Abrams, both of San Francisco, for appellants.

Hanna & Morton and James M. McRoberts, all of Los Angeles, and Cullinan, Hickey & Cullinan, Rogers & Clark, Webster V. Clark, Cullinan, Hickey & Sweigert, Brobeck, Phleger & Harrison, and George O. Bahrs, all of San Francisco, amici curiae.

John Francis Neylan, Bartley C. Crum, and Mathew O. Tobriner, all of San Francisco, for respondents.

Valle, Beilenson & Kenny, Laurence W. Beilenson, and William Berger, all of Los Angeles, M. Mitchell Bourquin, Edward P. Murphy, P. J. Murphy, and Clarence E. Todd, all of San Francisco, and Samuel W. Gardiner, of San Rafael, amici curiae.

EDMONDS, Justice.

The question presented for determination in this case concerns the right of labor to picket an employer's place of business. The controversy arose over a demand upon the employer to sign a contract with a union.

By a suit against the employer, the American Federation of Labor and a number of its affiliates, Retail Automobile Salesmen's Local Union No. 1067 and its affiliate, Retail Clerks International Protective Association, Garage Employees Union Local No. 665 and its affiliate, Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, San Francisco Labor Council, and a number of officers of these organizations, the non-union employees sought an injunction to prevent interference with their employment relations. The case is here upon the plaintiffs' appeal from an order dissolving a temporary restraining order and denying an application for a preliminary injunction.

The only evidence before the trial court in ruling upon the appellants' right to injunctive relief was the verified complaint. It alleges the following facts:

The plaintiffs, thirty-two in number, are employed as salesmen by the defendant Howard Automobile Company, which is a California corporation engaged in the business of selling and repairing automobiles in San Francisco "and elsewhere". In May, 1937, in San Francisco, the plaintiffs, being then all the salesmen employed by the company, united and organized and designated three of their number a committee to negotiate terms and conditions of employment with the company "in accordance with the terms of the Wagner Labor Relations Act". This committee forthwith notified the Regional Director of the National Labor Relations Board and the employer of its appointment, whereupon the employer recognized the committee as the bargaining agent for the entire sales force.

Other allegations of the complaint are that the plaintiffs and the employer are mutually satisfied with the terms and conditions of employment and desire to continue the relationship. Between the plaintiffs and their employer no labor dispute of any kind exists, and none of the plaintiffs has been or is now on strike. None of the plaintiffs is or has any desire to be a member of any of the defendant unions. Neither the plaintiffs nor the company has ever been a party to any agreement with any of the defendant unions or any other labor organization, and neither has ever requested any of the defendant unions to act for any of the plaintiffs as a collective bargaining agency.

The plaintiffs further assert that the Howard Company employs members of all of the defendant unions except members of the Salesmen's Union, and each of these unions has rules and agreements, binding on their respective members and enforceable by fines and penalties, not to pass picket lines or to do business with persons under picket. The placing of a picket at the company's plant will, pursuant to these rules and agreements, "compel" the members of these unions to abstain from visiting, delivering goods to, accepting delivery from, transacting business with, or working for the company.

The complaint also states that the Salesmen's Union has solicited the plaintiffs to join it and, in consequence of their refusal, has "placed a picket around the place of business of said company, and [its members] have congregated there in numbers, and announced their intention to maintain said picket until the said company compels plaintiffs to join said Union or discharges said plaintiffs, and until said codefendants of said company have convinced said company that it is profitable for it to sign a contract with said Union which would require plaintiff employees to join said Union, and if they refuse to join said Union, would require said company to discharge plaintiffs and each of them". None of the pickets has been or is an employee of the company. The defendant Labor Council has by resolution approved of the picket, and plaintiffs allege upon information and belief that the council has appointed a "Board of Strategy" to devise ways and means of "exerting pressure and coercion" on the company and on plaintiffs to sign a contract with and join the Salesmen's Union and has placed the company on its "We don't patronize list", a list of firms "boycotted throughout the nation by all organized labor".

Continuing their charges against the defendants, the plaintiffs say that the continuance of the picket has had the effect of "closing down the company's plant, stopping all work therein, and destroying its said business". The unions and their officers have "combined and confederated and conspired to aid, abet and carry out said boycott and said picket, and to fine, coerce and penalize any of their members who violate either boycott or picket". The effect of the boycott and picket is "ruinous to the business of any plant so boycotted or picketed, and coerces said company to deprive plaintiffs and each of them of their right to earn a livelihood freely and unmolested". Unless the codefendants of the company are restrained, the company intends to and will discharge plaintiffs or demand that each of them join the Salesmen's Union.

The prayer of the complaint is for a decree enjoining the labor organizations and their representatives from picketing or boycotting the company or "from in any wise threatening, coercing or intimidating" the company or any of its employees or customers for the purposes named in the complaint; from "in any manner interfering with" the business of the company; from inducing or compelling any of the company's employees to leave its employ; from preventing others from entering the service of the company; and from acting or aiding any combination or conspiracy to restrain the company in the free and unhindered control of its business.

Upon the filing of this complaint the superior court issued a temporary restraining order in literal accordance with the terms of the prayer and an order to show cause why a preliminary injunction should not issue. All of the defendants except the employer joined in a demurrer to the complaint, which challenged it on both general and special grounds. The application for the injunction was heard with the demurrer and submitted upon the allegations of the verified complaint. The trial court sustained the demurrer with leave to amend, dissolved the temporary restraining order and denied the application for a preliminary injunction. The appeal has been taken only from the orders denying injunctive relief.

Broadly stated, the position taken by the plaintiffs in their briefs is that in the absence of any dispute between themselves and their employer, the defendants have no right to interfere in any way with their employment relations. On the other hand, the labor organizations and their officers maintain that they collectively have a direct substantial and legitimate interest in the employment relations of the company, and that since they are employing means which are entirely lawful, their activities may not be enjoined.

The history of the law governing the right of workingmen to combine in order to bargain for better working conditions is marked by much divergence of opinion, with many changes through the years. In England, until 1824, combinations of laborers to raise wages or shorten hours or to affect business in any way were criminal even if there was no resort to a strike (5 Geo. IV C. 95; 6 Geo. IV C. 129; 34 Edw. III C. 9; Rex v. Journeymen-Taylors, 8 Mod. 10, 88 Eng.Rep. 9), and until after the middle of the nineteenth century it was a crime to threaten a strike for any purpose (Walsby v. Anley, 3 El. & El. 516, 121 Eng.Rep. 536; Skinner v. Kitch, 10 Cox, C. C. 493, L.R. 2 Q.B. 393), or to combine peacefully to persuade employees to leave work without picketing (Reg. v. Rowlands, 2 Den. C. C. 363, 17 Q.B. 671, 117 Eng.Rep. 1439). The sanctions of the criminal law against combinations of workingmen in furtherance of their interests were not finally relaxed until 1875. The Conspiracy and Protection of Property Act, 38 & 39 Vict. C. 86, sec. 3.

Development of the early law in this country shows a similar trend. Workingmen who combined for any purpose opposed to the interest of their employer were indicted and punished as members of a criminal conspiracy. People v. Melvin, 1810, 2 Wheeler Cr.Cas. N.Y., 262; People v. Fisher, 1835, 14 Wend., N.Y., 9, 28 Am. Dec. 501. See, also, Nelles, The First American Labor Case, 1931, 41 Yale L.J. 165; Witte, Early American Labor Cases, 1926, 35 Yale L.J. 825, 826; Landis, Cases on Labor Law, p. 28 et seq. And although in 1842 Massachusetts held that workingmen who quit work in concert to compel an employee to join their association were not guilty of a crime (Commonwealth v. Hunt, 45 Mass. 111, 4 Metc. 111, 38 Am. Dec. 346), until the end of the nineteenth century the criminal conspiracy doctrine was applied to associations of workmen to prevent strikes for any purpose. State v. Donaldson, 1867, 32 N.J.L. 151, 90 Am. Dec. 649; Commonwealth v. Curren, 1869, 3 Pittsb.R. 143; Commonwealth v. Sheriff, 1881, 15 Phila. 393; People v. Wilzig, 1886 4 N.Y.Cr.R. 403. In the meantime the labor injunction had come into general use in this country. See Frankfurter & Greene, The Labor Injunction, p. 17 et seq.; Bonnet, The Origin of the Labor Injunction, 1931, 5 So.Cal.L.Rev. 105. And although the courts have gradually recognized that immediate betterment of working conditions is a legitimate object of concerted activities by employees there has been a wide difference of opinion as to what means may be lawfully used for the attainment of labor's ends.

The parties are entirely correct in their agreement that, under the law as it has developed in recent years, an intentional interference with the advantageous economic relations of others by the members of labor organizations is not tortious unless violence is used or the object sought to be accomplished has no reasonable relevance to labor conditions. Therefore, the issues in the present controversy include only two questions: whether the specific activities carried on by the defendants are peaceful, and further, whether there is any legal justification for their conduct in view of the objects which they seek to attain.

[1] Concerning the means used, it must be taken as settled in this state, that workmen may associate together and exert various forms of economic pressure upon employers, provided they act peaceably and honestly. The conventional means of exerting this economic pressure which have been held lawful are the strike, (Pierce v. Stablemen's Union, 1909, 156 Cal. 70, 103 P. 324; Parkinson Co. v. Building Trades Council, 1908, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; Southern California Iron & Steel Co. v. Amalgamated Ass'n, 1921, 186 Cal. 604, 200 P. 1; Lisse v. Local Union, 1935, 2 Cal.2d 312, 41 P.2d 314); the boycott, both primary and secondary (Parkinson Co. v. Building Trades Council, supra; Pierce v. Stablemen's Union, supra; Southern California Iron & Steel Co. v. Amalgamated Ass'n, supra); and the picket (Lisse v. Local Union, supra; In re Lyons, 27 Cal. App.2d 182, 80 P.2d 745).

[2, 3] It is true that the early cases in the state intimated that picketing in any form was illegal (Rosenberg v. Retail Clerks' Ass'n, 1918, 39 Cal.App. 67, 177 P. 864; Pierce v. Stablemen's Union, supra), and that Moore v. Cooks', Waiters' & Waitresses' Union, 39 Cal.App. 538, 179 P. 417, held that peaceful picketing was per se unlawful. However, those conclusions were expressly renounced by this court in Lisse v. Local Union, supra. Indeed, the modern trend of decision clearly indicates that the right to picket peacefully and truthfully is one of organized labor's lawful means of advertising its grievances to the public, and as such is guaranteed by the Constitution as an incident of freedom of speech. Carlson v. California, 1940, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Thornhill v. Alabama, 1940, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; In re Lyons, 1938, supra; People v. Harris, 1939, 104 Colo. 386, 91 P.2d 989, 122 A.L.R. 1034; 1938, 48 Yale L.J. 308, 312. But the law clearly requires that concerted action by union workers be peaceful. Acts of violence or "acts * * * amounting to physical intimidation" will be enjoined. Goldberg, etc., Co. v. Stablemen's Union, 1906, 149 Cal. 429, 86 P. 806, 8 L.R.A.,N.S., 460, 117 Am.St.Rep. 145, 9 Ann.Cas. 1219; Southern California Iron & Steel Co. v. Amalgamated Ass'n, supra; Lisse v. Local Union, supra.

[4, 5] There is nothing in the complaint now being considered which indicates that the activities of the defendants were anything other than peaceful and honest within the meaning of the controlling authorities. The complaint alleges merely that the Salesmen's Union had placed a picket around the place of business of said company and that persons acting for it have congregated there in numbers and announced their intention to maintain this picket until their demands are complied with. Such conduct is not per se unlawful. Lisse v. Local Union, supra; In re Lyons, supra. True, the plaintiffs use the words "compel" and "coerce" in connection with the activities of the defendants, but by these words, in the light of the only specific activities alleged, the pleader does no more than to charge that the compulsion or coercion, though peaceful, was unlawful, which, of course, is only a conclusion.

[6, 7] It is a fundamental principle that the drastic sanctions of equity may not be invoked without a detailed showing of specific facts justifying such relief. Golden State Glass Corp. v. Superior Court, 13 Cal.2d 384, 90 P.2d 75. This rule is applicable to suits for injunctions in labor controversies and has been so applied in this state. In Davitt v. American Bakers' Union, 1899, 124 Cal. 99, 56 P. 775, the plaintiffs sought injunctive relief against a labor union charging interference with their business by "force, menaces and threats" and by the circulation of "false and malicious publications" at and near their place of business. Such averments were held to be too general to warrant relief, the court saying: "Conceding the formation of a conspiracy is charged, having for its object a common design and purpose, still we find no statement in the bill as to any specific overt acts done by defendants in pursuance of that design and purpose. A conspiracy, however atrocious

its purpose, is not the subject of a civil action, for it does not damage. Herron v. Hughes, 25 Cal. [555] 560. There is no allegation whatever showing the particular threats defendants made, what amount or kind of force defendants used, what kind or character of menace was exercised, or how the business was to be boycotted."

[8, 9] So the acts charged against the defendants are not unlawful because of the plaintiffs' allegation that they amount to coercion. One is not intimidated or coerced, in the sense of unlawful compulsion, by being induced to forego business relations with A rather than lose the benefit of more profitable relations with B. As Justice Angellotti said in his concurring opinion in the Parkinson case, an employer who yields to his employees' demands [154 Cal. 581, 98 P. 1039, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165] "may be said to have been coerced into doing so by fear that, if he does not, he will not be able to obtain such employés as will enable him to properly carry on his business, but this is not the kind of coercion of which the courts can take notice". In the opinion written by Justice Sloss the same view is expressed.

[10] It is equally beside the question to speak of threats, where that which is threatened is only what the party has a legal right to do. In one of his dissenting opinions Mr. Justice Holmes succinctly commented upon the use of such terms as follows: "I pause here to remark that the word 'threats' often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence. So, as to 'compulsion,' it depends on how you 'compel.' * * * So as to 'annoyance' or 'intimidation.'" Vegelahn v. Guntner, 1896, 167 Mass. 92, 107, 44 N.E. 1077, 1081, 35 L.R.A. 722, 57 Am.St.Rep. 443.

[11] In many of the decided cases where injunctive relief was granted, facts were alleged or proved which showed that violence had been threatened either expressly or impliedly. The complaint here in controversy includes no allegations concerning such acts, and it states no cause of action if the object of the defendants' conduct was a lawful purpose.

[12, 13] It is the well-established law of this state that members of a union or group of affiliated unions are privileged to refuse to work in the same shop or on the same job with other workmen irrespective of whether the latter have united or organized themselves into a separate trade union. And competition for work being an entirely lawful activity, whether the competing groups be unions or unions and individuals, a court of equity may not interfere by restraining the use of any lawful form of concerted action used in the struggle. Parkinson Co. v. Building Trades Council, supra. The principle that a closed union shop is a proper object of concerted action by employees has been widely recognized in other jurisdictions (Williams v. Quill, 1938, 277 N.Y. 1, 12 N.E.2d 547; Fenske Brothers v. Upholsterers' International Union, 1934, 358 Ill. 239, 193 N.E. 112, 97 A.L.R. 1318; Bayonne Textile Corp. v. American Federation of Silk Workers, 1934, 116 N.J.Eq. 146, 172 A. 551, 92 A.L.R. 1450; Seymour Ruff & Sons v. Bricklayers', etc., Union, 1933, 163 Md. 687, 164 A. 752; Grant Construction Co. v. St. Paul Building Trades Council, 1917, 136 Minn. 167, 161 N.W. 520, 1055; Scofes v. Helmar, 1933, 205 Ind. 596, 187 N.E. 662; Cohn & Roth Elec. Co. v. Bricklayers', etc., Union, 1917, 92 Conn. 161, 101 A. 659, 6 A.L.R. 887; Meier v. Speer, 1910, 96 Ark. 618, 132 S.W. 988, 32 L.R.A.,N.S., 792; Jetton-Dekle Lumber Co. v. Mather, 1907, 53 Fla. 969 43 So. 590; contra, Hotel & Railroad News Co. v. Clark, 1922, 243 Mass. 317, 137 N.E. 534; Cooks', etc., Union v. Papageorge, Tex.Civ.App., 1921, 230 S.W. 1086) and has been adopted by the American Law Institute in its Restatement of the Law of Torts. vol. 4, § 788.

[14] To the contrary, many courts in other jurisdictions have decided that the forcing of such a choice upon employees by labor unions is itself an unlawful interference with the "absolute, inherent and indefeasible right" of the individual employee to work under such conditions as he may choose. But the Supreme Court of the United States holds that there is no constitutional right inhering in individuals to work as nonunion employees. Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229. And the law of California as stated in Parkinson Co.

v. Building Trades Council, supra, is that the members of a labor union are privileged to bring such lawful pressure to bear, as is within their control, in order to induce nonunion employees to join their union. The defendant unions and their officers contend that the facts of that case are exactly the same in principle as those alleged in the plaintiffs' complaint, and that the conclusion there reached is determinative of the present controversy.

In the Parkinson case, the plaintiff, which was the employer, maintained a lumber yard, mill and plumbing and tinning shop and employed a nonunion tinner. Its other employees, who belonged to several affiliated unions of the American Federation of Labor, demanded that the tinner be compelled to join the Tinner's Union or be discharged. Both the tinner and the employer refused to accede to the unions' demands, with the result that the community labor council called a strike and secondary boycott against the employer. "Unfair notices" were sent to contractors and other customers of the employer, which according to union rules precluded the employees of these customers from working on or with materials furnished by the employer.

The resulting strike and boycott were conducted peaceably, and with minor exceptions, no threats of force or harm to anyone. A short time after the strike, the employer was able to secure nonunion men and resume operation of its plant, but the secondary boycott against its customers was continued in force by the unions. The employer brought suit against them for injunctive relief and damages, and after a trial the superior court issued a permanent injunction broadly restraining the defendants from interfering with its business.

Upon appeal this court reversed the judgment and held, six justices concurring in three separate opinions and one justice dissenting, that the plaintiff was not entitled to relief. All of the members of the court agreed, however, that the attempt by the defendants to secure a closed union shop was a legitimate object of collective action and the right of workingmen to combine in order to better the terms and conditions of their employment was fully recognized. Such combination was found to be the "necessary and desirable counterpart" of business combinations in order to enable workmen to compete in a "fair and equal way" in the struggle for existence. The ultimate motive for their activities was self interest—"to secure employment on more favorable terms for themselves", and in pursuit of that purpose they could lawfully attempt "to secure employment by the plaintiff * * *, to the exclusion of those not associated with them".

And there was said to be no valid distinction between union members withholding labor from their employer, with whom they had some dispute arising out of his treatment of workers, and withholding business from his customers, against whom they had no other dispute than that they were assisting the employer by trading with him. In other words, said the court, members of affiliated unions who were not employees of the employer, might lawfully engage in concerted activities against him for no other motive than that they considered him unfair to their associates. There was damage to the employer, to his customers and to his nonunion employees, but this damage was held to be merely one of the consequences of the "struggle of competition" and was therefore justified in law.

[15] The plaintiffs do not challenge the soundness of these principles but urge that they do not apply here because there is no "strike" and no "labor dispute". It is said that the related craft members "only ceased working because of the penalty imposed for passing a picket line" placed around the company's premises by the "irresponsible" Salesmen's Union. Such an interpretation of the facts assumes a lack of solidarity among the affiliated crafts and an unwillingness on the part of the members to co-operate in the action directed against the employer—an assumption which is negatived by every circumstance in the case. Moreover, as has been pointed out in Smith Metropolitan Market Co. v. Lyons, Cal.Sup., 106 P.2d 414, the term "labor dispute" is a broad one and, in the absence of statutory definition, may be properly applied to any controversy "which is reasonably related to employment and to the purposes of collective bargaining".

[16] The complaint alleges that all the unions and their officers have "combined, confederated and conspired to aid, abet and carry out said boycott and said picket" and that the defendant Labor Council "has by resolution approved of said picket" and has "appointed a Board of Strategy for the purpose of devising ways and means of exerting pressure and coercion on said

company and plaintiffs, and has placed said company on the 'We don't patronize list', a list of firms boycotted throughout the nation by all organized labor". These averments show that all of the defendants are acting in harmony in their effort to secure a union shop contract. The further allegations that the unions are "conspiring * * * to fine, coerce and penalize any of their members who violate either boycott or picket" mean no more than that the union members by contract and pledge have bound themselves to join in any unified action affecting their interests. In this there is no more "coercion" than there is in compelling the performance of any contract.

[17, 18] The fact that the defendant unions are craft organizations does not preclude them from consolidating to obtain an industrial bargaining unit. See 6 Chicago L.Rev. 675. The complaint alleges that these unions are affiliated with the American Federation of Labor, and also that they are members of the defendant Labor Council. This indicates that they are proceeding with some unity toward the objectives they seek. To hold, as the plaintiffs insist the court should, that separate organizations may not join forces in labor controversies for the purpose of obtaining a closed shop would establish a rule of law discriminating against the labor groups in this state which are organized horizontally, or into crafts, and in favor of the vertical or industrial type of union. For if the other employees of the company belonged to a single union they would be privileged, under the California authorities, to engage in any peaceful and lawful activities in order to compel the members of the sales department to join their union.

Viewed in this light the present case cannot be distinguished from the Parkinson case so far as the acts of organized labor are concerned. The facts in the two cases are parallel. There the tinner was satisfied with his job and his services were satisfactory to the employer; here the plaintiffs and the company are mutually satisfied with the terms and conditions of employment. There, as here, the defendants, who were members of affiliated trade unions employed in the company's plant and elsewhere, engaged in activities which were not per se unlawful in order to induce nonunion employees of the company to join a union affiliated with the defendants. In each case the defendants' purpose was to obtain a closed union shop.

[19] That some of the defendants in the present case are not employees of the company does not render their conduct unlawful; there was the same situation in the Parkinson case. If anything, the Salesmen's Union here has a more direct self-interest in organizing the company into a closed union shop than did the "outsiders" in the Parkinson case. The picketing here is merely a concomitant of the strike, just as the secondary boycott was the concomitant of the strike in that case. In both cases the concerted activities of the various unions were undertaken at the instigation and with the approval of a labor council, which appears to be the organization responsible for formulation of the policy and coordination of activities of the affiliated unions.

[20] Nor does the fact that in the present case relief is sought by nonmember employees rather than by the employer serve to distinguish the two cases. This court in the Parkinson case found justification for the defendants' conduct in the workingman's struggle for existence, Chief Justice Beatty saying: "In order to secure employment on more favorable terms for themselves, individuals have an absolute right to combine for the purpose of preventing the employment and competition of others". Justice Sloss, in a concurring opinion, summarized the position of union labor as follows: "The defendants were seeking in all they are shown to have done to secure employment by the plaintiff for themselves, to the exclusion of those not associated with them, and to secure that employment upon terms deemed satisfactory or advantageous to them. That is the effort of every dealer in goods. It is the struggle of competition, and is no more to be frowned upon where the subject of trade is labor than where it is a specific commodity." Stated in another way, the principle or rationale involved is that a court should not use its coercive implements to aid one party in an economic struggle in which the other party has a substantial interest at stake and is employing means which are not in themselves unlawful.

[21] The interest of the defendant unions in the present controversy is direct and obvious. The closed union shop is an important means of maintaining the com-

bined bargaining power of the workers. Moreover, advantages secured through collective action redound to the benefit of all employees whether they are members of the union or not, and members may resent nonmembers sharing in the benefits without liability for the obligations. Hence a closed shop policy is of vital importance in maintaining not only the bargaining power but also the membership of trade unions. These considerations serve to justify the defendants' conduct as much against the complaint of nonmember employees as against the complaint of an employer. See authorities cited in Smith Metropolitan Market Co. v. Lyons, supra.

Counsel for the employer contend that by the decision in Overland Publishing Co. v. H. S. Crocker Co., Inc., 193 Cal. 109, 222 P. 812, this court has limited the principles established and applied in the Parkinson case. However, in the Overland case the plaintiff, who was engaged in the stationery business, brought suit for damages under the Cartwright Act (Stats. 1907, p. 984, as amended, Deering's Gen. Laws Act 4166) against the members of the Printers' Board of Trade, an association of stationers which, it was charged, constituted a combination in restraint of trade. The complaint alleged, among other things, that the defendants had entered into agreements with the printers, pressmen, and bookbinders' unions in San Francisco by which the union members agreed to work for only such stationers as were members of the defendants' association, and pursuant to that agreement all plaintiff's union employees were called out on strike "solely pursuant to an order of the defendants" in order to compel plaintiff to join defendants' association. The court held that these acts were in violation of the Cartwright Act. That determination has no bearing upon the facts of the present case. The attempt to induce an employer to become a member of an employers' association is not reasonably related to either the working conditions or the bargaining power of the union members and was plainly an unlawful object of concerted action on their part.

[22] Nor can the contention that, whatever justification may exist for defendants' conduct under the general principles of equity, sections 920 to 923, inclusive, of the California Labor Code, St.1937, p. 208, compel the conclusion that the defendants' actions are unlawful interference with their rights be sustained.

In the case of Shafer v. Registered Pharmacists Union Local 1172, Cal.Sup., 106 P.2d 403, which was considered and decided concurrently with the appeal in the present case, it was held that this legislation does not prohibit closed union shop contracts nor lay any restrictions upon labor in its efforts to compel employees to join a particular union.

[23] Considering other allegations of the complaint, the defendants are charged with a conspiracy to cause damage to the plaintiffs and their employer. However, the employer is seeking no relief, although the threatened injury to it may affect the plaintiffs; that is, as the complaint charges, unless the defendants are restrained, the employer intends to and will discharge plaintiffs if they do not join the Salesmen's Union. The threatened damage to the employer, therefore, has significance only in so far as it may, by reason of economic pressure and choice, result in damage to the plaintiffs.

Moreover, the damage to the plaintiffs may not accurately be characterized as loss of their jobs or absolute denial of their "right to work", as much of the argument in some of the briefs implies. The extent of the damage to the plaintiffs is no more than presentation of a choice between leaving the work of their present employer, either voluntarily or upon its demand, or joining the Salesmen's Union. This choice is forced upon them by the concerted action of other salesmen who are competing with them in the sale of automobiles and by the members of allied trade unions.

[24] It is also urged that the complaint shows that the plaintiffs have established their own labor organization to bargain collectively with the employer and that under such conditions any attempt by the defendants to "unionize" them or to interfere with their employment relations is unlawful. But there are two fundamental and equally conclusive reasons why this contention cannot be sustained.

First, this is a suit in which the employees only are seeking relief. The employer, although named as a party defendant, did not make an appearance in the trial court. Assuming, without deciding, that an employer may be entitled to equitable protection from injury to his business as the result of a true jurisdictional dispute between rival unions, it is, nevertheless, the settled law of this state that a group of the employer's workers can claim no such protection. This conclusion follows inescapably from the principles established in Parkinson Co. v. Building Trades Council, supra. The interest of the defendant unions in inducing the plaintiffs to join a union satisfactory to them is just as substantial as it would be if the plaintiffs were unorganized. The element of competitive struggle between workmen is still present, except that the group of thirty-two self-organized salesmen in the present case is a stronger competitor than was the lone tinner in the Parkinson case.

[25] The case of Greenwood v. Building Trades Council, 71 Cal.App. 159, 233 P. 823, is squarely in point and decisive of the question. There a dispute had arisen between two rival unions in the building trades industry. Sheet Metal Workers Union, Local 162, had been chartered by the American Federation of Labor; Sheet Metal Workers Union, Local No. 2, was not affiliated with the A. F. of L. but it was a member and had the recognition of the local Building Trades Council, a group of A. F. of L. unions. Local No. 162 refused to pay dues to the Building Trades Council, which in turn sent notices to all the building trades employers that its members would refuse to work on construction jobs where members of Local No. 162 were employed. In a suit for injunctive relief brought by the members of Local No. 162 it was held, upon the authority of the Parkinson case, that the boycott instituted by the members of the Building Trades Council could not be enjoined. It must be deemed settled, therefore, that one labor union may not have the protection of equity against the lawful competitive activities of a rival union.

[26, 27] Moreover, the facts alleged by the plaintiffs do not sufficiently show that they have organized a bona fide independent labor union. The complaint alleges only that they have "united, organized and designated three of their number a committee 'to bargain with the company' in accordance with the terms of the Wagner Labor Relations Act, 29 U.S.C.A. § 151 et seq."; that the committee notified the company and the Regional Director of the National Labor Relations Board of plaintiffs' choice of bargaining representative; and that the "company then and there recognized said committee as bargaining agents for the entire sales force * * *." The effect of the averments concerning the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., need not be considered, for nowhere in the complaint does it appear that the National Labor Relations Board has certified the plaintiffs' organization as a bargaining agent, or even that the Howard Automobile Company is engaged in interstate commerce. Moreover, the allegations that they formed a labor organization "in accordance with the Wagner Labor Relations Act" is a mere legal conclusion.

The remaining allegations fall far short of affirming the existence of a freely organized and independent trade union. The plaintiffs constitute only a portion of the employees of a single plant; they have no affiliation with any external labor organization; and they apparently have no constitution, by-laws, pledges or rules. In addition there is an apparent unity of interest between the plaintiffs and the defendant employer which negatives any inference that the plaintiffs have a bona fide and independent bargaining organization.

[28, 29] The need for specific allegations concerning the nature of such an organization is clear where, as here, the complaint itself is the only evidence before the court in deciding the issue of temporary injunctive relief. It has been demonstrated that the granting of temporary injunctions in labor disputes usually has the effect of determining and terminating the entire controversy. Frankfurter and Greene, The Labor Injunction, 47 et seq. The legislature has declared that interference by an employer in the collective bargaining processes of his employees is contrary to the public policy of this state. Labor Code, sec. 923. This necessarily means that employee organizations are unlawful when they are formed, subservient to the employer's will, chiefly in order to forestall the unionization of his plant by independent labor unions. To be sure the functional weakness of a single-department organization like the present one is not itself proof of employer domination. But it is a factor which should lead a court to carefully scrutinize all the circumstances surrounding its formation. See 40 Col. L. Rev. 278. If the legislative policy is to be made effective courts cannot close their eyes to the subtle realities of industrial strife.

Of course, the employer and its salesmen argue that the appellants have no right to interfere with relations which are entirely satisfactory to them. This position ignores the broader rights of labor in seeking to advance the interests of the worker by more thorough and complete organization. And although it is undeniable that many unworthy persons within labor's ranks have abused their power, on the other hand, the record of employers is not one of entirely altruistic purposes. Labor insists that in a free economy, the right to tell the public, upon whose patronage both depend for existence, the facts concerning employment in any particular business, is essential to its welfare and entirely consistent with democratic principles.

[30] The public ultimately pays the full cost of every labor dispute and better labor relations must be established. But if they cannot be brought about by enlightened self-interest the remedy lies with the legislature—not in the courts—in so far as contests peaceably conducted for a purpose legitimately connected with the welfare of labor as a whole is concerned.

The orders are, and each of them is, affirmed.

We concur: GIBSON, C. J.; CARTER, J.

MOORE, Justice pro tem.

I concur. The question involved in this case is whether the picket line around defendant employer's establishment is illegal. If the picket line be maintained by threat to use force or if its aim be to achieve an illegal purpose, it should be enjoined. But if it is maintained by neither immoral nor illegal means and if its purpose it to effectuate a lawful end, it should not be subjected to any restrictive order of the court. The allegations of the complaint do not set forth that any act has occurred whereby plaintiffs suffer any fear of violence. Hence, upon that ground defendants cannot be enjoined. We have, therefore, to determine (1) whether defendants purpose to effectuate the execution of a contract between the employer and the union be an illegal practice, and (2) whether the peaceful picketing by defendants to persuade the employer to execute such a contract gives occasion for equity to interfere.

In order to enforce a demand reasonably related to labor conditions a union is justified, by a long line of decisions, in resorting to any peaceable legal means. The courts have supported the union's right to strike, picket and boycott in the enforcement of such demands including the right to induce those in sympathy with its cause to withdraw patronage from an employer. Parkinson v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; Lisse v. Local Union, 2 Cal.2d 312, 41 P.2d 314. If the motive actuating a strike is immaterial (Greenwood v. Building Trades Council, 71 Cal.App. 159, 233 P. 823) we must then determine whether the fact that union and individual defendants are not employees of the defendant automobile company renders their picket line illegal.

If the acts of defendants are to be condemned, such condemnation must be founded upon statute or upon court decisions or it must be shown to violate good morals. We find no language in the Labor Code that outlaws a contract between union and employer. The chief aim of sections 921–923 was to remove from the path of labor the yellow dog contract at first cannonized in some court decisions but later repudiated by legislatures and by the highest courts. Section 921 inhibits the promise at the time of employment of either worker or employer to join or not to join or withdraw from an employer or an employee organization. Section 922 forbids anyone to coerce an applicant for employment not to join a labor organization. This is an apparent effort of the legislature to preserve the economic freedom of the toiler from the oppression of the employer. But the legislature could not have intended to suppress competition among workers. They have the same right to carry on their struggle as they have always had since the decision by this court in the Parkinson case. A part of the program of every labor group is to gain the favor of employers and the effort of any group will not be interrupted by the courts because such effort may result in the defeat of a minority or of a majority. The struggle for existence and the struggle for supremacy of labor groups, as among themselves, should continue unhindered by judicial interference so long as they maintain peace and order. Nowhere have the lawmakers suggested that an organized group of workers shall not seek to induce an employer, by peaceable means, to enter into a contract to the effect that he will employ only members of their organization or affiliated bodies. The argument is made that the success of the union's picket will require the Howard Automobile Company to violate public policy as defined by section 922. But section 923 clearly indicates that it was the employer against whom the workers are to be protected. After there declaring why negotiation between employer and employee "should result from voluntary agreement between employer and employees", it proceeds: "Therefore it is necessary that the individual workman have full freedom of association" etc., and "that he shall be free from the interference, restraint, or coercion of employers", etc. That the legislature could not have intended to limit the activities of any labor union in seeking advantage over another is emphasized by the facts: (1) that the right to do so was vouchsafed by the Parkinson decision more than thirty years ago, and (2) that said sections of the Labor Code are the fruit of the effort of organized labor.

The Norris-La Guardia Act, 29 U.S.C.A. § 101 et seq., which is a fair attempt to express the public policy of the nation in regard to labor controversies, makes provision that a labor dispute includes any controversy seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relation of employer and employee. In Lauf v. E. G. Shinner & Co., 302 U.S. 669, 58 S.Ct. 41, 82 L.Ed. 516, the Supreme Court held that while an employer cannot coerce his employees, yet the union may compel him to do so. If then the picket line of the defendants is peaceably maintained and if its purpose is to enforce a demand of the workers upon the employer of labor, wherein lies its illegality? Certainly the right of a worker to publish his criticism, and to speak freely of an employer's attitude toward union labor will not be denied even though the legislature may attempt by statute to curb such criticism. De Jonge v. State of Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278; Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; XIV Amendment, United States Constitution.

If labor should be prohibited from publishing all the facts concerning employment by an employer, the worker would be deprived of rights emphatically and often declared. The assertion that defendants "conspired" to injure the employer could have no significance unless they were engaged in a criminal or unlawful enterprise. Parkinson Co. v. Building Trades Council, supra. The demands of a union to strengthen its forces cannot be deemed unlawful even though there be no controversy between the employer and his employees. In the Matter of the Application of Frank Lyons, 27 Cal. App.2d 293, 81 P.2d 190. There is no provision in the organic law which forbids the unions of organized labor from competing with unorganized workers. In the case of Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S.Ct. 857, 863, 81 L.Ed. 1229, Justice Brandeis said: "Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. * * * It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right."

Also, in the case of Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690, 73 A.L.R. 669, it was declared by Justice Cardozo that the legality of defendant's conduct is not affected by the fact that no strike was in progress in any of the plaintiff's shops; that if the defendant believed in good faith that the policy pursued by plaintiff and by the shops united with the plaintiff was hostile to the interests of organized labor and is likely, if not suppressed, to lower the standards of living in the trade, defendants had the privilege by the pressure of notoriety and persuasion to bring its own policy to triumph. See Exchange Bakery & Restaurant v. Rifkin, 245 N.Y. 260, 157 N.E. 130, 132, where it was held that in order that a union may prevail, it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. "Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured." Ibid. If the legislature had intended to outlaw a contract between a union and an employer, obligating the employer to hire only members of the labor organization, it would have said so in terms unmistakable, for the subject has been aired in the American courts for more than a generation and has long been the theme of the publicist and the editor. Men engaged in the serious undertaking of enacting laws for a great commonwealth could not have overlooked a matter of such universal importance. On the contrary, the lawmakers have afforded to organized labor every reasonable device for the conduct of its campaign to effectuate its plan of procuring employment for union members to the exclusion of other workers. For illustration, section 1011 of the Labor Code, St. 1937, p. 210, inhibits an employer from misrepresenting the kind of labor in his employ. Section 1110, St. 1937, p. 213 upholds an agreement between two or more persons to do or not to do any act in furtherance of any trade dispute between employers and employees.

In the Parkinson case, supra, the entire court agreed that the attempt by defendant to secure a closed union shop was a legitimate objective. Therefore, since there is no statutory inhibition against the contract which defendant union seeks to have defendant automobile company enter into with said union, and since this court has already held that such a contract is a legitimate objective, for this court now to deprive an organized group of workers from procuring the execution of such a contract, where they are using only peaceful persuasion to achieve their purpose would render the court a law-making body instead of a law-interpreting tribunal.

CURTIS, Justice.

I dissent.

This is an action by certain individuals, thirty-two in number, employed as salesmen by defendant Howard Automobile Company, to enjoin defendant Retail Automobile Salesmen's Local Union, No. 1067, its members, and those acting on its behalf from picketing the place of business of the Howard Automobile Company and advertising the business as unfair to labor. A demurrer interposed by the defendants to the joint complaint filed by the plaintiffs was sustained with leave to amend by the trial court, and the temporary restraining order theretofore issued was dissolved and the application for a temporary injunction was denied. This appeal is taken from the order dissolving the temporary restraining order and denying the application for a temporary injunction.

As the case was decided upon the sustaining of a demurrer, by virtue of which fact the allegations of the complaint are necessarily accepted as true, a brief résumé of the complaint is necessary. The pertinent facts therein alleged are as follows:

(1) Plaintiffs are all salesmen of the Howard Automobile Company, a corporation engaged in the auto selling and repairing business in San Francisco and elsewhere and are all satisfied with the terms, pay, hours of work, conditions of employment, and desire to continue therein, and the company is satisfied with the terms, pay, hours and conditions of employment and with plaintiffs' services and desires to continue plaintiffs in its employ.

(2) In May of 1937, at San Francisco, plaintiffs then and there all of the salesmen of said company organized and designated three of their number a committee to negotiate rates of pay, wages, hours of labor and other conditions of employment with the company in accordance with the terms of the Wagner Act and said committee notified the company and the regional director of the Labor Relations Board of their choice of a bargaining representative and the company then and there recognized the committee as the bargaining agents for the entire sales force, to wit, all of the plaintiffs.

(3) No labor dispute of any kind, nor any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, existed between any of the plaintiffs and the company.

(4) None of the plaintiffs has been or now is engaged in any dispute with the company concerning wages, hours, conditions of labor or otherwise. None has been or now is on strike. There has been and now is no discussion or negotiations concerning terms of employment, hours of labor, wages or working conditions. None of the plaintiffs is a member of any of the defendant unions and none of them has any desire or has signified any desire or intention of becoming a member of any of the defendant unions. None of the plaintiffs has been or is now a party to any agreement with any of the defendant unions, or any other labor organization, and none of the plaintiffs has ever requested any of the defendant unions to act or negotiate for any of the plaintiffs as a permanent agency or otherwise.

(5) All of the defendant unions have rules, regulations, by-laws and agreements

enforceable by fines and penalties binding upon their respective members not to pass picket lines or to do business with plants and firms under picket, and said company employs members of all of said associations. The placing of a picket on the company's plant will, pursuant to such by-laws, rules, regulations and agreements, compel all of the members of each of the unions to abstain from visiting, delivering goods to, accepting goods from, or transacting business with or working for said company.

(6) The Retail Automobile Salesmen's Local Union, No. 1067, has solicited plaintiffs to join the union, but plaintiffs have refused to do so and in consequence of plaintiffs' refusal, the said union has placed a picket around the place of business of the company, the members thereof congregated there in numbers and announced their intention to maintain the picket until the company compels plaintiffs to join said union or discharge them.

(7) The continuance of the picket on the company's plant has closed it down, stopping all work and destroying its business and the company will, unless the defendant union is restrained, discharge all of plaintiffs or require them to join the union. None of the pickets is an employee of the defendant Howard Automobile Company. The Labor Council has approved the picket and has appointed a Board of Strategy to devise ways and means of exerting pressure and coercion on the company and plaintiffs to sign a contract with and join the union, and has placed the company on the "We don't patronize" list.

At the outset, in order to prevent "irrelevant sparring with ghosts" as one of the attorneys herein aptly phrased it, it is essential that we state the issue exactly, definitely and clearly eliminate from consideration all extraneous matters, and avoid the pitfall of assuming to be facts certain assumptions which are wholly unwarranted. It should first be noted that plaintiffs' salesmen employees are not unorganized, but are a group of organized employees who have selected three of their number to deal with their employer as their representatives to negotiate rates of pay, wages, hours of labor, and other conditions of employment with the company.

And for the purpose of presenting a precise picture of the situation, it should be pointed out that the unions of craft workers did not strike in order to compel the unionization of the entire Howard plant, but that their refusal to work was merely occasioned by the existence of the picket line which union rules forbade them, under severe penalties, to cross.

It is also to be borne in mind that none of the plaintiffs' salesmen is a member of the Retail Salesmen's Local Union, No. 1067, and that the defendant Retail Salesmen's Local Union, No. 1067, is a total stranger seeking to compel the plaintiff salesmen employees to join its organization and select it as its representative to negotiate with their employer.

It is also highly important to note that there is absolutely nothing in the pleadings to warrant any assumption that the present organization of the plaintiff employees is what is called a "company union" or is dominated by the employer. Certainly the allegation that the relations between employer and employees are harmonious and no dispute exists between them with reference to wages, salaries, or hours of employment does not afford any basis whatever for such an assumption. Much of the arguments seeking to justify the union's action in this controversy is based upon the fundamental error of assuming that the present organization is a "company union". As before stated, there is not one iota of reason for such an assumption, and any arguments based thereon are, of course, spurious.

It should also be stated that there are no allegations in the complaint charging the pickets with violence, physical coercion, or intimidation, and hence it must be taken for granted that such picketing has been peaceful.

The sole question involved in this case was phrased by the trial judge as follows: "Is it lawful for a labor union by peaceful picketing to attempt to induce an employer to employ only persons who are members of the picketing union when there is no strike and the employees of the picketed employer are satisfied with their employment and do not desire to join the union?" In one of respondents' briefs, it is stated that the activities of the union are not directed toward the employer, and are not directed toward an effort to induce the employer to do anything, but are directed solely toward "inducing and persuading" the salesmen, who have refused to join the union, to join the union. However, facing facts squarely, the conclusion is inescapable that the activities in which the Retail Automobile Salesmen's Local Union, No. 1067, are engaged are directed toward a coercion of the employer, Howard Automobile Company, to compel the members of its automobile sales force to join the Retail Automobile Salesmen's Local Union, No. 1067. Any other statement of the purpose of such activities is merely an evasion of the issue. The question may, therefore, be more correctly stated as follows: Is it lawful for a labor union to picket an employer's place of business for the purpose of compelling the employer to coerce his employees to join the picketing union, when the employees are definitely opposed to joining said union, and there is no controversy between the employer and those employees?

While sections 921 and 923 of the Labor Code, St.1937, p. 208, remain on the statute books in California, the answer, in our opinion, must be in the negative. Section 921 of the Labor Code provides:

"Every promise made after August 21, 1933, between any employee or prospective employee and his employer, prospective employer or any other person is contrary to public policy if either party thereto promises any of the following:

"(a) To join or to remain a member of a labor organization or to join or remain a member of an employer organization,

"(b) Not to join or not to remain a member of a labor organization or of an employer organization,

"(c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization.

"Such promise shall not afford any basis for the granting of legal or equitable relief by any court against a party to such promise, or against any other persons who advise, urge, or induce, without fraud or violence or threat thereof, either party thereto to act in disregard of such promise."

Section 923 of the Labor Code furnished the rule of construction for the interpretation of section 921 and the other two sections which comprise this chapter of the Labor Code. Said section is as follows:

"In the interpretation and application of this chapter, the public policy of this State is declared as follows:

"Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 921(a) of the Labor Code plainly declares a promise by an employee to an employer to join a labor organization or to remain a member of a labor organization to be contrary to public policy. This being so, a boycott or strike or picketing by a labor organization to coerce an employer into an agreement to procure such promise from present and prospective employees becomes an act for the furtherance of an illegal purpose, and therefore properly enjoinable.

Two major arguments are advanced in opposition to this conclusion. The first argument is as follows: Section 921(a) does not refer to a legitimate bona fide trade union but only to the so-called "company union". Therefore, the activity of the union herein being directed toward the securing from an employer of a promise from the employer to compel his employees to join the legitimate bona fide labor organization of respondent union does not come within the ban of said section and its activity in that regard cannot be curtailed. This argument is predicated upon the theory that said section is ambiguous and that by an examination of the labor struggle it becomes apparent that the purpose and intent of the legislature was directed solely to increasing the bargaining power of employees with their employers, and hence said section cannot possibly mean that closed shop agreements are unlawful. It is pointed out that for years the so-called "yellow-dog" contract was a source of conflict carried on with great bitterness by organized labor against certain employers. By such an agreement an employee might agree under coercion from his employer not to join a labor union, and such an agreement was held to be binding on the employees. Hitchman Coal & Coke Company v. Mitchell, 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260, L.R.A. 1918C, 497, Ann.Cas. 1918B, 461. Later employers, being unable to secure such contracts because of the growth of the power of organized labor, sought the same result, domination of their employees, by setting up and organizing "company unions" which they required their employees to join and over which they kept supervision and control. It is therefore argued that section 921 of the Labor Code was passed solely for the benefit of organized labor and was intended to eliminate both contracts on the part of the employees not to join an organized labor union and contracts to join a "company union". In other words, it is argued that subsections (b) and (c) of this section are directed toward rendering the so-called "yellow-dog" contracts illegal and void, and subsection (a) is directed toward rendering illegal and void, promises secured by employers from their employees to affiliate with "company unions".

We find ourselves unable to subscribe to this argument for three reasons: First: In our opinion the section is not ambiguous, but is plain and explicit and means what on its face it purports to mean. Therefore, no good reason exists for delving into the history of labor disputes in order to give an interpretation to a section contrary to the plain language employed therein. Second: The construction sought by respondents required that the term, "labor organization" used in subsection (a) of section 921, be limited to and closely defined as "company union" to the exclusion of legitimate bona fide trade organizations, whereas the same term, "labor organization" used in subsection (b) of the section, is to be defined as the all-inclusive bona fide trade union. Obviously the legislature, in using the phrase "labor organization," in several portions of the same section of the code, intended that it should have a uniform meaning. To hold the same term within the same section to mean two contrary things seems wholly unreasonable. Such an interpretation does such violence to the ordinary rules of construction as to preclude our acceptance of said argument. Third: The history of the California legislature during the years, 1937, in which the Labor Code was adopted, and in 1939, clearly shows that the legislature, by its action in turning down certain bills proposed by partisans of organized labor, refused to go the lengths claimed here. In 1937, four labor bills were introduced and defeated. In one of these bills, the terms, "labor organization" and "company union", were separately defined. Undoubtedly the legislature had the distinction of these two types of organization in mind, and had it desired or intended to limit the definition to subsection (a) of section 921 to "company unions", it would have been very simple for it to have so specified. In 1939, four assembly bills and two senate bills were proposed, but did not pass. One of these bills attempted to repeal sections 921 and 923 of the Labor Code, and the other five attempted to add a proviso to the effect that nothing contained in said section 921 should be construed as preventing a "bona fide" labor organization from entering into a contract with an employer whereby the employer agreed to employ only members of the said labor organization and to discharge employees, employed after such contract became effective, who did not belong to the said labor organization. In April, 1939, the District Court of Appeal, First District, Division Two, filed its opinion, 90 P.2d 113, interpreting sections 921 and 923 of the Labor Code as rendering unlawful and therefore enjoinable peaceful picketing directed toward the securing of a closed shop contract with the employer, Howard Automobile Company, covering its salesmen employees, and although the legislature did not adjourn until June, none of these bills which would have given to these code sections the effect claimed for them by the labor union was passed. This clearly demonstrates, we think, that the legislature was in accord with the interpretation given to these sections by the district Court of Appeal, and did not intend that the sections have the construction contended for by the respondent labor union. The fact that the bills were defeated, in our opinion, shows that the legislature definitely repudiated the idea of carrying out labor's demands in their totality, and instead insisted upon declaring the public policy of the state to be freedom of interference for the individual employee from both employer and labor organization domination.

In brief, we are satisfied that said section 921 is not ambiguous, that it means what on its face it plainly purports to mean. The attorney for the labor union states in his brief that, "The whole subject of labor legislation must ultimately be dealt with by the legislature. Its failure to to enact appropriate legislation at its last session is no reason now to place an impossible burden on the judiciary." This concession that the legislature failed to pass "appropriate legislation" clearly indicated that organized labor is seeking to obtain an advantage, by judicial construction, which it failed to win in the legislative halls. No doubt when, and if, "appropriate legislation" is passed, this court will be ready to interpret it to carry out the expressed intention of the legislature. It is, however, outside the scope of our duty and our power to interpret present legislation to carry out the purposes of some possible future legislation.

The second argument on which emphasis is placed by the respondents is that the Labor Code sections are directed solely against promises between an employee and his employer, whereas the union-shop contract is a promise by an employer to a union. Respondents assert that section 921 of the Labor Code prohibits contracts between an employer and an employee to join or to remain a member of the labor organization, but not a contract between an employer and a labor organization that all employees of the employer shall be or become a member of a labor organization. In other words, it is respondents' position that it may be unlawful for an employer to coerce an individual employee to join or not to join a labor organization, but it is proper and permissible for the employer to coerce his employees collectively. We think such argument accepts the shadow for the substance. When an employer makes a contract with a union that he will keep no one in his employ except union members, it becomes an implied term and condition of the contract of employment of every individual employee working for him that said individual shall become and remain a member of the union. Such term and condition of employment become a promise of each employee within the prohibition of section 921 of the Labor Code, since section 920 of the Labor Code provides specifically that "promise" includes "promise, undertaking, contract, or agreement, whether written or oral, express or implied".

We do not find any merit in the theory propounded that collective bargaining contracts are not between employees and the employer but are between a labor organization as a legal entity and the employer, and therefore the prohibitions of section 921 have no reference to such contracts. There can be no escape from the conclusion that the union, whether a legal entity or not, is an agent for the employees in the execution of the contract of employment and is, therefore, acting in behalf of and for the employees, and its contract is their contract.

Another argument is advanced by respondents that said contracts are not unlawful, but merely unenforceable in law and equity, and, therefore, any coercive attempt by a labor union to compel such agreements are not illegal per se and cannot be enjoined. This argument fails to take into consideration the express words of the statute. The statute definitely and expressly provides that such a contract is "contrary to public policy". This fact, in view of section 1667 of the Civil Code which declared contracts contrary to public policy to be unlawful, can mean nothing else than that the contracts proscribed by section 921 of the Labor Code are unlawful, and no amount of ingenious argument can dispel the logic of this conclusion.

The conclusion that section 921 of the Labor Code prohibits the coercion of employees by union activity for the purpose of securing a closed shop is, we think, fortified by the express provisions of section 923 of the Labor Code which declares the public policy of the state with reference to the interpretation and application of section 921. This section states that "it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." How is it possible in the same breath to reasonably say that an individual workman shall have full freedom of association, self-organization, and designation of representatives of his own choosing, and to say that it is legal and legitimate for any organization by destruction of an employer's business to force the individual workman to join a particular group and assent to a particular representative despite the fact that such workman is bending every effort, even to the extent of appeal for aid to this court, to prevent such coercion? By what process of reasoning, can it be said that the individual workman "shall be free from the interference, restraint, or coercion of" his employer, in the designation of a representative, or in self-organization and at the same time that it is perfectly all right for an employer to compel his employees to join a particular union upon threat of discharge and loss of job? The fact that the employer in his turn has been coerced by the labor organization to take such action, does not make such action any the less onerous to the individual workingman, nor widen his freedom of action in the matter. The idea of freedom for the employee from interference in association and self-organization and the idea of coercion by the union through the employer to secure a closed shop are on their face opposite and antagonistic. One or the other must be dismissed. In view of the fact that the former idea, of freedom of the employee from interference, is embodied in an express statute of the state as an expression of the public policy of the state, and the other is merely a proposition argued by the respondents, there can be no doubt as to which should be given effect by this court.

We have no hesitancy in conceding that prior to the enactment of sections 921 and 923 of the Labor Code that strikes, boycotts, both primary and secondary, and pickets were held to be legal in California, and courts refused to enjoin such union activities. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; Southern California Iron & Steel v. Amalgamated Ass'n, 186 Cal. 604, 200 P. 1; Lisse v. Local Union, 2 Cal. 2d 312, 41 P.2d 314; In re Lyons, 27 Cal. App.2d 182, 80 P.2d 745. It will also be conceded that in the case of Parkinson Co. v. Building Trades Council, supra, it was held that union men were within their rights in refusing to work for an employer who refused to sign an agreement, one of the terms of which was that said employer would only employ union men. However, at the time of that decision both an agreement not to join or not to remain a member of a labor organization (so-called "yellow-dog contract") and a promise to employ only union labor or remain a member of a labor organization (the closed union shop agreement) were legal. This situation has been reversed by the express terms of sections 921 and 923 of the Labor Code, and since the enactment of these sections, these decisions are no longer controlling.

It may also be conceded that certain decisions of the United States Supreme Court, both in interpreting federal legislation with reference to labor problems and state statutes based on such federal legislation, have given official sanction to picketing for the unionization of a non-union shop. Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229; Lauf v. E. G. Shinner & Co., 303 U.S. 323, 58 S.Ct. 578, 82 L.Ed. 872. These cases have been cited as persuasive in their reasoning of the interpretation to be given to sections 921 and 923 of the California Labor Code. In order to understand the inapplicability of such authorities, certain underlying facts with reference to the similarity and dissimilarity of the California Labor Code with federal legislation, such as the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., 49 Stats. 449, and the Norris-La Guardia Act, 29 U.S.C.A. § 101 et seq., 47 Stats. 70, and other state statutes, such as the Wisconsin Labor Code and the Oregon Act, should be outlined. A mere statement of the dissimilarity will suffice to show why the federal cases, cited by respondents in support of their contention that peaceful picketing for the purpose of the unionization of a plant and the securing of a closed shop is legitimate union activity, are not only not controlling in this jurisdiction but can have no persuasive effect by virtue of their reasoning. The major fundamental difference is that the California legislature definitely and deliberately rejected labor bills patterned on the Norris-La Guardia Act. The main feature of the Norris-La Guardia Act is the fact that it defines "labor dispute" to involve practically any dispute in the labor field regardless of whether or not the disputants stand in the relation of employer and employee, and forbids (except under certain limited conditions) the issuance of an injunction by a federal court in any case involving or growing out of a labor dispute. Clearly a dispute by an employer with an outside union over the unionization of his shop comes within such definition of "labor dispute". Hence in interpreting said act, or state acts which were practically identical, the United States Supreme Court was justified in holding that an injunction could not be issued in a controversy involving an employer and a labor union over the question of a closed shop. Senn v. Tile Layers Protective Union, supra; Lauf v. E. G. Shinner & Co., supra. Both of these cases involved the interpretation by the State Supreme Court of Wisconsin of a statute Wis.St.1937, § 103.62, similar to the Norris-La Guardia Act, which defined a "labor dispute" as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe". In both these cases the United States Supreme Court held that it was bound by the decision of the Supreme Court of the State of Wisconsin in its decision that the facts presented a controversy within the definition of "labor dispute" contained in the Wisconsin Act. Both the Norris-La Guardia Act and the Wisconsin Act contain a statement of public policy very similar to the declaration of public policy contained in section 923 of the Labor Code of California, to the effect that it is necessary that the individual worker "have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection". In the case of Lauf v. E. G. Shinner & Co., 82 F.2d 68, the Circuit Court of Appeals, Seventh Circuit, having in mind the expressed public policy of the Wisconsin Act, gave precedence to such policy, and held that inasmuch as the union activity therein involved interfered with the individual workingman's freedom of association, self-organization and designation of representatives of his own choosing, such activity was unlawful and was properly enjoinable. Upon appeal to the Supreme Court of the United States, that court held that the general declaration of public policy could not narrow the definition of "labor dispute" as defined in the Norris-La Guardia Act or enlarge the federal jurisdiction to issue an injunction in cases prohibited by such act. In other words, the United States Supreme Court, merely by saying so, gave precedence to the express provisions of the Norris-La Guardia Act defining "labor dispute" over the provision setting forth generally the public policy of said act, and held that a "labor dispute" being involved in the controversy an injunction by a federal court was not proper. Thus it is seen that the broad definition of "labor dispute" has colored and controlled the decisions of the United States Supreme Court which hold that an injunction may not be sought and secured in a federal court to enjoin union activities directed against an employer having as its purpose the securing of a closed shop.

California, by refusing to enact in its own legislation the definition of "labor dispute" which defines such dispute to include any and every possible controversy in which a labor question can be conceived, must be held to have rejected such definition and refused to sanction the taking away from our courts of power to issue injunctions in any and all disputes in which a labor question so broadly defined is involved, thus affirming the existing law in which "labor dispute" was defined as a controversy in which the disputants stood in the relation of employer and employee.

Therefore, while it may readily be conceded that certain decisions of the United States Supreme Court have given official sanction to picketing for the unionization of a closed shop under the broad definition of "labor dispute" as defined in the Norris-La Guardia Act, and kindred state statutes, it is readily apparent that such decisions, in the absence of such a definition in the California Labor Code (which was expressly rejected by the California legislature), can have no weight in determining what effect this court should give to sections 921 and 923 of the California Labor Code. Moreover it is worthy of note that in 1939 both Wisconsin and Oregon reversed their position and redefined "labor dispute" in much narrower terms. Wisconsin, Laws of 1939, chap. 25; Oregon, Laws of 1939, p. 7, chap. 2.

Likewise we have no hesitancy in admitting that the principle that a closed union shop is a proper object of concerted action by unions has been recognized in some other jurisdictions. It should also be pointed out, however, that other states have rejected this principle and in well expressed opinions have given their reasons for this rejection. See Safeway Stores v. Retail Clerks' Union, 184 Wash. 322, 51 P.2d 372; Swing v. American Federation of Labor, 372 Ill. 91, 22 N.E.2d 857; Fornili v. Auto Mechanics' Union, 200 Wash. 283, 93 P.2d 422; Roth v. Local Union, Ind.Sup., 24 N.E.2d 280; Meadowmoore Dairies, Inc., v. Milk Wagon Drivers Union, 371 Ill. 377, 21 N.E.2d 308; Stalban v. Friedman, 171 Misc. 106, 11 N.Y.S.2d 343; Hotel, Restaurant and Soda Fountain Employees Local Union No. 181 v. Miller, 272 Ky. 466, 114 S.W. 2d 501, 503. In the case of Hotel, Restaurant and Soda Fountain Employees Local Union 181 v. Miller, supra, the employer Miller sought and secured an injunction against the picketing activities of a union, affiliated with the American Federation of Labor, which was attempting by such activities to secure a closed shop agreement from him, after his employees had refused to join the union. The language employed therein is, we think, pertinent to the instant case.

"Labor has become highly organized with central federated unions and active locals of great influence and power. Such is the appellant. But to say that in the matter of bargaining with employers for the advancement of the causes of labor these organizations are to be given exclusive recognition by the courts, it seems to us, would destroy the independence of any group of workers who may desire to choose for themselves whom they will have as their agents to treat with their employer, and violate their liberty of action in contracting with their employer. This right of self-organization for the purposes of securing the redress of grievances and the protection from economic abuse and other impositions is recognized by contemporary legislation and judicial decree. It is current history that the Railway Labor Act of 1926, c. 347, 44 Stat. 577, with the amendment of 1934, c. 691, 48 Stat. 1185, 45 U.S.C.A. §§ 151–163, and the National Labor Relations Act of 1935, commonly called the Wagner Act, 49 Stat. 449, c. 372, 29 U.S.C.A. § 151 et seq., were enacted by Congress at the instance and for the benefit of organized labor. Those laws, obviously, have no relation or application to the case at bar. But they and the opinions of the Supreme Court affirming their constitutionality and interpreting their provisions may be regarded as an authoritative expression of modern economic philosophy. The Wagner Act itself declares it to be the policy of the United States to encourage the practice and procedure of collective bargaining and to protect 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.' Section 1, 29 U.S.C.A. § 151.

* * *

"As stated in National Labor Relations Board v. Jones & Laughlin Steel Corporation [301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352], supra, the Wagner Act, 29 U.S.C.A. § 151 et seq., imposes the duty upon an employer coming within its reach to confer and negotiate with such authorized representatives of his employees for the purpose of settling a labor dispute. Though there is no law making negotiations by the appellee Miller with any group obligatory, or imposing a duty upon him to deal with either the appellants or the independent organization, he has chosen to deal and to agree with the latter, and all parties are satisfied. By what right can it be said that a rival organization—even though extensive in its reach and strong in its operation—should be given sole recognition by the employer or by the courts to speak for and to bind those who do not belong to it and do not wish to belong to it?"

Finally it is urged that if sections 921 and 923, as interpreted, prohibit closed shop contracts, they are unconstitutional. The first ground suggested is that they are unconstitutional as a deprivation of freedom of contract. There is little, if any, merit in this contention. It is well recognized that the freedom of contract does not guarantee to a citizen the right to contract without abridgement or interference by any legislative authority. Such right is subject to control and regulation under the police power by means of legislation reasonably adapted to the protection of the public health, safety, morals and general welfare. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 582, 81 L.Ed. 703, 108 A.L.R. 1330, wherein the United States Supreme Court upheld the statute of Washington establishing a minimum wage law for women. That case quoted with approval the following statement of this rule: "'It was recognized in the cases cited * * * that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.' Chicago, B. & Q. R. Co. v. McGuire, 219 U.S. 549, 565 [567], 31 S.Ct. 259, 262, 55 L.Ed. 328." Much of the legislation proposed and promoted by organized labor such as the Norris-La Guardia Act and the National Labor Relations Acts could be equally well challenged on this ground.

To the argument that this legislation is discriminatory in that legislation in other fields of industrial enterprise, such as contracts for the exclusive handling and sale of certain products are not frowned upon, it may be said that there is clearly an inference between exclusive sale contracts for the sale of Buick automobiles, for instance, and a contract for the exclusive employment of union men, even though both contracts be secured by economic competition. In the former case, the subject matter of the contract is inanimate and possesses no rights which need be given consideration. There are in reality only two parties to the contract. In the latter case, in a contract between an employer and a labor union with reference to employment conditions, there is the third party, the employee, who has definite rights which must not be ignored. It is the rights of these employees which furnish the justification for the legislation.

Equally without merit is the contention that this legislation deprives the unions of their constitutional right to strike. The proposition that an individual, in the absence of a contract, can work or refuse to work as he sees fit must be distinguished from the right of the union to call a strike or the right of individuals, collectively or by agreement to refuse to work. The right to strike is not absolute for if the strike is for an unlawful purpose that strike itself is unlawful. Dorchy v. Kansas, 272 U.S. 306, 47 S.Ct. 86, 71 L.Ed. 248. Moreover in the instant case the appellants are not seeking an injunction against a strike as it is one of their contentions that a strike is not in existence at the plant and that the other workers at the Howard plant have not gone on a strike but have simply refused to pass the picket line which was established by the respondent labor union. In one of their briefs, appellants expressly disclaim any desire to secure an injunction against a strike.

Neither can we subscribe to the argument that the construction which we have put upon sections 921 and 923 of the Labor Code deprives the union of the right of free speech. This contention rests upon the proposition that picketing in and of itself is but the right of free speech and that the right to picket is no more than an exercise of free speech. However, as pointed out in an article by Charles O. Gregory, professor of law, University of Chicago Law School, which was published in the American Bar Association Journal, volume 26, page 709 (September, 1940), a fundamental fallacy exists in the denomination of peaceful picketing as an expression of free speech and identification of peaceful picketing with business advertising. In said article it is stated that freedom of speech historically deals with the unrestricted dissemination and communication of idea, chiefly concerning political and economic issues and that "our system of government is committed to the faith that the good sense of our populace is the best defense against the effusions of crackpots or against the more rigorous claims and propaganda of disciples representing undesirable political or social folkways". It is pointed out that in the United States labor organizations have always been allowed to talk, no effort ever having been made to prevent them from discussing their programs as freely as they choose. The article then points out that peaceful picketing resting as it does, not on the dissemination of ideas but on its coercive effect, is not entitled to the constitutional protection and for the sake of the welfare of our country private group pressure should not be removed from the sphere of legislative regulation. The thought that peaceful picketing may not correctly be deemed to be merely an expression of free speech is well stated in the following quotation from said well-reasoned article:

"The claim that such coercive union practices are justifiable as constitutional freedom of speech and are merely the exercise of ordinary civil rights available to all is a perversion of an American ideal which betrays an odd understanding of one of this country's most precious heritages. * * * Now if freedom of speech is to prove a valuable social asset, it will be because unrestricted expression educates and convinces others intellectually. It is submitted that peaceful picketing is not an argument intended to achieve an intellectual conquest. It is a type of coercion. The only intellectual conviction to which it leads is the understanding that if the picketed enterprise does not give in, or if patrons or applicants for jobs do not cease dealing with him, they will all eventually wish they had.

"True liberals in this country no longer look askance at economic compulsion. But to call such coercion constitutionally guaranteed freedom of speech, thereby placing it beyond the reach of regulatory legislation deemed practicable by the majority seems ridiculous policy and sheer misunderstanding of the concept under discussion. Let the unions employ all manner of persuasions (as contrasted to coercion) and call that freedom of speech. But when they insist upon 'expressing' themselves where everyone knows that their 'arguments' win, not because of any intellectual worth but chiefly because of annoyance and fear, they strain the concept beyond all sensible meaning. * * *

"Unless we wish to live in a society where all enterprise and all social activity, however private, is subjected to the coercive influence of annoyance and fear created by some conflicting group interest or prejudice, we had best save for our legislature the means of effective regulation of private group pressures which the founding fathers no doubt intended to include in the Constitution."

In the instant case by reason of the fact that no member of a union affiliated with the American Federation of Labor will go through a picket line thrown about his place of employment by another union also affiliated with the American Federation of Labor, the picketing has resulted in a complete shutdown of the employer's place of business. When picketing has this coercive effect, it is clearly not merely an expression of free speech and cannot correctly base its claim to a right to so picket upon the constitutional guarantee of free speech.

Throughout the discussion of respondents is the underlying thesis that its actions in this particular have been motivated by the desire to further the best interests of workingmen in general and to promote a higher social order, and in this regard it insists that its actions are justified in the instant case upon the ground that a closed shop is an important means of maintaining the combined bargaining power of the workers. Assuming that closed shops are for the best interests of workingmen in their negotiations with their employers, as their bargaining power is greater, nevertheless, it would appear that there are certain fundamental rights important to workingmen as individuals, which are so important as to outweigh any advantage of a closed shop procured by coercive activities. One of these rights is the right of an individual to ally himself with a group of his own seeking, and to select a representative for negotiations with his employer in whom he has faith and confidence. To have forced upon him membership in an association to which he is antagonistic, and to have imposed upon him as a representative, an agency which he does not desire, is so violative of his freedom of action and his liberty as an individual as to need no apology for the defense of these rights, and to justify the enactment by the legislature of a statute intended to preserve these rights to him. We cannot but believe that the rights of an individual as a citizen, are as highly important to him as his rights as a member of a social class, and should be as carefully preserved.

Nothing herein said can or should be construed as antagonistic to the principle of collective bargaining which has come to play an important part in our industrial life. However, we are convinced that the growth of the labor union has been based upon the principle of voluntary association of workers and not upon the combination of one group of workers over another group by coercion, and that insistence upon such voluntary association will in the long run work to the benefit rather than the detriment of organized labor.

Moreover, we can see no escape from the industrial war with its resulting injury to business and to individual workingmen between two or more warring factions of organized labor, as for instance, unions affiliated with the American Federation of Labor and the Congress of Industrial Organization unless the individual worker be permitted to choose the particular group with which he wishes to affiliate, and that his right to do so be protected and upheld. Crosby v. Rath, 136 Ohio St. 352, 25 N.E. 2d 934.

In addition to the foregoing discussion with reference to the effect of the law of this state as laid down in the Labor Code, it may also be said that this same regulation provided by the federal government in the National Labor Relations Act, 49 Stats. 449, 29 U.S.C.A. § 151 et seq., should apply in behalf of the union of which the plaintiffs are members. It appears from the allegations of the complaint, and cannot be disputed, that the plaintiff employees are under the jurisdiction of the National Labor Relations Board. The Howard Automobile Company as their employer is engaged in interstate commerce and is likewise subject to the operation of the federal act. Under that act such an employer is forbidden to interfere in any way with the union affiliations of his employees. The employer, in this case, the Howard Automobile Company, is proscribed by the federal act from even suggesting to its employees, the plaintiffs herein, that they join or do not join a union. Yet if the judgment in this case is to stand, that company must submit to activities on the part of the defendant unions, the result of which is to compel it to require its employees to join the picketing union or be discharged from their employment. If the company refuses to accede to the demand of the picketing union to violate the federal law it must suffer the loss of its business. If the company violates that law, as demanded by the picketing union, it is punishable thereunder. Such a result is not only contrary to the letter and spirit of the statutory law, but is also contrary to the "cherished judicial tradition embodying the basic concepts of fair play". Morgan v. United States, 304 U.S. 1, 22, 58 S.Ct. 773, 778, 999, 82 L.Ed. 1129. Such an interpretation placed on the law makes of it a weapon of coercion and intimidation to be wielded at the whim and caprice of a group not possessed of legislative authority and not subject to any legal control or restraint.

Furthermore, the plaintiff employees have the right of self-organization guaranteed to them by the federal act. National Labor Relations Bd. v. Swank Products, 3 Cir., 108 F.2d 872, 874; National Labor Relations Bd. v. Sterling Electric Motors, 9 Cir., 109 F.2d 194. Section 1 of that act, 29 U.S.C.A. § 151, was designed to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection". As before stated, there is nothing in the record herein to indicate that the plaintiffs' union was not organized in good faith. There is nothing whatsoever in the record upon which to base such a conclusion. The right of the plaintiff employees to organize their own union and to select their own bargaining representatives is recognized by both state and federal law.

The picketing which the plaintiff employees are here seeking to enjoin is contrary to their rights under both laws, is therefore picketing for an unlawful purpose, and as such should be subject to the injunctive processes of the courts of this state.

It is apparent that the trial court erred in sustaining the demurrer to the complaint and in dissolving the temporary restraining order.

The judgment should be reversed.

I concur: SHENK, J.

MARKS, Justice pro tem.

I dissent.

I agree with the conclusion reached in the opinion prepared by Mr. Justice CURTIS and with much of the reasoning and arguments there set forth. I believe that the concession that the picketing described in the complaint can be classified as "peaceful picketing", requires further examination. While my reasoning follows closely that of Mr. Justice CURTIS in most important particulars, there are certain departures and some additional reasons and authorities that I wish to particularize.

I have two points of departure from the majority opinion:

First, it was not necessary for the plaintiffs to allege that they had "organized a bona fide independent labor union". They alleged that they were all of the salesmen of the employer company and had "united and organized and designated three of their number a committee to negotiate rates of pay", etc., and that such committee had been recognized as bargaining agent for the entire sales force, being all the plaintiffs. These allegations follow the language of sections 921 and 923 of the Labor Code.

Second, the language used in the sections of the Labor Code just referred to is too simple and clear, the intent of the legislature in using that language is too plain to permit of judicial interpretation. Under such circumstances the courts must accept the language used by the legislature and give to it the usual, common and accepted meaning of the words employed. This being true, there is no room for judicial interpretation or speculation as to what the framers of the measure might have intended to accomplish by the legislation. The intent is clear from the act. Amendment of the act should be left to the legislature. It should not be accomplished by judicial legislation.

In considering these questions it should be observed that the word "union" or the words "labor union" do not appear in either of the three sections. It is there declared to be the public policy of the state to protect the individual worker in his "freedom of labor, and thereby to obtain acceptable terms and conditions of employment * * * that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment * * *."

This statute was followed in the allegations of the complaint. The pleading therefore should be sufficient to support the conclusion that the plaintiffs had formed and joined an organization of their own forming and choosing and had selected and designated their own bargaining representatives to negotiate with the employer the terms and conditions of employment. This is all the statute requires. The courts should demand no more.

A demurrer admits the truth of the allegations of a complaint. It adds nothing to those allegations nor does it subtract from them. The question of the issuance of an injunction was also submitted on the undenied allegations of the complaint, the truth of which were thus admitted.

The complaint here contains nothing that would in the slightest degree intimate that plaintiffs' organization was company inspired or company controlled. It would be purest speculation without any foundation of allegation or inference from any allegation for me to assume that the organization was dominated by the employer. Such influence or domination by the employer is prohibited by the Labor Code and is unlawful. The presumption "that a person is innocent of crime or wrong" (sec. 1963, Code Civ.Proc.) is a sufficient answer to any such speculation should I desire to indulge in it.

I am thus brought to the point where I must conclude from the allegations of the complaint that plaintiffs voluntarily and lawfully formed their own organization and freely selected their own bargaining agents to negotiate the terms of their employment. This they had the right to do under the statute. In the lawful exercise of this right they should be protected.

The last paragraph of the first section of the National Labor Relations Act of 1935, 29 U.S.C.A., § 151, declares it to be the policy of the United States to eliminate certain obstructions to the free flow of commerce "by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection". This language is so similar to that used in section 923 of our Labor Code in declaring the public policy of California that the construction of the federal act by the Supreme Court of the United States should be most persuasive here. In National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 622, 81 L.Ed. 893, 108 A.L.R. 1352, it was said:

"Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

"That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. * * *

"We reiterated these views when we had under consideration the Railway Labor Act of 1926, 44 Stat. 577. Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, 'instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.' Texas & N. O. R. Co. v. [Brotherhood of] Railway & S. S. Clerks, supra [281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034]. We have reasserted the same principle in sustaining the application of the Railway Labor Act as amended in 1934 (45 U.S.C.A., § 151 et seq.). Virginian Railway Co. v. System Federation, No. 40, supra [300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789.]"

There can be no doubt of the right of the working man to organize for his own protection and betterment. There is the eminent authority I have quoted, besides the statute, for the conclusion that the exact form such organization takes is immaterial. It may take the form of the closely knit craft union, the larger industrial union or the loose organization of workers for the purpose of selecting bargaining agents such as we have here. The statute so specifies. Sec. 923, Labor Code.

Having concluded that plaintiffs' organization is legal and their membership in it a matter of lawful right, it is necessary to consider the effect of the judgment on plaintiffs and their organization under the allegations of the complaint. No court should by judgment force the dissolution of a lawful organization. Neither should it force individual members to forfeit membership in one lawful organization and to join another if such action be against their will and without their consent. Freedom of individual action within lawful limits is a fundamental principle of our government.

It is alleged that plaintiffs are all the salesmen employed by their employer; that they compose all of the membership of their organization; that none of them desire to become members of any of the defendant unions which are maintaining the picket line; that defendant Salsemen's Union has solicited each of the plaintiffs to join that union; that each plaintiff has refused to do so; that a picket line has been placed around the employer plant; that the picket line will be maintained until the employer "compels plaintiffs to join said union or discharges said plaintiffs"; that unless the picketing be restrained the employer "intends to, and * * * will discharge all the plaintiffs from their said employment, or demand that plaintiffs and each of them join the said union". It is also alleged that the picket line "has had the effect of closing down the said plant, (and) stopping all work therein * * *".

These allegations must be accepted as true as the demurrer admits their verity and the case was not tried on its merits. But one conclusion can be drawn from them, namely, that unless they be enjoined the defendant unions will compel plaintiffs to forfeit memberships in their own organization and to join the defendant salesmen's union; that as a penalty for failing so to do they will forfeit their employment; that as a condition of future employment the employer will be compelled to require plaintiffs to belong to that union,—all this against the will and without the consent of plaintiffs.

Thus the case resolves itself into a jurisdictional dispute between labor organizations,—that of the plaintiffs small and weak numerically and those of the defendants, strong in numbers and powerful in influence.

A fundamental concept of our government always has been and always should be the protection of the lawful rights of minorities,—protection of the weak against the strong. Mere might should never make right. Mere force of numbers should never prevail over or be allowed to destroy the lawful rights of the few. Volumes have been written both in and out of the courts supporting this thesis. It should be unnecessary to cite any supporting authority other than the words of Thomas Jefferson when he wrote: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

In this case these principles may be violated. On the face of the record they will be violated. If this order be sustained it might not be inappropriate to ask what would happen to a numerically small craft union when confronted in a jurisdictional dispute with a stronger industrial union. There is a procedure to determine the equities under the law in such a case as this. The restraining order should be continued until the parties are put on their proof. Evidence should be taken and weighed by a court. Not until that is done should the grave questions here presented be decided with the complaint containing the allegations presenting these serious problems.

Also it might not be inappropriate to ask what is to become of our constitutional guarantees, both federal and state, of equal protection of the laws if plaintiffs are forced to surrender their lawful membership in their own lawful organization and take membership in a defendant union without their will and against their consent?

Is it not true, as said by the Supreme Court of the United States, in the National Labor Relations Board case, supra, "that such collective action would be a mockery if representation were made futile by interference with freedom of choice" when referring to employer interference? How much more true are those same words when applied to like interference by orders of the court, reinforced as they are by all the powers of the state?

It has been repeatedly held that the right of a man to sell his labor is a property right that is protected by the Constitution. It is also equally well settled that this right to sell his labor is limited by the language of the rule. It does not guarantee the right of a man to labor either as a union or a non-union worker. It is merely the right to work that is guaranteed.

However, these rules should not control the decision here. While the right of plaintiffs to labor at all is involved, the immediate question is the right to force lawful members of one lawful organization of laborers to forfeit their membership in that organization and to join another lawful organization of laborers, all against their will and without their consent. If this end should be accomplished it would deny to plaintiffs and their organization the equal protection of the laws.

I have found no reported case in California even touching upon what I conceive to be the real question involved here, —the right to force members of one lawful organization of laborers to forfeit their membership in that organization and take membership in another labor organization. The question seems to be of first impression here.

The case of Greenwood v. Building Trades Council, 71 Cal.App. 159, 233 P. 823, 828, is not even remotely related to that question. That case involved the right of Local Union No. 162 of the Sheet Metal Workers, a voluntary association, to membership and representation in the Building Trades Council of the city of Sacramento, a voluntary association,—and the collection of per capita dues. The real rule applied to settle the controversy in that case is thus stated in the opinion of the District Court of Appeal: "In 3 California Jurisprudence, 350, § 5, the rule as to membership is stated as follows: 'Membership in a voluntary association is not a right which can be gained independently and then enforced. It is rather a privilege which may be withheld, or accorded on such terms and conditions as the association sees fit to impose'. * * * We have not been cited to any authority holding that the courts have any power to enforce the admission of members; the only rule which we have discovered is that which we have quoted from 3 California Jurisprudence."

A new factor has been injected into cases of this kind by the adoption of sections 921, 922 and 923 of the Labor Code and similar earlier statutes on which those sections are founded. Those statutes have been enacted recently and render earlier decisions inapplicable to the legal situation here presented. Those earlier cases can only be relied upon now for the announcement of principles which do not conflict with the public policy of California as declared in these sections.

It is clear to me that the Labor Code now declares that it is the public policy of California to permit workmen, regardless of their numbers, to freely organize for the purpose of selecting their own bargaining agents to bargain with their employer concerning the terms of their employment; that in the exercise of this right the workers must be free from domination, intimidation or coercion. The constitutionality of an enactment having such purpose and effect may not now be questioned. See National Labor Relations Board v. Jones & Laughlin Steel Corp., supra; Senn v. Tile Layers Protective Union, Local No. 5, 301 U.S. 468, 57 S. Ct. 857, 81 L.Ed. 1229. There are many other cases supporting this conclusion.

It is very generally held that an act lawful in itself does not become unlawful because it was prompted by a bad motive; that "he who does what the law allows cannot be a wrongdoer whatever his motive". Union Labor Hospital Ass'n v. Vance Redwood Lumber Co., 158 Cal. 551, 112 P. 886, 889, 33 L.R.A.,N.S., 1034.

It is also held that in labor disputes where an act lawful in itself has as its object the accomplishment of a result prohibited by law, the act becomes unlawful. This was recognized by Mr. Justice Frankfurter when he wrote in 44 Law Quarterly Review at page 182: "The damage inflicted by combative measures of a union—the strike, the boycott, the picket—must win immunity by its purpose". That an unlawful purpose makes a strike illegal was established by the Supreme Court of the United States in Dorchy v. State of Kansas, 272 U.S. 306, 47 S.Ct. 86, 87, 71 L.Ed. 248, where, in speaking through Mr. Justice Brandeis, it said: "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted." See, also, Senn v. Tile Layers Protective Union, Local No. 5, supra; Overland Pub. Co. v. H. S. Crocker Co., 193 Cal. 109, at page 119, 222 P. 812.

In addition to the provisions of section 923 of the Labor Code to which we have already adverted, section 921 of that code interdicts any contract between an employer and employee "To join or to remain a member of a labor organization",—"not to join or not to remain a member of a labor organization",—"to withdraw from an employment relation in the event that he joins or remains a member of a labor organization".

A fair construction of the allegations of the complaint requires me to conclude that the picket line established by the defendant union seeks to accomplish the following results: to compel the employer to require plaintiffs to surrender membership in their organization (a reasonable inference from the allegations of the complaint); to compel plaintiffs to join and remain members of defendant Retail Automobile Salesmen's Local Union No. 1067; or as an alternative to require plaintiffs to withdraw from their employment relationship with their employer. Each one of these purposes is made unlawful by the Labor Code. It should follow that the picket line, by seeking to accomplish unlawful results, is itself unlawful and that its maintenance should be enjoined, assuming the truth of the allegations which we must do at this stage of the proceedings.

Weight is lent to this conclusion by the cases of Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034, and Consolidated Edison Co. v. National Labor Relations Board, 2 Cir., 95 F.2d 390, where employers were enjoined from committing some of the very acts which the picket line in the instant case sought to compel the employer here to commit.

Another new and novel question unapproached in any reported California case is presented by the allegations of the complaint, namely, is the picketing there described peaceful? This question is entirely unrelated to the others I have considered and can in itself be decisive of this appeal. It revolves around the question of what is *peaceful picketing*. Does this term only exclude acts or threats of physical injury or violence or does it also exclude conduct which amounts to mental and moral intimidation and coercion whereby the mind and will are overcome by fear of the consequences resulting from failure to yield to pressure?

It is thoroughly established and admitted that only peaceful picketing is lawful,—that picketing which is not peaceful is not lawful and should be enjoined. The authorities cited in the prevailing opinion fully sustain this rule.

The complaint alleges that the defendant unions "all have rules, regulations, by-laws and agreements enforceable by fines and penalties binding on their members respectively, not to pass picket lines or to do business with plants or firms under picket; that said company employs members of each and all of said associations; that the placing of a picket on the plant of said company will, pursuant to said by-laws, rules, regulations and agreements, compel each and all the members of each and all of said associations to abstain from visiting, delivering goods to, accepting goods from, or transacting business with or working for said company". The briefs admit that all of the workmen employed in the plant except plaintiffs are members of the defendant unions. It is also alleged that "the continuance of said picket on the plant of said company has had the effect of closing down the said plant, stopping all work therein and destroying its said business, * * * None of said pickets have been or are employees of said company, on strike or otherwise." These allegations present the question I wish to consider, namely, can the picketing described in the complaint with the serious penalty to be imposed on union workmen for passing through the picket line be held to be peaceful?

Peace is often defined as the absence of any force. Force may be applied to the mind as well as to the body. The use of force may result in the lack of freedom of movement and action. This may result just as truly from coercion of the mind as restraint of the body. This court has recognized these truths and has held that mere intimidation and coercion of the mind is just as effective an application of force as is physical violence or restraint.

In Southern Cal., etc., Co. v. Amalgamated Association of Iron, Steel and Tin Workers, 186 Cal. 604, at page 611, 200 P. 1, 4, this court said:

"'Any act of boycotting, therefore, which tends to impair this constitutional right freely to labor, by means passing beyond moral suasion, and playing by intimidation upon the physical fears, is unlawful.' See, also, Goldberg, etc., Co. v. Stablemen's Union, 149 Cal. 429, 86 P. 806, 8 L.R.A. (N. S.) 460, 117 Am.St.Rep. 145, 9 Ann.Cas. 1219; Berger v. Superior Court, 175 Cal. 719, 167 P. 143, [15 A.L.R. 373]; Rosenberg v. Retail Clerks' Ass'n, 39 Cal.App. 67, 177 P. 864; Moore v. Cooks', etc., Union, 39 Cal.App. 538, 179 P. 417; American Steel & Wire Co. v. Wire Drawers', etc., Unions (C.C.) 90 F. 608; Union Pacific R. R. Co. v. Ruef (C.C.) 120 F. 102; Atchison, Topeka & S. F. R. Co. v. Gee (C.C.) 139 F. 582; Kolley v. Robinson [8 Cir.] 187 F. 415, 109 C.C.A. 247; Franklin Union v. People, 220 Ill. 355, 77 N.E. 176 [110 Am. St.Rep. 248, 4 L.R.A. (N.S.) 1001], 4 L.R.A. (N.S.) 302, note.

"We quote from Martin on Labor Unions, p. 229: 'The use of force and violence is not necessary to make picketing unlawful. Intimidation is not limited to threats of violence or to physical injury to person or property. It has a broader signification, and there may also be a moral intimidation which is illegal. In the guise of picketing, strikers may obstruct and annoy others, and by insult and menacing attitude intimidate them as effectually as by physical assault.'"

The same rule was restated in Lisse v. Local Union No. 31, 2 Cal.2d 312, 41 P.2d 314, 316, as follows: "In this regard it is held that, in order to prove physical intimidation and fear, it is not necessary to show that there was actual force or express threats of physical violence used; that such result may be accomplished as effectually by obstructing and annoying others and by insult and menacing attitude as by physical assault. Southern Cal. Co. v. Amalgamated Ass'n, supra; Jordahl v. Hayda, 1 Cal. App. 696, 82 P. 1079; Martin on Labor Unions, p. 229. In so holding the Supreme Court, in the case of Southern Cal. Co. v. Amalgamated Ass'n, supra, in quoting approvingly from another case (Allis-Chalmers Co. v. Iron Molders' Union (C.C.) 150 F. 155, 173), said that 'intimidation * * * includes persuasion by or on behalf of a combination of persons, * * * resulting in coercion of the will from the mere force of numbers'; and the court then points out that the same rule is declared in Martin on Labor Unions, supra, as follows: 'Even a simple "request" to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct workmen, is unlawful intimidation, and not less obnoxious than the use of physical force for the same purpose.' The rule is applied with equal force as to customers and patrons. Goldberg [Bowen &] Co. v. Stablemen's Union, supra."

Here there is alleged the force of rule which was applied by the picket line to all union employees working in the employer plant. The rule brought into effect by the picket prohibited union members from crossing the picket line. It imposed severe penalties on them should they violate the rule. The fact of the picket line brought that rule into play. The rule was the force applied by the picket line. The result of that force was alleged. No union member crossed the line. The plant was completely "knocked out". A barricade manned by men could not have been more effective. I cannot distinguish between the mental and moral intimidation of the rule applied by the picket line and the physical intimidation of actual threats or actual violence. The results were the same, or perhaps more effective in the case of the rule and the picket line. Physical force may arouse such resentment that it may be met with like physical force. The intimidation and coercion of the rule and the picket line was so complete that no employee sought to cross the line.

It is instructive and very persuasive to study four decisions by this court in which injunctions against picketing that were approved or modified and approved are set forth in full. The injunctions actually approved and issued should be conclusive evidence of this court's opinion of the powers it should exercise in picketing cases.

In Goldberg, etc., Co. v. Stablemen's Union, 149 Cal. 429, 86 P. 806, 809, 8 L.R.A., N.S., 460, 117 Am.St.Rep. 145, 9 Ann.Cas. 1219, the judgment, as amended by this court, enjoined the defendant union and its pickets from interfering with or harassing or obstructing plaintiff "by means of pickets or transparencies, or otherwise, threatening or intimidating any person or persons * * * being employed at said place or places by the plaintiff".

In Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324, 325, the injunction ordered issued by the trial court was modified and affirmed. As so modified the defendant, its agents and employees were enjoined from "obstructing plaintiffs in the conduct of * * * their stable * * * or from in any wise molesting, interfering with, threatening, intimidating, or harassing any employé or employés of plaintiffs * * * or from * * * placing in front of said plaintiffs' place of business any picket, or pickets, for the purpose of * * * molesting, intimidating or coercing, or attempt to molest or intimidate or coerce * * * any employé now or hereafter employed by or working for, plaintiffs in their said business."

In Southern Cal., etc., Co. v. Amalgamated Association of Iron, Steel and Tin Workers, supra, this court set aside the judgment of the trial court and ordered a judgment entered which commanded the defendants "to desist and refrain from directly or indirectly, or by any means or method doing, or attempting to do, any of the following described acts, with the intent or purpose of intimidating the employees of the plaintiff, so as to prevent them from continuing in said employment, or with the intent or purpose of intimidating persons intending to or about to enter such employment, so as to prevent them from becoming such employees, to wit: stationing or placing, or causing to be stationed or placed, on the street or elsewhere, at or near the plaintiff's place of business, any picket or pickets * * *. The aforesaid defendants are also enjoined from and commanded to desist and refrain from interfering or attempting to interfere in any manner with the free use, occupation and enjoyment by the plaintiff, its agents, officers, servants, and employees of any of its property and premises of any kind or nature, or hindering or obstructing or attempting to hinder or obstruct, in any manner, the plaintiff's business or any part thereof; or molesting or interfering with or intimidating or harassing any employee of plaintiff or person who seeks to enter the employment of plaintiff".

In Lisse v. Local Union No. 31, supra, the judgment was modified and ordered reentered to read, in part, as follows: "'It is therefore ordered, adjudged and decreed that defendants herein and each of them and all persons acting for them or either of them or in aid or assistance of them or either of them be and they are hereby perpetually enjoined and commanded to desist and refrain directly or indirectly or by any means or method from doing or attempting to do any of the following described acts: (a) intimidating, threatening, molesting or coercing plaintiffs in the conduct of their business known as the "Rainbow Cafe" situated at No. 1218 Broadway Street, in the city of Oakland, California, or for any such purposes obstructing or interfering with, or attempting to obstruct or interfere with the free use, occupation and enjoyment thereof by plaintiffs, their agents, *servants* and *employees;* * * *'" (Italics added.)

Each of these cases, especially the later ones in point of time, stoutly uphold the constitutional right of free speech, the right of the working man to organize, to strike, to conduct primary and secondary boycotts, to persuade other workers, by peaceful means, to leave their employment, to seek members of their labor organization and use other such means as may be lawful to promote their own interest and better their own working conditions. These are still the lawful rights of labor if lawfully exercised. It is made equally clear, especially by the injunction in the Lisse case, that an employee who so desires is given the right to the free use and occupation of his employer's premises free from obstruction or interference of anyone. An employee cannot have the free use and enjoyment of his employer's premises unless he has the right to freely enter upon and leave those premises free from obstruction or interference by anyone. Thus the lawful rights of the unions and their members to promote their own welfare, and the lawful right of the individual workman, whether unionized or not, to sell his labor, were both protected.

Here the picket line and the rule interferes with the free use and enjoyment of the employer's premises by all of its employees. Unless this court decides to overrule the four cases last considered, the order of the trial court should be reversed. Instead of overruling any of those cases, the majority opinion cites some of them with approval.

To argue that the picket line and the union rule has not coerced the union employees of the employer into refusing to enter their place of employment because they voluntarily obeyed the rule against crossing the picket line would be the purest sophistry. Union membership and free fraternization with other union members is a right that must be valued highly. Severe penalties for violation of the union rule are described in the complaint. A fine or other punishment are penalties provided for violation of the rule. It would be as logical to argue that penalties provided for the violations of statutes do not compel obedience to those laws. Here the obedience by the union members, while in a sense voluntary, is none the less under compulsion of the rule, and the penalty to be imposed for its violation.

For these reasons the orders here for review should be reversed.

16 Cal.2d 379

SHAFER v. REGISTERED PHARMACISTS UNION LOCAL 1172 et al.

S. F. 16200.

Supreme Court of California.

Oct. 14, 1940.

Rehearing Denied Nov. 9, 1940.

1. Torts 🔑**10**

Peaceful picketing is lawful form of concerted action by labor union members.

2. Torts 🔑**10**

The securing of closed shop contract with employer is as proper an object of concerted action by employees as attainment of higher wages, shorter hours of labor, or better working conditions.

3. Statutes 🔑**214**

In interpreting statute, courts may and should have recourse to available extrinsic aids in order to discover meaning and purpose of legislation.

4. Statutes 🔑**184, 217**

In enforcing command of statute, both policy expressed in its terms and object implicit in its history and background should be recognized.

5. Master and servant 🔑**15, 16**

The term "employer organization," as used in section of statute, declaring contrary to public policy employee's or employer's promise to join or remain member of labor organization or employer organization, not to join or not to remain member of such an organization, or to withdraw from employment relation, if he joins or remains member thereof, refers to association of employers, not to company union, which is declared contrary to public policy by subsequent section. St.1937, p. 208, §§ 921, 923.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer Organization".

6. Master and servant 🔑16

The statutory provision, declaring employee's promise "to join or to remain a member of a labor organization," contrary to public policy, does not prohibit promise to join independent labor union, though term "labor organization," taken by itself, is broad enough to refer to either company union or independent union, as purpose of statute containing such provision was to prohibit company unions and interference by employers with collective bargaining by employees. St.1937, p. 208, §§ 921, 923.

7. Contracts 🔑108(2)

The statute, declaring contrary to public policy employee's promise to join or remain member of labor organization, not to join or remain member of such organization, or to withdraw from employment relation if he joins or remains member thereof, does not prohibit closed union shop contracts, which are approved by other provisions of Labor Code. St.1937, pp. 208, 210, 211, §§ 921, 923, 1011, 1012, 1015, 1016.

8. Torts 🔑10

Compulsion, brought about entirely by moral force, to join labor union for purpose of organizing closed union shop, is not made contrary to public policy by any statute and is proper exercise of labor's rights.

9. Torts 🔑10

The state Labor Code imposes no restraint on workers' efforts to secure closed union shop contract with employer, so that peaceful picketing of employer's place of business for such purposes is lawful and should not be enjoined. St.1937, p. 208, §§ 920–923.

CURTIS and SHENK, JJ., and MARKS, Justice pro tem., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Thomas Guy Shafer, doing business under the fictitious name and style of Guy's Drug Stores, against Registered Pharmacists Union Local 1172 and others for an injunction against picketing and boycotting of plaintiff's places of business. From a judgment granting a permanent injunction, defendants appeal.

Reversed, with directions.

Rehearing denied; SHENK, CURTIS, and HOUSER, JJ., dissenting.

James F. Galliano, of Oakland, for appellants.

Carleton L. Rank, of Oakland, for respondent.

EDMONDS, Justice.

By this appeal the defendants, Registered Pharmacists Union Local 1172, its president and its business agent, challenge a decree permanently enjoining them from picketing and boycotting the plaintiff's places of business. The determinative question in the case is whether closed union shop agreements have been rendered unlawful in this state by virtue of the enactment of Sections 920, 921, and 923 of the Labor Code, St.1937, p. 208.

The facts were presented to the trial court upon an agreed statement and are undisputed.

The respondent operates a small chain of retail drug stores in Oakland, California, doing business under the name of "Guy's Drug Stores." In 1937, he entered into a collective bargaining agreement with the union with respect to fourteen pharmacists and assistant pharmacists in his employ. This contract, which by its terms was to continue in force for one year, provided, among other things, that the pharmacists then employed, or thereafter hired by him, should apply for membership in the union. The union in turn agreed to take the respondent's then-employees into its membership, and in good faith to consider and pass upon the membership qualifications of future applicants in the regular manner and according to the usual standards required by it in admitting new members. The parties are agreed that the effect of their contract was to require the employer to retain only union-member pharmacists in employment and to recognize the defendant union as the sole collective bargaining agent of the employees who were subject to it.

At the end of the year the respondent refused to renew the agreement unless the closed shop provisions were deleted, although other drug store owners representing a substantial portion of the retail drug industry in that locality entered into and renewed similar agreements with the defendant union. Thereupon, the union declared a strike against him and started picketing his stores. All of his pharmacists responded to the strike call except three executives, who had not been subject to the agreement, and one non-executive employee who subsequently resigned from the union. The picketing was in every respect peaceful. The respondent suffered substantial and irreparable injury to his business as a result of the defendants' acts.

From these facts the trial court found in effect that the union's object was to force the employer to execute a closed union shop agreement obligating him to require his pharmacist employees, present and prospective, (1) to designate the union as their collective bargaining agent and (2) to become and remain members of the union as a condition of employment. The court concluded that such an object was unlawful and issued a permanent injunction prohibiting the appellants, in broadest terms, from picketing or boycotting the respondent's places of business.

[1, 2] In the absence of any controlling statutory provisions, the activities of the appellants may not be enjoined under the circumstances stated. It is established in this state that peaceful picketing is a lawful form of concerted action by the members of a labor union. (Lisse v. Local Union, 2 Cal.2d 312, 41 P.2d 314; In re Lyons, 27 Cal.App.2d 293, 81 P.2d 190), and it was long ago held by this court that the securing of a closed shop contract with an employer is as proper an object of concerted action by employees, as is the attainment of higher wages, shorter hours of labor or better working conditions. Parkinson v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165. However, the employer successfully contended in the trial court that by the enactment of sections 920, 921 and 923 of the California Labor Code the legislature outlawed closed shop contracts. The correctness of that conclusion is the question decisive of this appeal.

The Labor Code provides: "Every promise [as defined by section 920] made after August 21, 1933, between any employee or prospective employee and his employer, prospective employer or any other person is contrary to public policy if either party thereto promises any of the following: (a) To join or to remain a member of a labor organization or to join or remain a member of an employer organization. (b) Not to join or not to remain a member of a labor organization or of an employer organization. (c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization." Such a promise, the section continues, "shall not afford any basis for the granting of legal or equitable relief by any court against a party to such promise, or against any other persons who advise, urge, or induce, without fraud or violence or threat thereof, either party thereto to act in disregard of such promise." Sec. 921.

In this legislation the state's public policy with regard to labor organizations was stated as follows: "Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore, it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Sec. 923.

Concerning these provisions the respondent argues that a closed union shop contract violates the terms of Section 923 in that it deprives the individual employee of his right of "freedom of association, self-organization, and designation of representatives of his own choosing" guaranteed by that section. Moreover, it is said, such a contract also violates Section 921 because its effect is to require an individual employee "to join" and "to remain a member of a labor organization". On the other hand the appellants contend that these measures were drafted and proposed at the instance of organized labor for the purpose of extending and safe-guarding the principle of collective bargaining, and considering their history and background, they should not be interpreted contrary to the principle they were designed to promote.

[3, 4] It is a well settled rule of statutory interpretation that courts may and should have recourse to available extrinsic

aids in order to discover the meaning and purpose of legislation. Story v. Richardson, 186 Cal. 162, 198 P. 1057, 18 A.L.R. 750; Mundell v. Lyons, 182 Cal. 289, 187 P. 950. Also, in enforcing the command of a statute, both the policy expressed in its terms and the object implicit in its history and background should be recognized. See Stone, The Common Law in the United States, 50 Harv.L.Rev. 4, 12–16; Landis, A Note on "Statutory Interpretation", 43 Harv.L.Rev. 886, 891, 892.

Impartial studies of the labor movement in this country show that for many years the extension of collective bargaining in industrial relations has been opposed by employers. Chief among the devices resorted to for that purpose has been the anti-union or "yellow dog" contract, an agreement between an employer and his employee which in its usual form provides that the employer will maintain his business on a non-union basis and the employee will not become a member of any labor union during the course of his employment. Such a contract is set out in full in Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260, L.R.A. 1918C, 497, Ann.Cas.1918B, 461. References to other examples appear in Landis, Cases on Labor Law, p. 131, n. 9. When first used these agreements were little more than psychological deterrent to the growth of labor unions (see Cochrane, Why Organized Labor is Fighting "Yellow-Dog" Contracts [1925], 15 Am.Lab. Leg.Rev. 227-228), but in 1917 the Supreme Court of the United States gave equitable sanction to such contracts by enjoining attempts to unionize workmen who had subscribed to them. Hitchman Coal & Coke Co. v. Mitchell, supra, 1917. Following this decision many employers used such contracts to prevent the penetration of independent labor unions into their plants. Landis, Cases on Labor Law [1934], note 131 at 181-182; Seidman, The Yellow Dog Contract [1932], 29 et seq.; Witte, The Government in Labor Disputes [1932], note 136 at 221, 222.

However, with the growth of the labor movement in this country and the development of public opinion more favorable to collective bargaining, industry found it advisable to change the methods of opposition. Many employers, although professing to accept the principle of collective bargaining and unionization by which it is made effective, either directly or indirectly sponsored company controlled unions having no members except their own employees, and by that means were able to minimize the workers' demands. This was a change in method only. Formerly, the chief defense of an employer against the unionization of his employees was a requirement that each prospective employee promise not to join a union; under the new plan a promise was exacted that he would join the company union. 4 Encyc. Soc.Sciences, Company Unions, 123 [1931]; Labor and the Government, Twentieth Century Fund, Inc. [1935], 60-62; Commons, History of Labor in the U. S., Vol. III [Lescohier], p. 336, et seq. [1935].

Following the World War the company union came into very wide use in industry, and although a few of these associations were relatively free of employer domination and developed the necessary independence to represent their members fairly, by and large, as the investigations of impartial observers have shown, the single shop or company union has inherent weaknesses which prevent it from becoming an effective bargaining unit for the employees which it represents. Labor and the Government, supra, at 65–113, 323–332; 4 Encyc.Soc.Sciences, 124–145; 37 Col.L. Rev. 816, 827, et seq.; 40 Col.L.Rev. 278–309. As organized labor consistently looked upon such unions as impediments to effective collective bargaining and also as unduly restricting the rights of workers it sponsored and worked to secure corrective legislation. See Landis, Cases on Labor Law, 181-182. These efforts met with some success. See Railway Labor Act of 1926, 44 Stat. p. 577, 45 U.S.C.A. § 151 et seq.; National Labor Relations Act 1935, 49 Stat. 449, 452, sec. 8, 29 U.S.C.A. § 158. Labor is also responsible for the passage of the Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C.A. § 101 et seq., and state legislation based upon it, which although designed mainly to restrict the use of the labor injunction, also outlaw "yellow dog" contracts and, in the variants adopted by some legislatures, include provisions rendering company union contracts unlawful. See Frankfurter and Greene, The Labor Injunction, 205, et seq.; Frankfurter and Greene Labor Injunctions and Federal Legislation, 42 Harv.L.Rev. 766; Fraenkel, Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts, 30

Ill.L.Rev. 854–859; Fraenkel, Judicial Interpretation of Labor Laws, 6 Chic.L.Rev. 577, 581; 11 So.Cal.L.Rev. 484.

[5] The California legislation is the result of labor's efforts along these lines. In 1933 the legislature refused to pass a bill to enact a model anti-injunction law (A. B. 315) as it was presented, adopting only its declaration of policy, sec. 923, Labor Code, and the provisions which declare anti-union and company union contracts to be contrary to public policy. Secs. 920, 921, Labor Code. But there can be no doubt that the intended effect of this legislation was to balance the industrial equation, so far as it is possible to do so, by placing employer and employee on an equal basis. This purpose is plainly evinced by section 923, which commits the state, as a matter of public policy, to the principles of collective bargaining. In dealing with his employer, the individual workman is said to be unable either to bargain on equal terms or to combine with his fellow workmen in order to enhance his bargaining power; hence, it is necessary that he be free to associate, organize, and to designate representatives of his own choosing. And in order to make certain that the right to associate and organize be exercised without interference by the employer, the legislature provided that if the employer, as a condition of employment, exacts a promise to join or not to join a labor union, he shall have no right to injunctive relief or damages upon a violation of that promise.

However, the legislature recognized also that as a necessary corollary of the employee's freedom to contract, he should not require his employer "to join or remain a member of an employer organization" or, on the other hand, "not to join or not to remain a member * * * of an employer organization". This provision, which is in accordance with the purpose of such legislation, apparently had its genesis in the Federal Railway Labor Act of 1926, supra, sec. 2, 45 U.S.C.A. § 152, which provides for settlement of labor disputes by conference between representatives of the employers and employees chosen "without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other". See Frankfurter and Greene, The Labor Injunction, p. 213. That some restraint may well be laid upon any demands of labor concerning organizations of employers is apparent from situations such as that disclosed in the case of Overland Publishing Co. v. H. S. Crocker Co., 193 Cal. 109, 222 P. 812. Bearing in mind the necessity for economic equality as a foundation for fair bargaining, the plain language of section 921 when read in connection with the declaration of policy contained in section 923 can only mean that the term "employer organization", as used in each subdivision of the former, refers to an association of employers and not to a company union, as the appellants contend.

[6] Considering another point made by the employer in this connection, the clause "to join or to remain a member of a labor organization" may not reasonably be construed as prohibiting a promise to join an independent labor union. Although the term "labor organization", taken by itself, is broad enough to refer to either a company or an independent union, the purpose of the legislation must be considered in arriving at a conclusion concerning its meaning. If the words are meant to designate an independent union, then it is against public policy for an employee or prospective employee to join such an organization, which is a result exactly contrary to the declaration of policy in section 923. In matters of both employment and concerted activity for the purpose of collective bargaining, reads this section, the employee "shall be free from the interference, restraint, or coercion of employers of labor, or their agents". What is this "interference, restraint, or coercion" which should not be exercised against employees? Obviously it is anything which is a barrier to the full freedom of association and self-organization without which "the individual unorganized worker is helpless to exercise actual liberty of contract". Who should not interfere with the employees' rights? "Employers of labor, or their agents", says the statute. Nowhere is there the suggestion that some employees must be protected against other employees.

[7] These and other considerations render untenable the contention that union shop contracts in California are void under section 921. As has already been noted, the usual company union contract is an individual agreement between the employer and an employee, whereas the union

shop contract is an agreement running between the employer and the union as an entity. M. and M. Wood Working Co. v. N. L. R. B., 9 Cir., 101 F.2d 938; see 37 Col. L.Rev. 816, 824, n. 59 [1937]; Fuch, Collective Labor Agreements in American Law, 10 St.Louis L.Rev. 1 [1925]. The courts of this state have recognized the validity of closed union shop agreements for more than thirty years. The legislature has also shown its approval of the propriety of such contracts by the enactment of other provisions of the Labor Code. Thus, it is a crime to misrepresent the kind of labor employed in producing goods (sec. 1011, Labor Code, St.1937, p. 210); to make misrepresentations regarding the employment of union labor in connection with the sale of goods (sec. 1012); to forge a union label or trademark (sec. 1015); or to use a union label without authorization (sec. 1016). Considering all of these circumstances, a legislative intention to declare the closed shop contract unlawful will not be presumed.

[8] The argument is also made that it is absurd to suppose that these provisions were written with the intention of restraining the employer from influencing his employee, while at the same time conferring upon other individuals the right "to coerce" the same employee through the employer. But the right of workmen to organize for the purpose of bargaining collectively would be effectually thwarted if each individual had the absolute right to remain "unorganized", and using the term adopted by the appellants to designate the economic pressure applied against them through the employer, coercion may include compulsion brought about entirely by moral force. Certainly such compulsion is not made contrary to public policy by any statute of this state and is a proper exercise of labor's rights. Senn v. Tile Layers Union, 1937, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229; Lauf v. Shinner & Co., 1938, 303 U.S. 323, 58 S.Ct. 578, 82 L. Ed. 872; Fur Workers' Union No. 72 v. Fur Workers' Union No. 21238, 70 App. D.C. 122, 105 F.2d 1, affirmed 1940, 308 U. S. 522, 60 S.Ct. 292, 84 L.Ed. 443.

[9] The argument that provisions similar to those now being considered guarantee employees freedom "from all interference" in their selection of a collective bargaining agent has been accepted by several state courts. Roth v. Local Union, etc., Ind.Sup., 24 N.E.2d 280; Fornili v. Auto Mechanics' Union, 200 Wash. 283, 93 P.2d 422. Such reasoning was also adopted by the circuit court of appeals in its decisions in Lauf v. Shinner & Co., 7 Cir., 82 F.2d 68; Id., 7 Cir., 90 F.2d 250, and by the dissenting members of the supreme court upon a review of the case, but was rejected by the majority. 303 U.S. 323, 58 S.Ct. 578, 82 L.Ed. 872. It is not in accordance with the law of this state, as judicially declared for many years, nor is it based upon a fair construction of sections 920 to 923 of the California Labor Code, considering their history and purpose. These sections lay no statutory restraint upon the workers' efforts to secure a closed shop contract from an employer, hence the appellants' picketing was lawful and should not have been enjoined.

The judgment is reversed with directions to the trial court to dissolve the injunction.

We concur: GIBSON, C. J.; CARTER, J.; MOORE, Justice pro tem.

CURTIS and SHENK, JJ., and MARKS, Justice pro tem. (dissenting).

We dissent for the reasons stated in the dissenting opinions in the case of McKay v. Retail Automobile Salesmen's Local Union, No. 1067, Cal.Sup., 106 P.2d 373.

16 Cal.2d 374

LUND v. AUTO MECHANICS' UNION NO. 1414 et al.

S. F. 16146.

Supreme Court of California.

Oct. 14, 1940.

1. Injunction 🔑189

Where business agent of auto mechanics' union testified without contradiction that union teamsters and deliverymen would pass through such union's picket lines to make deliveries to lessor of portion of building occupied by lessee, at whose automobile repair shop picketing was directed, injunction against picketing entire building was too broad in scope.

2. Torts ⚷10

An auto mechanics' union and members thereof have substantial interest in employment relations of lessee, operating automobile repair shop in leased portion of building, and hence may peacefully picket his place of business.

3. Injunction ⚷114(2)

A lessor, operating automobile sales business in same building as lessee's automobile repair shop under single name of garage, without even partition separating two business places, handling credit accounts for both businesses under such name, supplying repair shop with some automobile parts and receiving half of its gross profits under lease agreement, had no just cause to complain that picketing of repair shop affected business of entire garage, and hence was not entitled to injunction against such picketing, especially where pickets' banners showed that they represented auto mechanics' union.

CURTIS and SHENK, JJ., and MARKS, Justice pro tem., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by R. C. Lund against Auto Mechanics' Union No. 1414 and others for an injunction against picketing of plaintiff's place of business. From a judgment granting an injunction, defendants appeal.

Reversed.

Samuel W. Gardiner and Martinelli & Gardiner, all of San Rafael, and Walter E. Rankin, of San Jose, for appellants.

Crist, Beene & Burger, of San Jose, for respondent.

EDMONDS, Justice.

Acts of union labor occasioned this suit for an injunction, and the appeal is from a decree enjoining the Auto Mechanics' Union and its business agent from maintaining pickets at the respondent's place of business.

At the time the controversy arose, the respondent owned and operated the "Campus Garage" at Palo Alto. By a verified complaint he alleged that he had only six employees, "none of whom are members of any union and none desire to join a union; that there is no dispute between him and these employees regarding wages, hours, working conditions or otherwise", and they are not on strike. However, the allegations continued, the appellants caused pickets to be placed and maintained in the front and rear of his establishment, carrying signs with the inscription "Unfair to Organized Labor, Auto Mechanics' Union No. 1414", to his damage in the sum of $10,000.

Upon the filing of this complaint, the superior court issued a temporary restraining order. Later the appellants answered the complaint and the issues thus joined came on for trial. Upon findings of fact that the acts charged in the complaint had been committed by the appellants, the court rendered judgment enjoining them from "intimidating, threatening, molesting or coercing" the respondent or any of his employees or customers and also from stationing any pickets for that purpose. Damages in the amount of $1 were awarded.

The following facts appear from the evidence introduced at the trial:

Until a short time before this suit was commenced the respondent carried on a general garage business, furnishing to the public automobile sales, repair, lubrication and storage services. Two buildings were used for this purpose, a small one with an entrance on Alma street and a larger one adjoining it and running through the entire block with entrances on both Alma and High streets. As a member of the Motor Car Dealers' Association of Palo Alto, respondent in 1937 entered into a closed shop agreement with the Auto Mechanics' Union. By the terms of this agreement the members of the association had the right to cancel it if within 90 days from its effective date (May 1, 1937) the union had not succeeded in procuring compliance by the independent automobile dealers in that territory with the union standards of employment. A controversy subsequently arose between the association and the union as to whether this obligation had been performed, and on October 30th the association served upon the union a notice of cancellation to take effect December 1, 1937.

Early in November plaintiff told his mechanics that he could not operate his business on the union scale, and they "agreed to work on a sixty-forty basis". They worked for a week on those terms and then went on strike and commenced picketing the garage. Respondent shut down the garage for several days, and the pickets were withdrawn. He then leased a portion of his building and later a larger part to Roy E. Strobel, and about the middle of November the garage was reopened as several separate business units, the respondent operating the sales, lubrication and storage departments of the business independent of the repair and paint shops which were conducted by the lessee.

The portion of the premises rented to Strobel was located in the middle of the large building and apparently was not closed off from the rest of the building in any way. The only access to it was by entering and crossing portions of the premises retained by the respondent. Strobel used "Campus Garage" billheads, work sheets and other stationery, which were furnished by the respondent, and there were no signs indicating that the repair shop was operated as an independent unit. However, Strobel informed customers that he was operating an independent business. All collections were handled by the plaintiff and any credit extended by the repair shop was deemed assigned to him, and Strobel's account with the respondent credited pro tanto.

According to the terms of the lease Strobel was required to pay 50 per cent of his gross profits as rent. The respondent paid the same rate charged "outsiders" for any repair work done. The respondent had no control over the employment of mechanics, and their wages were paid solely by Strobel. Some of the automobile parts used in the repair work were bought by Strobel, and others were furnished by the respondent.

When the garage was reopened under this arrangement no union men were employed in the repair shop, and the Auto Mechanics' Union again placed a picket line at the garage. One and two men were maintained at both the Alma street and High street entrances carrying signs reading, "Unfair to Organized Labor, Auto Mechanics' Union No. 1414". As a result, students would stop their cars in the street and honk their horns and jeer at the pickets and transportation companies, and merchants refused to make deliveries through the picket line.

The trial court's findings recite that on November 12, 1937, respondent sold his automobile repair business to Roy Strobel, who leased a portion of the building therefor and since that date the respondent has not been engaged in the automobile repair business and has employed no members of any union. The court also found that shortly before the commencement of the action the appellants caused from two to four pickets to walk back and forth on the sidewalk in front of the two entrances to the respondent's place of business, carrying signs described in the testimony; that the picket line caused people to congregate there and "to jeer and honk their horns at the pickets" and to impede "the ordinary ingress and egress to plaintiff's place of business" as a result of which transportation companies would not deliver merchandise to respondent's place of business.

The findings also state that at no time during the picketing has there been any contract in force between the respondent and the Auto Mechanics' Union and that there has been no strike and no labor dispute between the respondent and his employees or between the lessee and his employees, and that the picket line is maintained "for the sole purpose of compelling the hiring of only union auto mechanics by respondent's lessee". From these findings and one that it is impossible to estimate the damage caused by the appellants' acts, which if continued will cause great and irreparable injury to respondent for which no adequate remedy at law exists, the court concluded that respondent was entitled to injunctive relief.

[1, 2] At the beginning of the trial the appellants offered to stipulate to the entry of a decree restraining them from picketing the respondent's place of business unless their placards showed that the picketing was directed solely at the repair and service department and not at the sales department. This stipulation was not accepted by the respondent, because, it was said counsel for the appellants had no power to stipulate that other union men would pass through the picket lines to deliver goods to him. However, appellant Anderson later testified that he knew of no rule which would prevent union men from passing through a picket line under such circumstances.

There are no findings upon this point, and if it be true, as the witness stated, without contradiction, that union teamsters and delivery men would pass through a picket directed at the lessee's business to make deliveries to the respondent, the injunction issued by the trial court is entirely too broad in its scope. Under the principles set forth in McKay v. Retail Automobile Salesmen's Union, Cal.Sup., 106 P.2d 373, and Smith Metropolitan Market, Inc. v. Lyons, Cal.Sup., 106 P.2d 414, the appellants clearly have a substantial interest in the employment relations of the lessee, Strobel, and under such circumstances they are privileged to peacefully picket his place of business.

[3] But there are more fundamental reasons why the present judgment must be reversed. If the public was led to believe that the picketing was directed at the respondent's business rather than at the repair shop alone, he was as much responsible for the creation of that impression as were the appellants. Both businesses were carried on under the same roof and under the single name of "Campus Garage" and, as the record shows, were operated without even a partition to separate them. All credit accounts for both businesses were handled by the respondent under the name of "Campus Garage", and he retained complete control of what credit should be extended. In addition he supplied the repair shop with some of its automobile parts and received 50 per cent of its gross profits under the lease agreement, which was terminable at the will of either party upon 30 days' notice.

Considering all these circumstances the respondent has no just cause to complain that the picketing affected the business of the entire garage. Largely in substance as well as in form there was but one business unit in operation at that location. However, the banners carried by the pickets showed that they represented an "Auto Mechanics' Union", which was some indication that their activities were directed solely at the repair department of the garage, and under all of the circumstances shown, the respondent was not entitled to injunctive relief.

The judgment is reversed.

We concur: GIBSON, C. J.; CARTER, J.; MOORE, Justice pro tem.

CURTIS and SHENK, JJ., and MARKS, Justice pro tem. (dissenting).

We dissent for the reasons stated in the dissenting opinions in the case of McKay v. Retail Automobile Salesmen's Local Union No. 1067, Cal.Sup., 106 P.2d 373.

16 Cal.2d 405

FORTENBURY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

S. F. 16408.

Supreme Court of California.

Oct. 14, 1940.

1. Courts ⚷1

The term "jurisdiction" originally included only right to hear and determine concerning subject matter in particular case, but is now frequently used as meaning authority to do particular thing or exercise a power in a particular manner.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

2. Certiorari ⚷28(2)

The writ of certiorari may be used to question court's exercise of unauthorized power in case wherein it had jurisdiction of parties and subject matter.

3. Torts ⚷10

Labor may exert economic pressure on employers by peaceful means for purpose reasonably related to labor conditions.

4. Torts ⚷10

The boycott, both primary and secondary, is proper method for labor to apply economic pressure on employers in labor disputes.

5. Torts ⚷1

The law does not invariably give relief against damage because, in some circumstances, infliction of damage, though intentional, is without legal remedy.

6. Torts ⚷10

There is no remedy for damage which may be inflicted by peaceful picketing or boycotting for purpose reasonably related to working conditions or employees' right to bargain collectively.

7. Injunction ⚷219

The superior court had no jurisdiction to issue restraining order prohibiting peaceful picketing of premises of customer of employer whose products were boycotted by union in order to conduct strike of such employer's employees most effectively, and should not have adjudged picket guilty of contempt in violating such order.

CURTIS and SHENK, JJ., and MARKS, Justice pro tem., dissenting.

In Bank.

Proceeding by Carl D. Fortenbury for a writ of certiorari to review a judgment of the Superior Court in and for the County of Los Angeles, holding petitioner guilty of contempt for violating a temporary restraining order against picketing in connection with a labor dispute.

Judgment annulled.

Gallagher, Wirin & Johnson, of Los Angeles, for petitioner.

Robert W. Kenny and Morris E. Cohn, both of Los Angeles, amici curiae for California State Federation of Labor.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, for respondent.

EDMONDS, Justice.

Upon application of the petitioner this court issued a writ of certiorari for the purpose of reviewing a judgment in which he was held guilty of contempt of court for violating a temporary restraining order prohibiting picketing in connection with a labor dispute. Admittedly, he continued picketing after service of the order upon him. But he contends that as any restraint upon peaceful picketing is a violation of constitutional right, he committed no contempt of court.

There is no dispute concerning the facts upon which the restraining order was issued. They are fully alleged in the petition and by stipulation are admitted to be true. Briefly summarized they are as follows:

For some time before the present controversy arose, Runnymede Poultry Farms and Poultry Workers Union Local No. 17, of which the petitioner is a member, were engaged in a labor dispute. The differences concerned wages and the right to bargain collectively. Finally, the employees struck, and, as it appeared to them, in order to conduct the strike most effectively, the union boycotted the products of the employer. In carrying out this purpose the petitioner and other members of the union picketed the premises of the Sunset Poultry Market, one of the employer's customers, although there was no controversy between the owners of the market and the union other than was involved in the sale of the Runnymede products.

Thereupon, the owners of the market brought an action to enjoin the petitioner and others from continuing this picketing. The court issued a temporary restraining order which prohibited the petitioner and others from stationing or maintaining any picket or pickets in front of or in the immediate vicinity of the plaintiffs' establishment until the further order of the court. The order was served upon the petitioner while he was walking to and fro in front of the market carrying a placard with the inscription, "This market unfair to organized labor, Local No. 17, C. I. O.". Disregarding the order, the petitioner continued picketing.

Upon the filing of an affidavit concerning the petitioner's continuance of picketing, a citation issued requiring him to show cause why he should not be adjudged in contempt of court. After a hearing, in which he admitted the facts which have been stated, he was held guilty of contempt, and fined as punishment therefor.

The first question which must be considered concerns the scope of the present proceeding. The petitioner contends, in effect, that upon the facts presented to it, the respondent court had no jurisdiction to restrain peaceful picketing, that the order served upon him was therefore void and he could violate it with impunity. On the other hand, the respondent insists that the superior court had jurisdiction to issue the order which was disregarded, and, conceding for the sake of argument, that it acted erroneously, the propriety of the order may not be reviewed upon certiorari.

[1] The term jurisdiction originally included only the right to hear and determine concerning the subject matter in a particular case. But the modern tendency has been to broaden that meaning, particularly where the right to review a decision by certiorari or other prerogative writ is the question for decision. A court may have jurisdiction of the cause of action and of the parties, but it may lack the authority or power to act in the case except in a particular way. Under such circumstances, it is now generally held that the court had no jurisdiction. As pointed out in the case of Spreckels S. Co. v. Industrial Accident Commission, 186 Cal. 256, 260, 199 P. 8, 9, "the word is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of something in excess of the authority possessed".

[2] More recently, this court again recognized the confusion which exists in determining whether, in a given situation, there was a lack of jurisdiction or mere error in the exercise of jurisdiction. Upon the authority of the Spreckels case and other decisions, it held "that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess". Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109, 112. In other words, under the modern practice, the writ of certiorari may properly be used to question the exercise of unauthorized power in a case where the court had jurisdiction of the parties and the subject matter.

This concept of jurisdiction does not imply an abandonment of fundamental legal principles. On the contrary, it necessarily follows from the constitutional requirements of judicial process and long-established rules. Texas Co. v. Bank of America, 5 Cal.2d 35, 53 P.2d 127; Sour v. Superior Court, 1 Cal.2d 542, 36 P.2d 373; Hall v. Superior Court, 198 Cal. 373, 245 P. 814; Loftis v. Superior Court, 25 Cal. App.2d 346, 77 P.2d 491; Michel v. Williams, 13 Cal.App.2d 198, 56 P.2d 546.

Applying these principles to the present case, as has been pointed out the facts are undisputed; that is, there was no conflict in the evidence before the superior court upon which the restraining order was issued. The parties agree that there was a labor dispute between the union of which petitioner is a member and the Runnymede Poultry Farm; that a strike has been called by the union in an attempt to enforce its demands and that secondary picketing had been resorted to. But it is also stipulated that the picketing was peaceful. The question is therefore presented whether under those circumstances the superior court had jurisdiction, as that term is broadly used, to enjoin the petitioner and his associates from picketing. If it did not have such jurisdiction, then the judgment of contempt may and should be annulled in this proceeding.

[3, 4] In the cases of Smith Metropolitan Market Co. v. Lyons, Cal.Sup., 106 P.2d 414 and McKay v. Retail Automobile Salesmen's Union, Cal.Sup., 106 P.2d 373, which were considered and decided concurrently with the present appeal, it was held that labor may exert economic pressure upon employers provided that peaceful means are used and the purpose is one reasonably related to labor conditions. It was also held, that the boycott, both primary and secondary, is a proper method of applying such pressure. These decisions are determinative of the present controversy.

Although the respondent argues that a person secondarily boycotted is an innocent third party caught between the upper and lower millstones of an industrial dispute in which he has no interest, this is clearly not correct. One who sells a product of a merchant or manufacturer who is engaged in a labor dispute with his employees, inescapably becomes an ally of the employer. He has a direct unity of interest with the one being struck. By providing an outlet for that product, he enables the employer to maintain the working conditions against which labor is protesting. And unless the union is allowed to follow the product to the place where it is sold and to ask the public by peaceful representations to refrain from purchasing it, the workers have no real opportunity to tell their story to those whose interest or lack of interest will, in large measure, determine the issues in dispute. Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910, 116 A.L.R. 477.

Obviously, the establishment where a product is sold is the only effective point where the consumer may be told the facts concerning a labor controversy. "It may very well be", says the American Federation of Labor in an amicus curiae brief filed in this case, "that the public would choose to give the merchant the benefit of their custom in an even greater measure because of the dispute. The democratic concepts of society envisages that in the case of a dispute in which the workers' position is unjust, the public will so respond". "Wherever that occurs", the Federation continues, "picketing will fail and the merchant will be unaffected. It is only in cases where the truth will deter the consuming public that the merchant will suffer a financial loss; but under these circumstances the balance of interest is not exclusively between the union and the merchant; the interest and attitude of the public, in the last analysis, is the direct cause of the loss of patronage."

[5-7] As has been pointed out in the Smith case, the law does not invariably give relief against damage, because in some circumstances the infliction of damage, though intentional, is without legal remedy. So far as cases of picketing or boycott

are concerned, there is no remedy for damage which may be inflicted where, as here, the means are peaceful and the purpose is reasonably related to working conditions or the right to bargain collectively. The superior court, therefore had no jurisdiction to issue the restraining order which was violated, and should not have adjudged the petitioner guilty of contempt.

The judgment is annulled.

We concur: GIBSON, C. J.; CARTER, J.; MOORE, Justice pro tem.

We dissent: CURTIS, J.; SHENK, J.; MARKS, Justice pro tem.

16 Cal.2d 389

C. S. SMITH METROPOLITAN MARKET CO., Limited, v. LYONS et al.

L. A. 16592.

Supreme Court of California.

Oct. 14, 1940.

Rehearing Denied Nov. 9, 1940.

1. Injunction ⇨128

In suit to enjoin picketing, court's findings that defendants conspired to unionize plaintiff's employees, compel them to become members of union, and compel plaintiff to force them to join union, *held* not objectionable as not supported by evidence, in view of more specific probative facts found by court, absence of contention by plaintiff that words "compel" and "force" referred to threats or acts of physical compulsion, and statements in complaint and another finding that picketing was peaceable.

2. Evidence ⇨5(2)

It is matter of common knowledge that labor unions do not limit use of picketing to occasions when union employees are on strike because of labor disputes between them and their employers.

3. Injunction ⇨101(1)

Peaceful picketing by labor unions for purpose reasonably connected with controversy affecting workers in an industry generally, as well as those employed by person against whom picketing is directed, may not be enjoined.

4. Torts ⇨10

It is not unlawful for labor unions to notify public that employer is marketing commodities under nonunion conditions by peacefully picketing his place of business.

5. Injunction ⇨128

In suit to enjoin picketing, evidence that pickets used no placards or printed matter, but occasionally stated to passersby that plaintiff corporation's market was unfair to organized labor or nonunion, and that some members of public refused to patronize plaintiff solely because they believed it was having dispute with its employees, did not support court's findings that picketing was fraudulent as maintained for purpose of causing plaintiff's customers, prospective customers, and public to believe erroneously that labor dispute existed between plaintiff and its employees.

6. Injunction ⇨128

In suit to enjoin picketing of plaintiff corporation's market, court's findings that one purpose and effect of picketing was to cause other business firms and their employees to refrain from selling or delivering merchandise to plaintiff, though they did not refuse to deal with plaintiff voluntarily and because they did not desire to deal with place of business unfair to organized labor, were not objectionable as findings, not supported by evidence, that defendants' conduct was unlawful.

7. Torts ⇨10

The secondary boycott is form of economic pressure which labor organizations may properly employ in pursuit of any lawful end.

8. Torts ⇨10

The mere fact that labor unions, in picketing places of business of corporation employing no union men, intended to institute boycott against it does not render picketing illegal.

9. Torts ⇨10

Justification of picketing by labor union does not depend on existence of strike by employees of picketed employer, as such justification or lack thereof depends on purpose for which means of concerted action are used rather than type of means used.

10. Torts ⇨10

Picketing by labor union without a strike is no more unlawful than a strike without picketing.

11. Torts 🔑10

Justification for picketing by labor union does not depend on existence of labor dispute between picketed employer and his employees.

12. Constitutional law 🔑88

An individual's right to carry on his business as he pleases is not absolute.

13. Constitutional law 🔑89(4)

An employer has no constitutional right to conduct his business as closed nonunion shop.

14. Torts 🔑1

The law does not invariably give relief against acts causing loss.

15. Injunction 🔑101(1)

Workmen's intentional infliction of damage to others by use of lawful methods of concerted action in field of labor, as by stopping work, persuading others not to work, and interfering with advantageous trade relations, does not warrant injunctive relief against such workmen, if damage is inflicted in pursuit of legally justifiable object.

16. Master and servant 🔑16

The statute declaring state's legislative policy in favor of collective action by workmen and reasons therefor is not effort to destroy free competition, but attempt to insure equality of bargaining power, on which benefits of competition and free enterprise rest, and thus secure to individual workman larger measure of freedom in his dealings with employers. St.1937, p. 208, § 923.

17. Constitutional law 🔑70(3)

Whether labor combination and organization places in hands of few persons an immense power, which should be limited and controlled for general welfare, is for law-making power, not courts, to determine.

18. Injunction 🔑101(1)

A court is no more justified in fettering workmen's bargaining power by injunction merely because they are organized in union than in fettering such power of employers because of their organization in partnerships, joint ventures, or corporations. St. 1937, p. 208, §§ 921, 923.

19. Injunction 🔑101(1)

In suit to enjoin picketing, determinative issue is whether workmen are demanding something reasonably related to employment and purposes of collective bargaining. St.1937, p. 208, §§ 921, 923.

20. Torts 🔑10

The propriety of lawful concerted action against employer by workmen depends on whether they have such interest in employment relationship that attainment of their object will benefit them directly or enhance their bargaining power. St.1937, p. 208, §§ 921, 923.

21. Torts 🔑10

Members of labor organization may have substantial interest in employment relations of an employer, so as to entitle them to take concerted action against him, as by picketing, though none of such workmen is or ever was employed by him.

22. Torts 🔑10

Where union and nonunion employees are engaged in similar occupation and their respective employers are engaged in trade competition with each other, union's efforts to extend its membership to employments wherein it has no foothold are not unlawful, as such aim is not unreasonable.

23. Trade unions 🔑6

As modern industry is not organized on single shop basis, independent labor organizations should be permitted to grow and extend their bargaining power beyond single shop.

24. Torts 🔑10

A labor union may take lawful concerted action, as by picketing, to organize nonunion shop, though labor standards thereof are equal to those of its union competitors, as such fact does not render union's interest in extending its organization any less substantial.

25. Torts 🔑10

Where butcher's union had contracts with number of markets and butcher shops in certain city for employment of only union members in compliance with union employment standards, some of such markets refused to comply with union standards until their competitors were unionized, and president of market company employing no union members admitted that he would not sign union contract, if it required night and Sunday closing, as did such other contracts, members of such union were privileged to direct against such company any peaceful form of concerted action within their control, including picketing, for purpose of establishing closed union shop in such company's meat department, as they had substantial interest in company's employment relations. St.1937, p. 208, §§ 921, 923.

26. Injunction 🔑101(1)

A labor union cannot be enjoined from peacefully picketing premises of employer having no dispute with his employees on ground that employee's privilege to work as nonunion man or employer's privilege to conduct his business as he chooses is constitutional right which may not be interfered with by union in its endeavors to extend its bargaining power.

27. Torts 🔑10

Labor unions have right to engage in concerted action to obtain union shop, thereby strengthening their bargaining power.

28. Constitutional law 🔑70(3)

The fear that labor unions have grown so strong as to endanger vital civil liberties and disrupt functioning of economic system is argument for consideration by Legislature exclusively, not by court, in suit to enjoin lawful concerted action, such as picketing, by labor union to obtain closed union shop.

CURTIS and SHENK, JJ., and MARKS, Justice pro tem., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the C. S. Smith Metropolitan Market Company, Limited, against Jack Lyons, individually and as business agent of the Amalgamated Meat Cutters and Butcher Workmen Local Union 284, and others for an injunction against picketing. Judgment for plaintiff, and defendants appeal.

Reversed, with direction.

Prior opinion, 89 P.2d 425.

Rehearing denied; SHENK, CURTIS, and HOUSER, JJ., dissenting.

Rosecrans & Emme and Bayard R. Rountree, all of Los Angeles, and Harry Albert, of Long Beach, for appellants.

Henry B. Lister, of San Francisco, amici curiae.

R. W. Henderson, of Bakersfield, for Kern County Bldg. Trades Council.

Jonah Jones, Jr., of Long Beach, and Pierson & Block and Gibson, Dunn & Crutcher, all of Los Angeles, for respondent.

Luce, Forward & Swing, of San Diego, amici curiae.

EDMONDS, Justice.

Injunctive relief granted an employer in a controversy with union labor over picketing occasioned this appeal. The market company had no union men employed and the purpose of the picketing was to bring about the establishment of a closed shop in its meat departments.

At the time the dispute arose, C. S. Smith Metropolitan Market Co., Ltd., was a California corporation, engaged in selling groceries, meats, and other commodities at retail. It owned and operated seven retail markets located in several cities in southern California. When these markets were picketed, the company sued Amalgamated Meat Cutters and Butcher Workmen Local Union 284, its officers and members, and also Central Labor Council of Long Beach and its secretary. After trial upon issues framed by the complaint and an answer alleging affirmative defenses, the court made findings and conclusions of law generally favorable to the market company and rendered judgment permanently restraining the appellants from picketing. The court also found that the market company had been damaged by the appellants' acts, but that the evidence was insufficient to establish the amount which should be awarded therefor. The appeal is from this judgment.

The findings refer to "plaintiff's employees" but they must be considered as referring only to the workers employed in the respondent's meat departments. These findings include the following facts:

At the time the controversy arose, there was no strike or dispute concerning the terms and conditions of employment between the market company and its employees; the employees were entirely satisfied with their employment and had made no request upon their employer for a discussion concerning any matter involving terms of employment. The market company discharged several employees, but not because they were members of the butchers' union, and the market company did not discriminate against the organization. In fact, the president of the company instructed his manager to employ union men at one market and offered to pay the union initiation fee for any employees who desired to join the union, but none accepted the offer.

The business agent of the butchers' union made a request for a discussion concerning the terms and conditions of employment of its employees, but had no authority to represent the employees. So far as the market company was informed none of its employees were members of any labor union and none had any desire to become members, but preferred to work under terms and conditions of their own choosing without interference by labor unions. The market company had not engaged in a course of intimidation against the employees to prevent them from joining labor unions; it had never been a party to any agreement with a labor union and had never requested the appellants to act as collective bargaining agent for its employees.

The sole purpose of the appellants' picketing was to compel the market company's employees to become members of the butchers' union and to compel the market company to discharge those who refused to join the union. For the accomplishment of their purpose, the appellants combined and conspired together to boycott and peaceably picket the market company's places of business. Pickets were stationed for the purpose of interfering with its patronage and inducing other merchants and their employees to cut off business relations. A further purpose of picketing, the court found, was "to obtain employment for union members * * * under good working conditions, fair wages and fair hours of labor", to obtain an agreement with the market company for the employment of union members only, and to persuade "meat cutters employed by * * * [the market company] to become members of the" butchers' union. This union had contracts with a number of markets and butcher shops in Long Beach whereby such markets and butcher shops agreed to employ only members of the union; to pay them union wages for a maximum of 55 hours per week and to close on Sunday.

The respondent paid its butchers more than the union scale, with hours of employment less than the union schedule existing in Long Beach. All of the markets with which the defendant union had contracts did not adhere to union standards. The respondent did not increase its employees' wages and reduce their hours of employment because of the efforts of the butchers' union or for the specific purpose of making it appear to the public that it was paying fair wages or to persuade many of the employees not to join the union. It is not true that if the union's activities were abandoned, the market company would change working conditions in its markets to the detriment of its employees.

The presence of pickets at the market company's places of business led many prospective customers to believe that a labor dispute existed between it and its employees, with a consequent loss of patronage. The picketing also caused other business firms and their employees to refrain from selling or delivering merchandise to the market company. There follow findings of damage to the market company and of the inadequacy of the remedy at law. The conclusions of law state that the appellants' activities were unlawful, entitling the respondent to injunctive relief.

The appellants do not challenge the findings favorable to the employer upon the issues relating to (1) the existence of any strike or controversy between it and its employees concerning the terms and conditions of employment; (2) the union's contention that the market company pursued a course of discrimination against its members and (3) the union's further claim that the market company raised the wages and reduced the hours of its employees solely because of the efforts of the union and to prevent the unionization of those employees. But they attack other findings which they contend are not supported by the evidence.

[1] They object first to the findings which state that the appellants "conspired" to unionize the market company's employees and "to compel" them to become members of the butchers' union and "to compel" the market company "to force" its employees to join the union. However, the words to which the appellants object are in reality mere conclusions and have little significance in the light of the more specific probative facts found by the court. The market company does not contend that the words "compel" and "force" refer to threats or acts of physical compulsion, nor could such a contention be made in view of statements both in its complaint and in another finding that the unionists maintained "a peaceable picketing".

[2-5] The appellants also challenge parts of other findings which state, in substance, that the picketing was maintained for the purpose and had the effect of causing the market company's customers and prospective customers and the public to believe that a labor dispute existed between it and its employees when in fact no such dis-

pute did exist, and through such wrongfully induced belief, these persons refrained from patronizing the company. Upon this issue the evidence shows that the pickets used no placards or printed matter but occasionally stated to passers-by "This market is unfair", or, "This market is unfair to organized labor", or, "This place is non-union", or, "This is a non-union shop".

By general understanding, the respondent argues, picketing indicates that union employees are on strike because of a labor dispute between them and their employer. But it is a matter of common knowledge that unions do not limit the use of the picket to such occasions. And even assuming that some members of the public may have refused to patronize the market company solely because they believed that it was having a dispute with its employees and for no other reason, that fact does not make the appellants' conduct fraudulent. Peaceful picketing is commonly used by unions to advertise labor's grievances and may not be enjoined when the purpose is reasonably connected with a controversy which affects workers in an industry generally as well as those employed by the person against whom it is directed. If an employer is marketing commodities under nonunion conditions, it is not unlawful for labor unions to notify the public of that fact by peacefully picketing his place of business.

This was recognized in the case of Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 1031, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165, where the court said: "In reference to the word 'unfair,' it clearly appears that, as employed by the defendants and labor organizations generally, it has a technical meaning * * *. Such declaration means, and in this instance was understood by all parties concerned to mean, not that the plaintiff had been guilty of any fraud, breach of faith, or dishonorable conduct, but only that it had refused to comply with the conditions upon which union men would consent to remain in its employ or handle material supplied by it."

For these reasons any findings in this case which may be construed as indicating that the appellants' picketing was fraudulent are not supported by the evidence.

[6] But there are other findings which seem to imply that the appellants' conduct was per se unlawful. These state that one of the purposes of the picketing was to cause other business firms and their employees to refrain from selling or delivering merchandise to the market company, and that such was the effect of the picketing, although these third persons were not refusing to deal with the market company "entirely voluntarily * * * and because they do not desire to deal with a place of business * * * unfair to organized labor". These findings, however, do not show that the form of appellants' concerted action was unlawful.

[7, 8] It has long been the established law of this state that the secondary boycott is a form of economic pressure which labor organizations may properly employ in pursuit of any lawful end (see cases cited in McKay v. Retail Automobile Salesmen's Union, Cal.Sup., 106 P.2d 373), and the mere fact that in picketing the market company's places of business the appellants intended to institute a boycott against it does not make the picketing illegal. Moreover, it is obviously untrue that when truck drivers employed by other firms refuse to go through the picket line, they do so involuntarily. Such refusal is undoubtedly based upon the freely adopted rules of the local union to which they belong. In the present case, therefore, the form of concerted action adopted by the unionists in order to accomplish their objective was entirely lawful, and it remains only to determine whether the object which they sought to accomplish was justified in law.

In Shaefer v. Registered Pharmacists Union, etc., et al., Cal.Sup., 106 P.2d 403, it was held that closed union shop contracts are not unlawful under sections 920–923 of the Labor Code, St.1937, p. 208 and in McKay v. Retail Automobile Salesmen's Union, supra, this court decided that labor organizations may engage in concerted action against a partially unionized employer in order to obtain a closed union shop. It declared that such action was not an unlawful interference with the rights of nonunion employees.

[9, 10] The findings and evidence in the present case present a further question. They show that the market company's employees, none of whom were members of the union, were satisfied with the terms and conditions of their employment, were not on strike, and were not engaged in a labor dispute with their employer. In its briefs, the market company attaches considerable importance to these findings and argues that peaceful picketing of a closed, nonunion

shop by a labor organization is unlawful where there is no strike or dispute between the employer and his employees.

But there is no magic in the words "strike" or "labor dispute" and it is begging the question to make the justification for concerted action depend upon the existence of a strike, which is itself a weapon in the struggle. Justification, or the lack of it, depends upon the purpose for which the means of concerted action are used rather than upon the type of means used. "Picketing without a strike is no more unlawful than a strike without picketing." Exchange Bakery & Restaurant v. Rifkin, 1927, 245 N.Y. 260, 157 N.E. 130, 132. See, also, 40 Harv.L.R. 596; 27 Col.L.R. 190.

[11] It is equally clear that the term "labor dispute" is not the criterion for decision of this case under California law. The term, as used in this connection, appears to have been first injected into the law by the enactment of the anti-injunction amendment to the Clayton Act and several state prototypes. 38 Stats. at Large 730, secs. 6, 20, 15 U.S.C.A. § 17, 29 U.S.C.A. § 52, Cal.Stat.1903, p. 289; 1909, Ch. 362, p. 593, Minn.Stat.Mason [1927], sec. 4258; Ore.L. [Olson, 1920], sec. 6817; Wash. Comp.Stat. [Remington, 1922], sec. 7613; Wis.Stat. [1927], sec. 133.05, and others. See Fraenkel, Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts, 30 Ill.L.R. 854; Fraenkel, Judicial Interpretation of Labor Laws, 6 Chic.L.R. 577, 579; also, Brandeis, J., dissenting in Duplex Printing Press Co. v. Deering, 254 U.S. 443 at page 484, 41 S.Ct. 172, 65 L.Ed. 349, 16 A.L.R. 196. These laws, which were the fruit of years of agitation by organized labor, sought to exempt unions from the common-law doctrine of "conspiracy" as well as from the statutory concept of "combinations in restraint of trade" and prohibited the courts from enjoining peaceful concerted action by workmen in cases "involving or growing out of a dispute concerning terms or conditions of employment". Most of them, including that of California, have been repealed.

The term "labor dispute", therefore, appears to be a term of statutory law unknown to common law and first used and invoked in enactments attempting to curtail injunctive interference by courts in labor controversies. The earliest attempts to do so forbade its use in "labor disputes" and by judicial interpretation that prohibition was held not to extend beyond disputes in which employer and employee alone were the participants. See Duplex Printing Press Co. v. Deering, supra. Later legislation, such as the Norris-La Guardia Act, 29 U.S.C.A. § 101 et seq., forbids judicial intervention in labor controversies though nonemployees participate or even alone cause the dispute, provided the dispute has relevance to employment relations. Lauf v. Shinner & Co., 1938, 303 U.S. 323, 58 S. Ct. 578, 82 L.Ed. 872; New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 58 S.Ct. 703, 82 L.Ed. 1012. In California the words have no statutory definition.

[12, 13] The gravamen of the charge against the appellants under the findings in the present case is a conspiracy to damage the market company by intentionally interfering with its business. However, here, as in McKay v. Retail Automobile Salesmen's Local Union, supra, the damage to the employer was not absolute. The market company was presented with the choice of yielding to the union's demands or continuing to endure the interference with its business relations which the appellants' activities caused. The right of an individual to carry on his business as he pleases is by no means an absolute one. Numerous valid restrictions upon such a right have been enacted by the legislature, as, for example, the Cartwright Act (Stats. 1907, p. 984), the Fair Trade Act (Stats. 1931, p. 583), and many other provisions regulating compensation, hours of labor, and working conditions generally. See Labor Code, passim. And it is now recognized that an employer has no constitutional right to conduct his business as a closed nonunion shop. American Steel Foundries v. Tri-City, etc., Council, 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed. 189, 27 A.L.R. 360; Magruder, A Half Century of Legal Influence Upon the Development of Collective Bargaining, 50 Harv.L.Rev. 1071, 1086. The interference with the employer's business must, therefore, be considered in its relation to the purposes of the appellants.

[14] The law does not invariably give relief against acts causing loss and the field of business competition furnishes numerous examples of intentional infliction of damage without legal remedy. American Auto Ass'n v. Amer. Auto Owners Ass'n, 1932, 216 Cal. 125, 13 P.2d 707, 83 A.L.R. 699; Union Labor Hospital v. Vance Lumber Co., 1910, 158 Cal. 551, 112 P. 886, 33 L.R. A.,N.S., 1034; Katz v. Kapper, 1935, 7 Cal. App.2d 1, 44 P.2d 1060; Dr. Miles Cali-

fornia Co. v. Sontag Chain Stores Co., Cal. App., 47 P.2d 540, superseded by reason of the enactment of Fair Trade Act in 1937, 8 Cal.2d 178, 64 P.2d 726; Mogul Steamship Co. v. McGregor, 1892, 61 L.J.Q.B. 295; see, also, Bohn Mfg. Co. v. Hollis, 1893, 54 Minn. 223, 55 N.W. 1119, 21 L.R.A. 337, 40 Am.St.Rep. 319; Macauley v. Tierney, 1895, 19 R.I. 255, 33 A. 1, 37 L.R.A. 455, 61 Am.St.Rep. 770; Cote v. Murphy, 1894, 159 Pa. 420, 28 A. 190, 23 L.R.A. 135, 39 Am.St.Rep. 686; Payne v. Western, etc., Ry., 1884, 13 Lea, Tenn., 507, 49 Am. Rep. 666. The damage is nonetheless justified when inflicted by a combination of business men than by one (Union Labor Hospital v. Vance Lumber Co., supra; Mogul Steamship Co. v. McGregor, supra) or by large aggregations of capital in corporate form.

The damage may hit the competitor directly, as when a chain bank or chain grocery enters a community too small to support more than the local establishment already there; or may affect merchants generally, as when a wholesale opens a retail store solely for the purpose of competing with certain retailers until they withdraw their patronage from a competing wholesaler. Katz v. Kapper, supra. In the absence of legislation laying down rules for the contest (see the Cartwright Act, supra, and the Fair Trade Act, supra) or outside the scope of such legislation, business men are apparently free to inflict damage in the struggle of competition so long as they abstain from violence, fraud or other unlawful conduct. "Every one who enters the field of competition desires and plans to draw custom from his competitors. Unless his acts are unlawful, his avarice is not actionable." American Auto Ass'n v. Amer. Auto Owners Ass'n, supra, 216 Cal. at page 142, 13 P.2d at page 715, 83 A.L.R. 699. "The fact that the methods used were ruthless, or unfair, in a moral sense, does not stamp them as illegal. It has never been regarded as the duty or province of the courts to regulate practices in the business world beyond the point of applying legal or equitable remedies in cases involving acts of oppression or deceit which are unlawful. Any extension of this jurisdiction must come through legislative action." Katz v. Kapper, supra, 7 Cal.App.2d at page 6, 44 P.2d at page 1062. The justification for such conduct is said to be that free competition is generally considered worth more to society than it costs. Holmes, J., dissenting in Vegelahn v. Guntner, 1896, 167 Mass. 92, 106, 44 N.E. 1077, 35 L.R.A. 722, 57 Am.St.Rep. 443.

[15] The foregoing principles are applicable and have been applied to competition in the field of labor. The use of any of the lawful methods of concerted action in this field—stopping work, persuading others not to work, interfering with advantageous trade relations—all necessarily cause economic loss not only to the parties directly affected but to customers and often to the public generally. Nevertheless, in the struggle for existence the fact of damage to others, intentionally inflicted, does not warrant injunctive relief against workmen any more than it does against business men, if it is inflicted in pursuit of a legally justifiable object. Parkinson v. Building Trades Council, supra.

The underlying reason beneath these rules is a widespread belief in competition, free enterprise, and equality of opportunity. Statutes such as the Cartwright Act and the Fair Trade Act, supra, represent interference with the free play of competition in specific situations where the legislature has concluded that the competitive struggle has become unequal or unfair. And the inequality of bargaining power between employer and employee has long been fully recognized by legislation curtailing the employer's freedom to bargain with his employees as he chooses. For example, California has statutes dealing with compensation (Labor Code, secs. 200–452), working hours (secs. 510–856, Id.), women and minors (secs. 1171–1398, Id.), immigrants (secs. 1460–1486, Id.), employment agencies (secs. 1550–1681, Id.), unemployment relief (secs. 2010–2183, Id.), health (secs. 2260–2606, Id.), employment relations (secs. 2700–3091, Id.), workmen's compensation and insurance (secs. 3201–6002, Id.), and safety in employment (secs. 6300–7601, Id.).

[16] Even more significant is section 923 of the Labor Code which declares the legislative policy of this state in favor of collective action by workmen. That section likewise declares the legislative reasons for favoring such a policy. Individual workmen, it is said, are not free to exercise actual liberty of contract in bargaining for work with employers. This is so because the latter have been permitted "to organize in the corporate and other forms of capital control" of great economic strength. Hence, in order to equalize bargaining power it is said to be necessary that

workmen be permitted to organize and to engage in "concerted activities for the purposes of collective bargaining or other mutual aid or protection". This is not an effort by the legislature to destroy free competition; it is rather an attempt to insure an equality of bargaining power upon which the benefits of competition and free enterprise rest, and thus to secure to the individual workman a larger measure of freedom in his dealings with employers of labor. In other words combination and organization are permissible on both sides, and the determination of terms and conditions of employment is to be left to bargaining and competition by these organizations in a free and unrestricted market.

[17-20] It may very well be that combination and organization on one side or the other places in the hands of a few persons an immense power which, in the general welfare, ought to be limited and controlled. But these are considerations for the law-making power, not for courts. And considering sections 921 and 923 of the Labor Code, a court is not more justified in fettering by injunction the bargaining power of workmen merely because they are organized in a union than it would be in fettering the bargaining power of employers because they are organized in partnerships, joint ventures or corporations. Accordingly, in cases such as the present one, the determinative issue is whether the workmen are demanding something which is reasonably related to employment and to the purposes of collective bargaining. More specifically, the propriety of lawful concerted action depends upon whether the workmen have such an interest in the employment relationship that the attainment of their object will benefit them directly or will enhance their bargaining power.

[21, 22] The members of a labor organization may have a substantial interest in the employment relations of an employer although none of them is or ever has been employed by him. The reason for this is that the employment relations of every employer affect the working conditions and bargaining power of employees throughout the industry in which he competes. Hence, where union and nonunion employees are engaged in a similar occupation and their respective employers are engaged in trade competition one with another, the efforts of the union to extend its membership to the employments in which it has no foothold is not an unreasonable aim.

[23] Modern industry is not organized on a single shop basis, and it is a logical corollary of the collective bargaining principle that independent labor organizations should be permitted to grow and extend their bargaining power beyond the single shop. The market for a product may be so competitive that one producer cannot maintain higher labor standards resulting in higher costs than those maintained by his nonunion competitors.

[24] Nor is the interest of the union in extending its organization any less substantial where the labor standards of the nonunion shop are on an equality with those of its union competitors. Under these circumstances it may reasonably be believed vital to union interests to organize such a shop, for there can be no doubt that the receipt by other workmen of equivalent benefits without suffering correlative union responsibility serves to create intraunion unrest and disaffections.

[25] Tested by these principles, it is apparent in the present case that the members of the butchers' union have a substantial interest in the employment relations of the market company. The findings show that the union had contracts with a number of other markets and butcher shops in Long Beach under which they agreed to employ only members of the union and to comply with union standards of employment, including the union scale of wages and hours and night and Sunday closing of butcher shops. It was also found that not all of the markets with which the union had contracts adhere to union standards of employment. On this point the evidence shows that these shops refuse to comply with union standards until their competitors are unionized. It is immaterial that the respondent pays its butchers more than the union scale with hours of employment less than those fixed by the union. The market company's president admitted that he would not sign a union contract if it required night and Sunday closing, although a city ordinance provided that butcher shops be closed at such times. Under these circumstances, it is clear that the continued operation of the respondent's shops under nonunion conditions had an immediate effect upon both the working conditions and bargaining power of all the union butchers employed in Long Beach. The appellants were, therefore, privileged to direct against the market company any peaceful form of concerted action within their control.

The case of In re Lyons, 1938, 27 Cal. App.2d 182, 80 P.2d 745 fully supports this conclusion and is in accordance with the reasoning and conclusions of the New York court of appeals. Stillwell Theatre, Inc. v. Kaplan, 1932, 259 N.Y. 405, 182 N.E. 63, 84 A.L.R. 6; Wise Shoe Co. v. Lowenthal, 1935, 266 N.Y. 264, 194 N.E. 749; Exchange Bakery, etc., v. Rifkin, supra. Courts in other jurisdictions have also held that peaceful concerted action by labor unions against nonunion employers may not be enjoined. Kirmse v. Adler, 1933, 311 Pa. 78, 166 A. 566; Smythe Neon Sign Co. v. Local Union, etc., 1939, 226 Iowa 191, 284 N.W. 126; American Steel Foundries v. Tri-City Council, supra; Empire Theatre Co. v. Cloke, 1917, 53 Mont. 183, 163 P. 107, L.R.A.1917E, 383; Steffes v. Motion Picture, etc., Union, 1917, 136 Minn. 200, 161 N.W. 524; Music Hall Theatre v. Moving Picture, etc., Local, 1933, 249 Ky. 639, 61 S.W.2d 283; but see Hotel, etc., Union v. Miller, 1938, 272 Ky. 466, 471, 114 S.W.2d 501.

[26] However, it is conceded that the courts in some states have enjoined peaceful picketing by a labor union in the absence of a dispute between the employer and his employees. This conclusion is reached in most cases by calling the privilege of an employee to work as a nonunion man, or the privilege of the employer to conduct his business as he chooses, a constitutional right which may not be interfered with by a union in its endeavors to extend its bargaining power. Mitnick v. Furniture Workers Local, 1938, 124 N.J.Eq. 147, 200 A. 553; Fornili v. Auto Mechanics' Union, 1939, 200 Wash. 283, 93 P.2d 422; Roth v. Local Union, etc., Ind.Sup.1939, 24 N.E.2d 280; Swing v. A. F. of L., 1939, 372 Ill. 91, 22 N.E.2d 857; Keith Theatre v. Vachon, 1936, 134 Me. 392, 187 A. 692; Lyle v. Local No. 452, 1939, 174 Tenn. 222, 124 S.W.2d 701. Such reasoning is specious in that it begs the question in issue. It was rejected by this court in the Parkinson case and by the Supreme Court of the United States in the Senn case. As Mr. Justice Holmes aptly put it, "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified." American Bank & Trust Co. v. Federal Bank, 1921, 256 U.S. 350, 358, 41 S.Ct. 499, 500, 65 L.Ed. 983, 25 A.L.R. 971.

Other courts have sanctioned such an injunction upon the ground that the interest of the labor union is too remote under such circumstances. Berry v. Donovan, 1905, 188 Mass. 353, 359, 74 N.E. 603, 5 L.R.A., N.S., 899, 108 Am.St.Rep. 499, 3 Ann.Cas. 738; Quinton's Market v. Patterson, 1939, 303 Mass. 315, 21 N.E.2d 546; Moreland Theatres Corp. v. M. P. Union, 1932, 140 Or. 35, 47, 12 P.2d 333; Culinary Workers Union v. Fuller, Tex.Civ.App. 1937, 105 S.W.2d 295; Hughes v. Kansas City, etc., Local, 1920, 282 Mo. 304, 221 S.W. 95. Occasionally peaceful picketing of a nonunion shop has been enjoined upon the ground that under the particular circumstances the controversy was so bitter that orderly picketing could not be maintained. Busch, etc., Co. v. United, etc., Local, 1939, 281 N.Y. 150, 22 N.E.2d 320, 124 A.L.R. 744. Compare May's Furs v. Bauer, 1940, 282 N.Y. 331, 26 N.E.2d 279; 28 Calif.L.Rev. 352, 364.

[27, 28] But in this state, ever since the decision in the Parkinson case, the courts have recognized the right of labor unions to engage in concerted action to obtain a union shop, or, in other words, to strengthen their bargaining power. The fear that they have grown so strong as to endanger vital civil liberties and disrupt the functioning of our economic system is an argument exclusively for the consideration of the legislature. Upon this point Mr. Justice Brandeis aptly stated in one of his dissenting opinions: "Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive

method of trial by combat." Duplex Printing Press Co. v. Deering, 1921, 254 U.S. 443, 488, 41 S.Ct. 172, 184, 65 L.Ed. 349, 16 A.L.R. 196.

The judgment is reversed and the trial court is directed to dismiss the action.

We concur: GIBSON, C. J.; CARTER, J.; MOORE, Justice pro tem.

CURTIS and SHENK, JJ., and MARKS, Justice pro tem. (dissenting).

We dissent for the reasons stated in the dissenting opinions in the case of McKay v. Retail Automobile Salesmen's Local Union, No. 1067, Cal.Sup., 106 P.2d 373.

16 Cal.2d 423

BAINBRIDGE et al. v. STONER et al.

Sac. 5243.

Supreme Court of California.

Oct. 23, 1940.

1. Corporations 🔑307

One who is a director of a corporation acts in a "fiduciary capacity", and cannot secure any personal advantage as against corporation or its stockholders, but the relationship is not one of "trust" but of "agency", although a director must comply with requirements of statute relating to trustees. Civ.Code, § 2230.

See Words and Phrases, Permanent Edition, for all other definitions of "Agency", "Fiduciary Capacity", and "Trust".

2. Mines and minerals 🔑104

A director or officer of a mining corporation was not, as director or officer, an "express trustee" of corporation's property, where director or officer had no title to property in his charge.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Trustee".

3. Trusts 🔑37½

To create an "express trust" there must be an explicit declaration of trust followed by an actual conveyance or transfer of property to trustee.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Trust".

4. Trusts 🔑69

Where one has, in good faith, acquired title to property belonging to another, the law implies an obligation on the part of the one in whom title has vested to hold property for benefit of owner and, eventually, to convey property to owner, and a "resulting trust" may be imposed for owner's benefit.

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting Trust".

5. Trusts 🔑66

A "resulting trust" is created when, because of some invalidity such as lack of a definite purpose or legality, an express trust fails, or where property is purchased and title taken in name of one person but consideration is paid by another, or where, after a trust is fully performed, there is property remaining in hands of trustee, and a "resulting trust" is one implied by law to carry out intention of parties.

6. Trusts 🔑136

Under a "resulting trust", the trustee has no duties to perform, no trust to administer, and no purpose to carry out except single purpose of holding or conveying trust property to beneficiary.

7. Trusts 🔑91

The theory of a "constructive trust" is adopted by equity as a remedy to compel one to restore property to which he is not justly entitled to another.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

8. Trusts 🔑95

Under a "constructive trust", person holding property may have acquired it through fraud, undue influence, breach of trust, or in any other improper manner, and the one whose property has been taken from him is not relegated to a personal claim against wrongdoer, which might have to be shared with other creditors of wrongdoer, but is given right to a restoration of property itself.

9. Trusts 🔑91

Under a "constructive trust", trustee is not charged with responsibility based upon either actual or presumed intention of parties. Civ.Code, § 2224.

10. Mines and minerals ⇨104

If defendant, while director of a mining corporation, acted in defendant's own interests and in defiance of rights of corporation and its stockholders in acquiring title to corporation's property, there was no presumed intention which would make defendant a "resulting trustee" of property, and hence defendant became a "constructive trustee" of property for benefit of corporation and its stockholders. Civ.Code, § 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trustee" and "Resulting Trustee".

11. Limitation of actions ⇨103(2)

Repudiation of a constructive trust by trustee was not necessary to set statute of limitations in motion against beneficiaries of trust.

12. Limitation of actions ⇨100(7, 11)

If defendant, while director of a mining corporation, acted in defendant's own interests and in defiance of rights of corporation and its stockholders in acquiring title to corporation's property, a cause of action in favor of corporation and its stockholders arose when defendant acquired the property, and three-year statute of limitations commenced to run against stockholders at least as soon as stockholders knew, or should have known, what defendant had done. Code Civ.Proc. § 338.

13. Limitation of actions ⇨100(13)

In determining whether suit by minority stockholders against director of mining corporation, to have director declared a trustee of mining claims for benefit of corporation and stockholders on ground that director fraudulently acquired title to property belonging to corporation in defiance of rights of stockholders and corporation, was barred by three-year statute of limitations, previous litigation resulting in judgment against corporation, and execution sale of corporation's assets and transfers under which defendant allegedly acquired title to corporation's property, gave interested persons "constructive notice" of director's alleged wrongdoing. Code Civ.Proc. § 338.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

14. Limitation of actions ⇨179(2)

Ordinarily, plaintiff cannot invoke aid of equity for relief against fraud after expiration of three-year period of limitation for an action for fraud unless plaintiff affirmatively pleads that he did not discover facts constituting the fraud until within three years prior to date that plaintiff filed complaint. Code Civ.Proc. § 338.

15. Limitation of actions ⇨100(12)

"Discovery", as used in three-year statute of limitations concerning actions for fraud, is not synonymous with knowledge. Code Civ.Proc. § 338.

See Words and Phrases, Permanent Edition, for all other definitions of "Discovery".

16. Limitation of actions ⇨199(2)

Where plaintiff attempts to invoke aid of a court of equity for relief against fraud after expiration of three-year period of limitations for an action for fraud, the court must determine as matter of law when, under facts pleaded, there was a "discovery" of fraud by plaintiff, in legal sense of quoted term. Code Civ.Proc. § 338.

17. Limitation of actions ⇨179(2)

When plaintiff attempts to invoke aid of equity for relief against fraud after expiration of three-year period of limitations for an action for fraud, an averment of lack of knowledge of fraud within the statutory period is not sufficient to satisfy plaintiff's burden to affirmatively plead that he did not discover facts constituting fraud until within three years prior to date that plaintiff filed complaint. Code Civ.Proc. § 338.

18. Limitation of actions ⇨195(5)

When plaintiff attempts to invoke aid of equity for relief against fraud after expiration of three-year period of limitations for an action for fraud, plaintiff must show that he had no means of knowledge or notice of fraud, within the statutory period, which followed by inquiry would have shown circumstances upon which cause of action is founded and must also show when and how facts concerning fraud became known to plaintiff. Code Civ.Proc. § 338.

19. Appeal and error ⇨917(1)

On plaintiffs' appeal from judgment dismissing action as to codefendant after codefendant's demurrer was sustained without leave to amend, Supreme Court was bound to presume that plaintiffs had stated their alleged cause of action as completely as they could, where complaint to which demurrer was sustained was the third complaint filed by plaintiffs and plaintiffs made no application to trial court for leave to further amend.

20. Limitation of actions ⚷179(2)

A complaint, in suit by minority stockholders against director of a mining corporation to have director declared a trustee of mining claims for benefit of stockholders and corporation on ground that director fraudulently acquired title to property belonging to corporation in defiance of rights of stockholders and corporation, did not state a cause of action, where complaint was silent as to means by which plaintiffs discovered that director had acquired corporation's property and suit was commenced more than three years after property was allegedly acquired by director. Code Civ. Proc. § 338.

21. Pleading ⚷210

Facts should not be pleaded in a demurrer.

22. Pleading ⚷216(1)

Where defendant desires to take advantage of plea of statute of limitations by demurrer, all facts involved in demurrer are those alleged in pleading demurred to, and demurrer merely raises a question of law as to sufficiency of facts to constitute a cause of action or defense. Code Civ.Proc. § 458.

23. Limitation of actions ⚷180(5)

Defendant's demurrer pleading the three-year statute of limitations as a bar to suit to have defendant declared a trustee of property on ground of alleged fraud was sufficient to present issue of law concerning application of bar of limitations to facts stated in complaint, notwithstanding that demurrer failed to specify subdivision of statute upon which defendant relied as being applicable statute of limitations, as required by statute. Code Civ.Proc. §§ 318, 337–339, 458.

CARTER, CURTIS, and HOUSER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Suit by Minnie M. Bainbridge and another, in behalf of themselves and other minority stockholders of the Mark Twain Mining Company, against B. L. Stoner and others, to have defendant B. L. Stoner and others declared trustees of certain mining claims for the benefit of the corporation and its stockholders and for other relief. From a judgment dismissing the suit as to defendant B. L. Stoner, plaintiffs appeal.

Affirmed.

Samuel J. Jones, of San Francisco, for appellant Minnie M. Bainbridge.

W. K. Ephraim, in pro. per.

Rowan Hardin, of Sonora, and B. L. Stoner, in pro. per., for respondents.

EDMONDS, Justice.

The question which is presented by the appellants in this case concerns the sufficiency of their complaint to state a cause of action against the respondent B. L. Stoner. The superior court sustained his demurrer without leave to amend and subsequently entered a judgment dismissing the action as to him.

According to the allegations of the complaint, the action was brought by the appellants in behalf of themselves and other minority stockholders of the Mark Twain Mining Company, a corporation, to have Stoner and others declared trustees of certain mining claims for the benefit of the corporation and its stockholders. The appellants also seek an accounting from them of the proceeds of ore and certain personal property which it is alleged they removed from the mine and sold. They ask also that a temporary injunction issue to restrain the defendants from transferring or encumbering the real property, or removing any ore therefrom, pending the final determination of the case.

The complaint alleges the following facts: In April, 1928, the corporation owned three mining claims worth over $50,000 and tools and equipment of a reasonable value of $15,000. Stoner, who was then president of the corporation and one of its directors, and Claude Sharon, also named as a defendant, in order to secure for themselves the entire assets of the corporation, "connived a plan and scheme" to obtain those assets through judicial proceedings. Thereupon Stoner, acting through F. H. Howard, brought an action against the corporation for $6,600, and caused a judgment to be rendered in favor of Howard, the plaintiff in the suit, against the mining company. After the rendition of this judgment, which was subsequently modified as to amount, Howard assigned it to Stoner, who levied execution upon the corporation's real property. Stoner purchased the property at the execution sale for "about the amount of such judgment, $3,000 or less", and took possession as owner. During the year in which the property could have been redeemed, Stoner removed ore valued at about $55,000 and also disposed of equipment, machinery and tools belonging to the corporation as his own personal property and has not accounted to the corporation for it, and the amount so received by him has more than discharged any obligation of the corporation for the amount paid at the execution sale.

By other allegations the appellants charge that on the same day the sheriff executed and delivered a deed of the mining claims, no redemption having been made, Stoner conveyed one of these claims, the Chilano Quartz Mine, to Leslie Logan. According to the complaint, this deed, given without consideration, was executed and delivered at the request of the defendant Sharon, and the grantee holds title for Sharon. The appellants also assert that Stoner, Sharon and Logan claim to own the property of the mining company.

Concerning their right to bring this action, the appellants allege that at the time Howard sued the corporation, and at all times since, Stoner has dominated and controlled its officers and directors and that he and his associates own a majority of its stock. The appellants sue "on behalf of themselves and all others similarly situated who shall come in and contribute to the expense of the action", explaining that no demand has been made upon the corporation, its directors or officers, to institute proceedings against the defendants because the domination and control of the respondent Stoner makes such demand useless.

Pleading as to the time of bringing the action, the appellants say that any apparent delay in filing the complaint was caused by their lack of information concerning the circumstances of the transfer and misappropriation of the property of the mining company to the respondent Stoner, and by him to Logan. They made no discovery of the circumstances and conditions surrounding these acts until some time in the month of September, 1936. Because of the facts alleged by them, the trusts sought to be established and enforced are, under the law, "of a continuing nature and character and essentially such, in relation to real property, as are cognizable in a court of equity and exempt from the operation of the statute of limitations".

The demurrer challenges the sufficiency of the complaint upon the general ground that it does not state facts sufficient to state a cause of action; also that the alleged cause of action is barred by laches and by sections 318, 337, 338 and 339 of the Code of Civil Procedure, which are statutes of limitation.

The appellants contend that the only questions presented by the demurrer are whether they are chargeable with laches and whether any statute of limitations bars a recovery. They say that their action is one to declare a trust and for an accounting, that such an action does not lapse while the trust continues and the statute does not begin to run until there is knowledge of a breach or the trust is terminated. The respondent's position is that where fraud is alleged and the facts pleaded show that the cause of action is barred by a statute of limitation, the complaint must include a statement of facts, showing why discovery of the fraud was not made at an earlier date. He argues that as the appellants' complaint pleads the commencement of the action by Howard against the corporation prior to June, 1928, the rendition of judgment against the corporation in 1928, the issuing of execution upon the judgment in 1930, the recording of an assignment of the judgment to Stoner, the conveyance of the property in 1931 by the sheriff's recorded deed to Stoner, and the recorded conveyance to Logan, who took possession of a portion of the property in that year, the stockholders of the corporation had notice of the alleged fraudulent acts and the statute began to run at least as early as 1931 when the sheriff's deed was delivered. Considering the complaint as one to establish a trust, the respondent takes the position that if he secured the property as alleged, he became a constructive trustee and the statute of limitations commenced to run in his favor in 1931.

[1, 2] One who is a director of a corporation acts in a fiduciary capacity, and the law does not allow him to secure any personal advantage as against the corporation or its stockholders. Hobbs v. Tom Reed Gold Min. Co., 164 Cal. 497, 129 P. 781, 43 L.R.A.,N.S., 1112; Schnittger v. Old Home, etc., Min. Co., 144 Cal. 603, 78 P. 9; Farmers' & Merchants' Bank v. Downey, 53 Cal. 466, 31 Am.Rep. 62; Lowe v. Copeland, 125 Cal.App. 315, 13 P. 2d 522; Highland Park Inv. Co. v. List, 42 Cal.App. 752, 184 P. 48. However, strictly speaking, the relationship is not one of trust, but of agency, although it has been held that a director must comply with the requirements of section 2230 of the

Civil Code relating to trustees. Snediker v. Ayers, 146 Cal. 407, 80 P. 511. See, also, Graves v. Mining Co., 81 Cal. 303, 22 P. 665. But having no title to the property in his charge, Stoner was not an express trustee of it as a director or officer of the corporation.

[3] To create an express trust there must be an explicit declaration of trust followed by an actual conveyance or transfer of property to the trustee. O'Neil v. Ross, 98 Cal.App. 306, 277 P. 123; Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am.St.Rep. 43; Restatement of the Law of Trusts, sec. 2.

[4-6] Nor did he become a resulting trustee when he acquired the title to the corporation's property. That relationship arises only where one has, in good faith, acquired title to property belonging to another. Under such circumstances, the law implies an obligation on the part of the one in whom title has vested to hold the property for the benefit of the owner, and, eventually to convey to the owner. Cummings v. Cummings, 55 Cal.App. 433, 203 P. 452. A resulting trust is created when, because of some invalidity such as lack of a definite purpose or legality, an express trust fails, or where property is purchased and title taken in the name of one person but the consideration is paid by another, or where after a trust is fully performed, there is property remaining in the hands of the trustee. It is one implied by law to carry out the intention of the parties and the trustee has no duties to perform, no trust to administer, and no purpose to carry out except the single one of holding or conveying to the beneficiary. Fulton v. Jansen, 99 Cal. 587, 34 P. 331; Restatement of the Law of Trusts, sec. 404; 2 Bogert on Trusts and Trustees, § 451.

[7-9] The theory of a constructive trust was adopted by equity as a remedy to compel one to restore property to which he is not justly entitled, to another. The person holding the property may have acquired it through fraud, undue influence, breach of trust, or in any other improper manner and he is usually personally liable in damages for his acts. But the one whose property has been taken from him is not relegated to a personal claim against the wrongdoer, which might have to be shared with other creditors; he is given the right to a restoration of the property itself. The title holder is, therefore, said to be a constructive trustee holding title to the property for the benefit of the rightful owner, but he is not charged with responsibility based upon either the actual or presumed intention of the parties. (Sec. 2224, Civ.Code; Burns v. Ross, 190 Cal. 269, 212 P. 17; Restatement Restitution, sec. 160.)

[10] According to the allegations of the appellants' complaint, the respondent Stoner, while a director of the corporation, secretly planned and executed a project whereby he acquired title to the property of the corporation in defiance of the rights of the corporation and its stockholders. If in doing so he had acted in good faith and had used the corporation's money to acquire property for it, to which he took title in his own name, he would be a resulting trustee of that property. But as he acted in his own interests and in defiance of the rights of the corporation, for the purpose of acquiring title for himself, there was no presumed intention which would make him such a trustee, and he, therefore, became a constructive trustee for the corporation and its stockholders.

[11-13] No repudiation of a constructive trust is necessary to set the statute of limitations in motion. A cause of action in favor of the corporation and its stockholders arose when Stoner acquired the property of the corporation (Leviston v. Tonningsen, 212 Cal. 656, 299 P. 724; Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, 196 P. 884) and the statute commenced to run against the appellants at least as soon as they knew, or should have known, what he had done. Neilsen v. Neilsen, 216 Cal. 150, 13 P.2d 715; Wills v. Pauly, 116 Cal. 575, 48 P. 709. See 4 Bogert on Trusts, § 953; Restatement of Restitution, sec. 179. This was more than three years before they commenced their action because the litigation resulting in the judgment against the corporation, the execution sale and the various transfers, gave all interested persons constructive notice of the president's wrongdoing. The action was, therefore, barred at the time the complaint was filed unless the rule should not be applied to an officer or director of a corporation when he deals with the corporate property.

[14-18] Under ordinary circumstances, a plaintiff may not invoke the aid of a court of equity for relief against fraud after the expiration of the period of limitation for such an action unless he affirmatively pleads that he did not discover the facts constituting the fraud until

within three years prior to the date he filed his complaint. Sec. 338, Code Civ. Proc. The word discovery as used in the statute is not synonymous with knowledge. And the court must determine as a matter of law when, under the facts pleaded, there was a discovery by the plaintiff, in the legal sense of that term. Consequently, an averment of lack of knowledge within the statutory period is not sufficient; a plaintiff must also show that he had no means of knowledge or notice which followed by inquiry would have shown the circumstances upon which the cause of action is founded. Moreover, he must also show when and how the facts concerning the fraud became known to him. Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Turner v. Liner, 31 Cal.App.2d 196, 87 P.2d 740.

[19, 20] This rule has been somewhat relaxed, so far as the requirement for allegations stating the circumstances which are relied upon by the plaintiff as excusing discovery of the fraud are concerned, in cases involving confidential relationship. Rutherford v. Rideout Bank, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L.R.A.,N.S., 125; Tarke v. Bingham, 123 Cal. 163, 55 P. 759; Lataillade v. Orena, 91 Cal. 565, 27 P. 924, 25 Am.St.Rep. 219. But assuming that this exception is applicable to the present case, the complaint, which is the third filed by the appellants, is entirely silent concerning the second essential of such a pleading, namely, the means by which they discovered that Stoner had acquired the corporation's property. No application was made to the court for leave to further amend, and in view of the previous opportunities which have been given, it must be presumed that the appellants have stated their cause as completely as they can. As so stated, it lacks an essential averment.

However, in seeking to avoid the effect of the respondent's demurrer, the appellants contend that it must be disregarded because he failed to specify the subdivision of the code section which he relies upon as the applicable statute of limitation, as required by section 458 of the Code of Civil Procedure. This section provides: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section —— (giving the number of the section and subdivision thereof, if it is so divided, relied upon) * * *."

[21, 22] But this section, by its express terms, does not apply to a demurrer. It specifies a substitute for pleading "the facts showing the defense", and facts have no place in a demurrer. As stated in a very early case decided before the statute was enacted, where a defendant desires to take advantage of the plea of the statute of limitations by demurrer, "all the facts involved in a demurrer are those alleged in the pleading demurred to, and the demurrer merely raises a question of law as to the sufficiency of the facts to constitute a cause of action or a defense". Brennan v. Ford, 46 Cal. 7. Later, the code section was considered and its application restricted "to cases in which the statute [of limitations] is pleaded in the answer as an affirmative defense. It is in an answer, and not in a demurrer, that '*facts* showing the defense' would be proper, and the provision that 'the party pleading must establish on the trial the facts showing that the cause of action is so barred' clearly indicates that the section has no reference to a demurrer to a complaint upon the ground that the facts alleged therein show that the cause of action is barred. In such a case it is sufficient to specify the statute as one of the grounds of the demurrer." Williams v. Bergin, 116 Cal. 56, 47 P. 877, 878. In the case of Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, 540, a judgment which followed an order sustaining the defendant's demurrer to the complaint upon the ground "that the cause of action is barred by the statute of limitations" was affirmed. "The demurrer does not specify any section of the statute," said the court, "but that is not necessary when the question is raised by demurrer".

[23] In the present case, respondent pleaded the bar of section 338 of the Code of Civil Procedure. This sufficiently presented the issue of law concerning the bar of the statute of limitations to the facts stated in the plaintiff's complaint and was properly sustained.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; TRAYNOR, J.

CARTER, Justice (dissenting).

I dissent.

The opinion of my associates is to my mind inconsistent and erroneous in that it places an extremely strict construction upon the complaint of plaintiffs and yet at the same time it brushes aside a serious defect in defendants' demurrer.

The complaint, it is true, is unartfully and loosely drawn, and the averments touching upon discovery of the fraud lack fullness and certainty. However, as noted in the majority opinion, the rules requiring full and complete allegation of the circumstances of delayed discovery of fraud have been somewhat relaxed in cases which involve a confidential relationship. Lataillade v. Orena, 91 Cal. 565, 27 P. 924, 25 Am.St.Rep. 219; Rutherford v. Rideout Bank, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383. Furthermore, even if a pleading is lacking in certainty because it presents essential facts only inferentially and it would therefore be subject to attack by special demurrer, it may still be sufficient as against general demurrer. Manuel v. Calistoga Vineyard Co., 17 Cal.App.2d 377, 61 P.2d 1204; 21 Cal.Jur., p. 111, sec. 69; p. 268 et seq., sec. 187. Such is the case here. As no special demurrer was filed and the deficiencies in the complaint are not such as to render it vulnerable against general demurrer, it should be held to state facts sufficient to constitute a cause of action.

In the several cases cited in the majority opinion, the complaint showed on its face that the cause was barred by the statute of limitations, which had been specially pleaded. Lady Washington C. Co. v. Wood, 1896, 113 Cal. 482, 45 P. 809; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Turner v. Liner, 31 Cal.App.2d 196, 87 P.2d 740. None of these cases considered the question of whether, in the absence of either a special demurrer or a proper plea of the statute of limitations, the pleading would have been sufficient as against general demurrer.

In the present case, as already stated, there was no special demurrer, nor was there, in my opinion, a good and sufficient plea of the statute of limitations. An attempt was made in the general demurrer to plead the applicable statute, sec. 338, subd. 4, Code Civ.Proc., but the subdivision of the code section was not specified as required by section 458 of the Code of Civil Procedure.

Section 458 was enacted in 1872 and has never been amended. It provides: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section —— (giving the number of the section and *subdivision* thereof, if it is so divided, relied upon) of the Code of Civil Procedure * * *."

As early as 1893, in the case of Wolters v. Thomas, 3 Cal.Unrep. 843, 32 P. 565, it was held that all of the requirements of this section must be met, and that therefore the issue of the statute of limitations would not be raised by a plea which merely specified the code section relied upon, without also specifying the subdivision thereof. This holding is approved and reaffirmed in Overton v. White, 18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99. See, also, Hart v. Slayman, 30 Cal.App.2d 556, 86 P.2d 861.

It is my view that these decisions are sound. The opposing party, I believe, is entitled to know the precise defense which he has to meet and this essential information can be assured him only by requiring that the subdivision number as well as the number of the code section be specified.

The majority opinion seeks to overcome the force of the authorities above cited by invoking a pronouncement found in the case of St. Paul Title & Trust Co. v. Stensgaard, 1912, 162 Cal. 178, 121 P. 731, 39 L.R.A., N.S., 741, to the effect that where only one subdivision of the statute of limitations relied upon has any application to the facts alleged, the pleading of the code section is sufficient because it results in no uncertainty. It will be noted that such a rule simply reads into the clear, plain, and unambiguous language of section 458, an exception which is not contained therein. Furthermore, in the St. Paul case the question was not whether the pleading which omitted to specify the subdivision was sufficient, but was merely whether the trial court erred in permitting an amendment to cure the defect. Hence, as pointed out in Overton v. White, supra, the language relied upon is purely dicta.

There is also a line of early cases which would confine application of section 458 to a plea of the statute of limitations raised by answer, and hold it inapplicable to such plea when made by demurrer. No reasoning supports the distinction. It had its origin in a misconception in the case of Williams v. Bergin, 116 Cal. 56, 47 P. 877, of the purport of the decision in the earlier case of Brennan v. Ford, 46 Cal. 7.

Brennan v. Ford, supra, concerned a demurrer which alleged that the cause of action was "barred by the Statute of Limitations". An objection, made on the general ground that the defense was not well pleaded in point of form, was simply held in so many words to be untenable. Section 458 was not cited, nor was failure to specify the code section mentioned. The statute had only become effective on January 1, 1873, and the opinion was filed in April of the same year.

The decision in Williams v. Bergin, supra, was rendered in 1897. There this court, again considering the effect of a demurrer which merely alleged that the cause was "barred by the statute of limitations", cited the Brennan case as a premise for a restricted construction of section 458, saying: "The demurrer sufficiently presented the defense of the statute of limitations. Brennan v. Ford, 46 Cal. 7. The provisions of section 458, Code Civ.Proc., have reference to cases in which the statute is pleaded in the answer as an affirmative defense. It is in an answer, and not in a demurrer, that 'facts showing the defense' would be proper, and the provision that 'the party pleading must establish on the trial the facts showing that the cause of action is so barred' clearly indicates that the section has no reference to a demurrer to a complaint upon the ground that the facts alleged therein show that the cause of action is barred. In such a case it is sufficient to specify the statute as one of the grounds of the demurrer. A demurrer upon this ground can be sustained, however, only when it affirmatively appears from the complaint that the plaintiff's cause of action is barred. The defendant cannot, in support of the demurrer, invoke other facts which might be introduced in his defense." (116 Cal. 56, at pages 59, 60, 47 P. at page 878.)

The holding was perpetuated in the later case of Spreckels v. Spreckels, 172 Cal. 775, 783, 158 P. 537, 540, where the court said: "The demurrer does not specify any section of the statute, but that is not necessary when the question is raised by demurrer. Brennan v. Ford, 46 Cal. 7; Williams v. Bergin, 116 Cal. [56] 59, 47 P. 877." A similar statement is found in Young v. California State Board of Pharmacy, 9 Cir., 273 F. 30, 33.

In my opinion these holdings are clearly erroneous and should not be followed. There is nothing whatsoever in the language of section 458 to indicate that it is, or was ever meant to be confined in its application to a plea of the statute of limitations by answer, and to be inapplicable to such a plea when made by demurrer. The code commissioner's note, explaining the enactment, states the reason which makes conformity with its requirements as important in the one case as in the other. Said note reads: "Note—The Commissioners say in their report that they introduced this section believing that a pleading under it will be more concise, and at the same time will afford to the opposite party all the information necessary to enable him to meet the defense made." Obviously, it is quite as necessary that the litigant have all necessary information to meet the defense when it is raised by demurrer as when it is raised by answer.

It is my conclusion that the rule of construction of section 458 declared in the line of cases headed by Wolters v. Thomas, supra, should be applied regardless of whether the plea of the statute of limitations is raised by answer or demurrer. In the present case it should be held that the attempted plea of the statute of limitations in the demurrer was nullified by its failure to conform to the requirements of section 458 of the Code of Civil Procedure, that the elimination of this plea and the absence of a special demurrer left the complaint subject only to the general ground of demurrer, that it failed to state facts sufficient to constitute a cause of action and that as against such an attack the pleading is clearly sufficient. The judgment of the trial court should be reversed with direction that the demurrer be overruled.

I concur: CURTIS, J.

I concur in the foregoing conclusion: HOUSER, J.

41 Cal.App.2d 219

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. CHAPMAN.

Civ. 12585.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1940.

1. Guaranty 🔑1

A contract of "guaranty" gives rise to a separate and independent obligation from that which binds the principal debtor.

See Words and Phrases, Permanent Edition, for all other definitions of "Guaranty".

2. Guaranty 🔑85(1)

Compliance with statute requiring property covered by trust deed to be bid in for its fair market value at foreclosure sale was not essential to cause of action founded upon a written contract guaranteeing payment of note secured by trust deed which was foreclosed. Code Civ.Proc. § 580a.

3. Contracts 🔑147(2)

Where a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. Civ.Code, § 1639.

4. Contracts 🔑157

Where through fraud, mistake, or accident a written contract sued upon fails to express the real intention of the parties, and such mistake or imperfection of the writing is put in issue by the pleadings, the erroneous parts of the writing may be disregarded. Civ.Code, § 1640; Code Civ.Proc. § 1856, subd. 1.

5. Pleading 🔑8(2)

In action founded upon written contract guaranteeing note executed by corporation, defendant's allegation that he executed the guaranty purely as a matter of form and understood that he was executing it in a representative capacity for the estate of his deceased father, who was president of the corporation, was a mere "conclusion" and did not raise issue of whether defendant executed guaranty in any other capacity than as individual guarantor as indicated by the contract itself. Civ.Code, §§ 1639, 1640; Code Civ.Proc. § 1856, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

6. Appeal and error 🔑1078(1)
Pleading 🔑8(9)

In action founded on written contract guaranteeing note secured by trust deed which was foreclosed, defendant's allegations, denying that the foreclosure sale was in every respect in compliance with terms of the trust deed and in accordance with law, were mere "conclusions" of law which, where defendant failed to argue or present any points and authorities in support of the allegations on appeal, raised no questions requiring discussion.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the Security-First National Bank of Los Angeles, a national banking association, against G. A. Chapman to recover upon a written contract guaranteeing a note. From a judgment for plaintiff predicated upon granting of plaintiff's motions to strike defendant's answer and for a summary judgment under Code Civil Procedure, § 437c, defendant appeals.

Affirmed.

Evans, Pearce & Campbell, of Los Angeles, for appellant.

Thorpe & Bridges, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff predicated upon the granting of its motions (a) to strike defendant's answer, and (b) for a summary judgment under section 437c of the Code of Civil Procedure, defendant appeals.

These are the essential facts:

The complaint alleged that on or about August 10, 1935, S. J. and G. A. Chapman Corporation executed and delivered to plaintiff a promissory note in the principal sum of $18,000 bearing interest at 7 per cent per annum and that said note was secured by a trust deed executed by said corporation to the Los Angeles Trust and Safe Deposit Company as trustee covering certain real property described therein; that contemporaneously with the execution of the note defendant herein as an individual made, executed, and delivered to plaintiff a written guarantee of the aforementioned note.

Paragraph VI of the complaint read thus: "VI. That by reason of said default, and in compliance with the terms and provisions of said deed of trust, the said Trustee, at the request of plaintiff, on or about the 21st day of July, 1939, sold said property, having first given notice of the time and place of such sale in the manner and for a time not less than that required by the laws of the State of California for the sale of real property under deeds of trust, and that at the time of sale so fixed on July 21, 1939, the said Trustee sold said property covered by said deed of trust, at public auction, to plaintiff herein, it being the highest bidder at said sale, for the sum of $9,000.00."

Defendant in his answer, after admitting the execution of the guaranty set forth in the complaint, denied (1) that the sale by the trustee under the deed of trust was in every respect in compliance with the terms of said deed of trust and in accordance with the law in such cases made and provided, and (2) as affirmative defenses alleged:

(a) That, at the time plaintiff requested defendant to execute the guaranty, plaintiff made a reappraisement of the properties covered by the deed of trust and placed a value thereon which it agreed was adequate security for the note and that defendant in executing the guaranty did so "purely pro forma" and solely by reason of the death of the father of defendant who was president of the corporation which executed the note, to-wit, the S. J. and G. A. Chapman Corporation, and that defendant understood he was executing the guaranty in effect for the estate of his deceased father.

(b) That the property described in the trust deed was sold for less than its true market value and that plaintiff made an election of parties defendant when it sued defendant herein and failed to enter suit for a deficiency judgment against the principal maker of the note, to-wit, the S. J. and G. A. Chapman Corporation, and by so doing sought an arbitrary fixing of the guarantor's liability without equity and contrary to law.

(c) That the complaint was insufficient in that it failed to set forth the fair market value of the property at the time of the trustee's sale, as required by section 580a of the Code of Civil Procedure of the state of California.

Defendant relies for reversal of the judgment on these propositions:

First: The complaint failed to state facts sufficient to constitute a cause of action, because it did not allege that the property covered by the trust deed was bid in by the plaintiff for its fair market value at the foreclosure sale, as required by the provisions of section 580a of the Code of Civil Procedure.

Second: It was error for the trial court to strike defendant's answer, for the reason that the first affirmative defense raised the issue of whether defendant intended to be the guarantor or signed the guaranty in a representative capacity, to-wit, as executor of his father's estate.

Defendant's first proposition is untenable and is governed by the following established rules:

[1] (1) A contract of guaranty gives rise to a separate and independent obligation from that which binds the principal debtor. Loeb v. Christie, 6 Cal.2d 416, 420, 57 P.2d 1303.

[2] (2) In an action founded upon a contract of guaranty it is unnecessary for the plaintiff to allege compliance with the provisions of section 580a of the Code of Civil Procedure, in order to state a cause of action against the guarantor. Bank of America, etc., Ass'n v. Hunter, 8 Cal.2d 592, 598, 67 P.2d 99.

Applying the foregoing rules to the facts in the instant case, we find that the defendant was sued upon a contract of guaranty; therefore it was unnecessary for plaintiff to allege compliance with the provisions of section 580a of the Code of Civil Procedure, in order to state a cause of action.

[3-6] Defendant's second proposition is likewise untenable. The rule is established that, when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. Sec. 1639, Civ.Code.

This rule is subject to the further rule that, when through fraud, mistake, or accident, a written contract fails to express the real intention of the parties and such mistake or imperfection of the writing is put in issue by the pleadings, then the erroneous parts of the writing may be disregarded. Sec. 1640, Civ.Code; sec. 1856, subdiv. 1, Code Civ.Proc. In the present case no facts are pleaded in defendant's answer showing any fraud, mistake, or accident, resulting in an imperfection in the writing, which evidenced the contract of guaranty executed by defendant. Hence, no imperfection in the writing is put in issue by the pleadings. The allegations that defendant executed the guaranty "purely pro forma" and "understood that he was executing said guaranty in effect for the Estate of his deceased father, S. J. Chapman" are pure conclusions of the pleader and are not allegations of matters of fact. As the defendant has failed to argue or present any points and authorities in support of the allegations in his answer denying that the sale by the trustee under the deed of trust was in every respect in compliance with the terms of the said deed of trust and in accordance with law, we will not consider that such allegations, which were mere conclusions of law, raised any questions which require discussion. Bradley v. Butchart, 217 Cal. 731, 747, 20 P.2d 693.

For the foregoing reasons, the judgment is affirmed.

I concur: MOORE, P. J.

I concur in the judgment: WOOD, J.

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41 Cal.App.2d 284

PEOPLE v. NORTHUM et al.

Cr. 535.

District Court of Appeal, Fourth District, California.

Oct. 28, 1940.

1. Conspiracy 🔑23

A "conspiracy" exists when two or more persons conspire to commit a criminal offense. Pen.Code, § 182.

See Words and Phrases, Permanent Edition, for all other definitions of "Conspiracy".

2. Conspiracy 🔑27

Even though presence of a large number of members of "Jehovah's Witnesses" in community was arranged through a spirit of retaliation against local authorities, there would be no criminal "conspiracy" to disturb the peace, if no overt acts were performed which were unlawful. Pen.Code, § 182.

3. Conspiracy 🔑47

Evidence *held* insufficient to sustain convictions of members of "Jehovah's Witnesses" for conspiring to commit crime of disturbing the peace by tumultuous or offensive conduct, where there was no showing of any discourtesy on the part of the members, or any showing of any disturbance, either in public or private. Pen.Code, § 182.

4. Constitutional law 🔑90

Generally, the right of free speech is subject to the exception that it shall not be exercised as to interfere with the rights of others.

5. Nuisance 🔑61

Members of "Jehovah's Witnesses" who were charged with conspiracy to disturb the peace did not commit a "nuisance" in a legal sense in going to homes in community in order to talk to householders who would admit the members and listen, especially where the calls were not repeated. Pen.Code, § 182.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Lester A. Northum, John H. Chism, L. M. Feaster, Dorothy Templeton, and Grace Templeton were convicted of conspiracy to disturb the peace, and they appeal.

Reversed.

Earl F. Crandell, of Los Angeles, for appellants.

A. L. Wirin, of Los Angeles, amici curiae for appellants.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Roger Walch, Dist. Atty., of Hanford, for respondent.

BARNARD, Presiding Justice.

The defendants were charged with conspiracy to commit the crime of disturbing the peace in that they "did conspire, combine, confederate and agree together to maliciously and wilfully disturb the peace and quiet of persons and/or neighborhoods in the city of Hanford, County of Kings, State of California, by tumultuous and/or offensive conduct". A jury found them guilty, and they have appealed from the judgment and from an order denying a new trial.

The appellants were all members of "Jehovah's Witnesses" and, as such, were engaged in the practice of going from door to door preaching their beliefs by word of mouth, by the use of phonograph records and by distributing literature. On June 6, 1940, the district attorney, having received complaints that members of this organization were going from door to door in the city of Hanford, summoned the appellant Northum to his office. Northum's attention was called to riots which had occurred in other communities which had resented the doctrines preached by this organization, he was told that with the rising patriotic fervor in that community it was not a wise time to be preaching such doctrines, and he was asked to co-operate by desisting therefrom for the time being. Northum refused this request and the next day he was arrested on a charge of disturbing the peace. He was released on bail the next day and the following day, June 9, some 150 members of Jehovah's Witnesses, most of whom were from an adjoining county, "invaded" the residential districts of Hanford. A large number of telephone calls were received at the sheriff's office and by various officials of the city, complaining that these people were going from house to house, and one group of five citizens demanded of a police officer that some action be taken in connection therewith. As a result, the district attorney sent officers out to contact the offending persons and request them to cease their operations. These requests being ignored or refused, three of the appellants were arrested and charged with disturbing the peace. These three appellants called the appellant Northum on the telephone and shortly thereafter the appellant Feaster appeared on the scene. Northum and Feaster had not previously been in Hanford on that day. Two of the appellants informed the officers that whenever the people of a community interfered with their members it was the policy of this organization to send a large group into the territory and work it in the way in which they had worked that day. Thereupon, a complaint was issued charging all five of the appellants with conspiring to disturb the peace.

The appellants contend that the evidence is insufficient to support the verdict and judgment, that there is no evidence of any unlawful acts, or of any conspiracy to do unlawful acts, upon their part, and that the effect of the judgment is to deprive them of their constitutional rights of free speech and freedom in the exercise of their religious beliefs. The respondent admits that there was, in the trial of this case, "no issue of religious persecution, nor was the question as to whether or not the members of Jehovah's Witnesses should salute the American flag involved".

While there is evidence that a large number of persons had telephoned to various officers complaining of the fact that members of the group to which the appellants belonged were going about from house to house, there is no evidence that any of the persons so telephoning complained of any specific act on the part of any of the appellants or claimed that any unlawful act had been committed in his presence by any one of the appellants or of the group to which they belonged. There is no evidence of any act of discourtesy on the part of any of the group toward any citizen of Hanford and no evidence of any disturbance, either public or private. The nearest approach to any evidence of any conflict or controversy between any persons is the testimony of one man to the effect that one of the appellants came to his house, rapped on the door, and came in and asked if she could play a record, that he told her he was not interested and she asked him if he would read some of her literature, and that he and his wife and another man who was present all repeatedly refused this request. The only reasonable inference is that she entered the house with permission, and he testified that the conversation did not become heated and that "after I abruptly told her to go, in plain words, she did". There is no evidence that any of the appellants attempted to hold a meeting or that they carried on any of their activities on the public streets or in any public place, the only activities complained of being at private homes. There is no evidence that any attempt was made to play a phonograph record or to carry on any extended conversation unless the individual in question was admitted to a private house, and no evidence of any refusal to leave upon being requested so to do.

The respondent, in effect, concedes that no one of the appellants committed any act which was in itself unlawful or which was, of itself, offensive. This fact is important, since the appellants were charged with conspiring to disturb the peace by "tumultuous and/or offensive conduct". The respondent's sole contention is that, while preaching from door to door by any single one of the appellants under the circumstances shown by the evidence would not constitute a disturbance of the peace, an entirely different situation is presented here "when there exists a conspiracy of a large number of these individuals to deliberately invade a community at a time when the patriotic fervor of the people is running high, and to do it for retaliation against the local civil authorities, knowing full well that by so doing they are making themselves offensive and arousing the anger of the people to the point that might well result in violence".

[1, 2] In the sense material here, a conspiracy exists when two or more persons conspire to commit a criminal offense. Pen.Code, sec. 182. Under these circumstances, it is difficult to see how a criminal conspiracy can be said to have existed when the carrying out of the agreed purpose has involved the doing of no act which is, in itself, unlawful. If, as conceded, the acts of the individual appellants were not in themselves unlawful they can hardly be held to have been guilty of a conspiracy in planning and agreeing upon the performance of those acts. If we concede that the presence of a large number of these individuals in this community was arranged through a spirit of retaliation against the local authorities, this would not constitute a criminal conspiracy if no overt acts were performed which were unlawful. The contention seems to be that the mere presence of this group of people, although they did nothing unlawful, might arouse the anger of the citizens and result in violence. In other words, we are asked to assume that the performance of lawful acts on the part of the appellants might arouse the people of the community to the point where they would engage in unlawful acts against the appellants.

In Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 905, 84 L.Ed. 1213, 128 A.L.R. 1352, a somewhat similar case in which, however, the element of conspiracy was lacking, the court said:

"The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. * * *

"One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. * * *

"We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion."

[3] In the instant case, if the appellants were acting within their rights in their individual conduct and if the individual members of this organization were not disturbing the peace by pursuing their activities, there is no evidence which would support the conspiracy charge merely because, by arrangement, a larger number of persons were, on this occasion, engaged in these activities. There is no evidence of the use of profane, indecent or abusive remarks directed to other persons or of any acts or statements which, in themselves, would be likely to provoke violence or a disturbance of the peace. While a large number of the members of this organization engaged in these activities in this community on that day, we find no evidence that they congregated in one place or engaged in any demonstration which would naturally be expected to lead to a disturbance. The only evidence is that they went to individual homes, either singly or possibly in some instances with two going together, and there is no evidence that they forced their attentions or conversation upon any person who was unwilling to listen. In our opinion, the evidence is not sufficient to sustain the verdict or judgment.

[4, 5] It is in times of stress that problems with respect to the exercise of the right of free speech and the exercise of re-

ligious freedom more commonly arise. Unfortunately, at such times both interference with these rights, on the one hand, and the abuse of these privileges on the other, are apt to occur. As a general rule, the right of free speech is subject to the exception that it shall not be so exercised as to interfere with the rights of others. When such interference exists, it cannot be doubted that such rights of others may be protected under our laws and constitutions. But no such a situation is presented in this case where, so far as shown by the evidence, the appellants talked only to willing listeners who admitted them to their homes and where they desisted and left upon the request of the occupants. In one sense it is more or less of a nuisance for a householder to have to answer the doorbell in response to the ring of one who wants to present either physical or mental wares in which he is not interested. But this in itself is not a nuisance in the legal sense, especially where it is not repeated. There is no evidence that any of the appellants went twice to the same home or in any other respect committed a nuisance, under our general laws. So far as appears from the evidence, any citizen in this community who objected to the teachings of this group had ample protection for himself and his family by refusing to admit them to their homes.

The judgment and order appealed from are reversed.

We concur: MARKS, J.; GRIFFIN, J.

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41 Cal.App.2d 268

PEOPLE v. BOULWARE.

Cr. 3368.

District Court of Appeal, Second District, Division 2, California.

Oct. 25, 1940.

Hearing Denied Nov. 19, 1940.

1. Automobiles 🔑332

To constitute a crime under the Vehicle Code making operating an automobile while under influence of intoxicating liquor and causing bodily injury a crime, it must appear that defendant was intoxicated, while so intoxicated drove a vehicle, while so driving did some act forbidden by law or neglected some duty imposed by law, and as a proximate result of such act or neglect some bodily injury was suffered by a human being. Vehicle Code, § 501, St.1935, p. 174.

2. Automobiles 🔑357
Criminal law 🔑1173(2)

In prosecution for unlawfully driving an automobile while under influence of intoxicating liquor and causing bodily injury, as result of defendant's automobile colliding with automobile which was stopped at intersection because of a "stop" semaphore, where defendant testified that he acted as reasonably prudent person in swerving his automobile when in imminent peril to escape truck which was being driven into boulevard toward him, failure to instruct on doctrine of "imminent peril", as requested by defendant, was prejudicial error, notwithstanding that there was substantial evidence that defendant was driving automobile while intoxicated. Vehicle Code, § 501, St.1935, p. 174.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Robert Boulware was convicted of unlawfully driving an automobile while under the influence of intoxicating liquor and causing bodily injury, and he appeals.

Reversed and new trial ordered.

Halverson & Halverson, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 501 of the Vehicle Code, St.1935, p. 174, (unlawfully driving an automobile while under the influence of intoxicating liquor and causing bodily injury) after trial by jury, defendant appeals.

Viewing the evidence most favorable to respondent (the People), the essential facts are:

December 18, 1939, defendant, while intoxicated, drove his automobile in an easterly direction on Santa Monica boulevard and at the intersection of said boulevard with Sunset boulevard and Descanso street collided with a Chevrolet car, which was stopped because of a "stop" semaphore. As a result of the collision Mr. Preston, a passenger in the Chevrolet was injured and defendant's car was turned over.

Defendant testified that as he approached the intersection where the accident occurred he noticed that the signal indicated "stop," he observed a truck entering the street from a service station and coming directly toward him. He swerved to the right to escape the truck and collided with the Chevrolet car.

Defendant relies among other grounds for reversal of the judgment on this proposition:

The trial court committed prejudicial error in refusing to instruct the jury as follows:

"A person who, without negligence on his part, is suddenly confronted with unexpected and imminent danger, either to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only the cure that an ordinarily prudent person would exercise if confronted with the same unexpected danger, under the same circumstances. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer."

[1] This proposition is tenable. In order to constitute a crime under section 501 of the Vehicle Code it must appear that defendant (1) was intoxicated, (2) while so intoxicated drove a vehicle, (3) while so driving did some act forbidden by law or neglected some duty imposed by law, and (4) as a proximate result of such act or neglect some bodily injury was suffered by a human being.

[2] There can be no doubt in the present case that there was substantial evidence of the first and second elements required to constitute the crime of which defendant stands charged. However, under defendant's testimony, if believed by the jury, he acted as a reasonably prudent person in swerving his automobile when in imminent peril to escape the truck which was being driven into the boulevard toward him. and thus the fourth element necessary to constitute the crime would be absent. Therefore, he was entitled at his request to have an instruction read to the jury upon the doctrine of "imminent peril". The instruction requested by defendant correctly stated the law apropos to defendant's theory of the reason for the accident and, since, no other instruction on the subject was given, it was prejudicial error for the trial judge to fail to give the requested instruction or an instruction embodying the principles of law stated therein. Clearly such must be the law in a criminal case where a defendant as the result of the jury's finding may suffer the loss of his liberty by being imprisoned as punishment for his offense, since in civil cases where the result of a jury's verdict may be only to deprive a defendant of his property it has been held prejudicial and reversible error to refuse in a proper case to instruct a jury upon the doctrine of "imminent peril". Varner v. Skov, 20 Cal.App.2d 232, 238, 67 P.2d 123.

For the foregoing reasons the judgment is reversed and a new trial is ordered.

We concur: MOORE, P. J., WOOD, J.

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41 Cal.App.2d 208

REMONDINO v. REMONDINO.

Civ. 12803.

District Court of Appeal, Second District, Division 2, California.

Oct. 18, 1940.

1. Husband and wife ⚷4

A husband and wife constituted a social unit upon their marriage and husband's obligation to support wife arose immediately out of such unity, and continued as long as they both should live.

2. Bankruptcy ⚷421(5)

Final divorce decree for husband which embodied terms of property settlement contract for monthly payments to wife for support, was a "final judgment" for "support money" and husband's obligation thereunder was therefore not dischargeable in bankruptcy. Bankr.Act § 17(2), 11 U.S.C.A. § 35(2); Civ.Code, §§ 136, 137, 137.5, 159.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment" and "Support Money".

3. Bankruptcy ⚷421(5)

The fact that wife's judgment for alimony, support and maintenance due and owing, obtained in husband's divorce action wherein decree embodied property settlement contract providing for monthly payments to wife for support, was a judgment which could be enforced against husband by a suit even in another jurisdiction, did not affect the nature of the obligation upon which the judgment was based, which obligation was for support to which wife was entitled as of right growing out of the marriage, and which therefore could not be barred by a discharge in bankruptcy of husband. Bankr. Act § 17(2), 11 U.S.C.A. § 35(2); Civ.Code §§ 136, 137, 137.5, 159.

4. Bankruptcy ⚷421(5)

Where purpose of judgment for support money is to guarantee the economic safety of wife by husband, husband's discharge in bankruptcy does not affect his liability under the judgment, regardless of whether the award of support money to which wife is entitled as of right was fixed by property settlement contract, the terms of which were caused by parties to be embodied in the divorce decree. Bankr.Act § 17(2), 11 U.S.C.A. § 35(2); Civ.Code §§ 136, 137, 137.5, 159.

5. Bankruptcy ⚷421(5)

Alimony due or to become due, or for the maintenance and support of wife or child, remains obligation of bankrupt notwithstanding his discharge. Bankr.Act § 17 (2), 11 U.S.C.A. § 35(2).

6. Husband and wife ⚷266

A husband and wife may contract with regard to their property.

7. Divorce ⚷245(1)

Where property settlement contract provided for monthly payments to wife for her support, such provision constituted an integral element of the adjustment of the respective obligations of husband and wife, and when it was approved by court and embodied in husband's final divorce decree, court had no jurisdiction subsequently to modify it. Civ.Code, §§ 136, 137, 137.5, 159.

8. Divorce ⚷236

Husband's final divorce decree which approved and embodied terms of property settlement contract providing for monthly payments to wife for support and maintenance was a decree for "alimony", notwithstanding court did not so designate it. Civ. Code, §§ 136, 137, 137.5, 159.

See Words and Phrases, Permanent Edition, for all other definitions of "Alimony".

9. Divorce ⚷238

Where wife is guilty of immoral or unsocial conduct or where she refuses without reason to conform to the place or mode of living selected by husband, wife is completely cut off by husband's divorce from any economic advantage as against her former spouse, and husband cannot be compelled to pay alimony. Civ.Code, §§ 136, 139.

10. Divorce ⚷236

Where property settlement contract indicated that separation of husband and wife might have been due to husband's fault, that husband contemplated that wife would institute divorce proceedings, and terms of the contract providing for monthly payment of $100 to wife for life for support were approved by and embodied in divorce decree obtained by husband, the decree was for "alimony" or "support money" and not merely one based on contract obligation, as against contention that decree was obtained by "fault" of wife and therefore that husband could not be compelled to pay alimony. Civ.Code, §§ 136, 137, 137.5, 139, 159.

See Words and Phrases, Permanent Edition, for all other definitions of "Fault".

11. Divorce ⚷236

Notwithstanding fault, if any, of wife, so that husband who obtained a divorce could not be compelled to pay alimony, court could approve and embody in divorce decree, at husband's request, property settlement contract providing for monthly payments of $100 to wife for life, and the decree which therefore specifically provided for wife's support and maintenance, was a decree for "alimony" or "support money" and not one based merely upon the contract obligation. Civ.Code, §§ 136, 137, 137.5, 139, 159.

12. Bankruptcy ⚷363

Where husband's final divorce decree embodied property settlement contract providing for monthly payments to wife for her support, and wife filed the judgment for money in the final decree as a claim in husband's subsequent bankruptcy proceedings, and husband was not prejudiced by the filing of the claim, wife was not thereby "estopped" to assert that judgment was for her support rather than based merely upon husband's contract obligation, and that husband's obligation was therefore not affected by his discharge in bankruptcy. Bankr.Act § 17(2), 11 U.S.C.A. § 35(2); Civ. Code, §§ 136, 137, 137.5, 139, 159.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

13. Courts ⚷209(2)
Judgment ⚷713(3)

Where husband's divorce decree embodied settlement contract providing for monthly payments to wife for support, wife thereafter instituted contempt proceedings upon husband's default, and husband obtained writ of prohibition issued by Supreme Court upon default and directed to superior court, upon petition which alleged that the decree was based on the contract only and could not be enforced by contempt proceedings, the issuance of the writ by Supreme Court did not determine the "law of the case" or operate as "res judicata", precluding subsequent finding that the decree was for "alimony" or "support money" and therefore not barred by husband's discharge in bankruptcy. Bankr.Act § 17(2), 11 U.S.C.A. § 35(2); Civ.Code, §§ 136, 137, 137.5, 139, 159.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case" and "Res Judicata".

14. Judgment ⚷650, 665

A decision of an appellate court must be final and the action must have been between the same parties as those who appeared in trial court in order for the decision to be "res judicata".

15. Appeal and error ⚷1195(1)

A decision of an appellate court must have been a decision upon appeal from the identical issues tried before the lower court in order to become the "law of the case".

◆

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action for divorce by Charles Henry Earle Remondino against Marie K. Remondino, wherein a final decree was entered which embodied contract between parties providing for monthly payments for support and maintenance of defendant, and wherein defendant subsequently sought an order for judgment for accrued alimony, support and maintenance moneys due and owing. From a judgment for defendant for $11,300, plaintiff appeals.

Affirmed.

Charles B. De Long and Clarence Harden, both of San Diego, for appellant.

Hunter M. Muir, of San Diego, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a "supplemental" judgment in the sum of $11,300 as the amount "due, owing and unpaid to her from the plaintiff for alimony, support and maintenance in accordance with the terms of the final decree of divorce herein * * * to June 1, 1938, * * * and that execution issue out of this court in aid of the collection of said judgment".

Plaintiff and defendant were married June 4, 1912, and separated November 1, 1918. On the following day, they entered into a contract, in the preamble of which they declared that they "now are living separate and apart and expect in the future to live separate and apart and are desirous of settling their obligations to each other growing out of their marriage relation and for the purpose of avoiding all litigation and contention, both present and future as regards their marriage obligations * * * and to adjust the same amicably and finally as between themselves". By the covenants of the contract, plaintiff agreed to pay defendant $100 on the first day of every month thereafter "for the support and maintenance" of defendant. By other provisions plaintiff obligated himself to pay his wife the sum of $500 six months later and to keep his life insured in the sum of $5,000 in her favor. It was further agreed that in the event either party should institute an action for divorce "this contract and the provisions hereof shall be confirmed by such court" whereby the court should by its orders and decrees in such action require plaintiff to do and perform all of his obligations as set forth in said contract. In the event of such court action, plaintiff would allow and pay forthwith to defendant upon the commencement of such action the sum of $150 as attorney fees and such additional sums as the court might order him to pay to defendant, together with the sum of $25 and such additional sums thereafter as the court might direct for costs and expenses to enable the wife to prosecute or defend such action. The contract contained mutual releases of the parties upon any property then owned or thereafter to be acquired except as specifically provided in the agreement.

Thereafter, on or about the 19th day of August, 1921, plaintiff instituted his action for divorce in the superior court of San Diego county alleging that "willfully and without cause, defendant deserted and abandoned the plaintiff against his will and without his consent" and attached said contract as an exhibit. In his complaint, plaintiff requested "that this court should * * * require said plaintiff * * * to comply with and to perform each and all of the terms of said contract to be performed by him in accordance with the terms therein. * * *"

On September 3, 1921, the court awarded the husband an interlocutory decree of divorce which recited the contract and ordered "that said property settlement agreement and each and all of the terms and covenants thereof be, and the same are, by the court, confirmed" and "that said plaintiff * * * be and he is hereby ordered and required and directed to comply with each and all of the terms and covenants thereof". Said decree proceeded then to order the plaintiff to pay $100 per month for and during the term of her natural life and to keep said life insurance in her favor in the sum of $5,000 in force and adjudged that in the event said insurance in said sum shall fail at the time of the death of plaintiff, then defendant shall be entitled to receive from the estate of plaintiff in lieu of such insurance the sum of $5,000. Thereafter on the 8th day of September, 1922, the final decree was entered containing in substance all that was embodied in said interlocutory decree.

Plaintiff ceased making the payments after the expiration of some years following the execution of the contract. In his brief, he says that on April 3, 1929, after proper notice, he moved said superior court for a modification of said final decree with respect to said monthly payments. It is now claimed that at the hearing of said motion defendant made objection to any alteration of the decree on the ground that the court was without jurisdiction to do so because of the fact that the payments therein provided were fixed by the parties themselves in said contract. The court properly declined to amend the provisions of said final decree with respect to said payments for the reason that it had "neither authority nor jurisdiction to change the decree". Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540.

Plaintiff sets forth in his brief that on October 20, 1931, defendant moved said court for an order requiring plaintiff to show cause why he should not be held in contempt for his refusal to make said monthly payments as provided by said decree. An order was issued, returnable November 9, 1931, to which hearing plaintiff objected on the ground that the judgment was not an ordinary judgment for support and maintenance but that it was based upon the contract of the parties and therefore was not such judgment as would justify contempt proceedings for its enforcement, while defendant contended that the judgment should be classified as a judgment for alimony. After overruling plaintiff's said objection, the court adjourned proceedings to December 14, 1931. In the interim, plaintiff filed his petition in the Supreme Court for a writ of prohibition to prohibit said superior court from hearing said motion. No return to said petition was filed. The petition was disposed of as a default by issuing the peremptory writ.

Thereafter, on the 4th day of August, 1937, plaintiff was adjudged a bankrupt. Defendant filed her claim in the bankruptcy proceeding setting forth that under said final decree there was unpaid "alimony" as of November 29, 1937, amounting to $10,300 and in the schedules of the bankrupt plaintiff listed his liability to defendant as a debt of $10,300 "the amount due under the property settlement contract * * * reduced to and contained in a final decree of divorce".

On January 5, 1938, plaintiff received his discharge. On May 10th defendant, after proper notice, applied to the court for an order for judgment "covering the accrued alimony, support and maintenance moneys due and owing". At the hearing she presented an affidavit reciting that the amount due her "as and for alimony, support and maintenance" under said agreement and final decree aggregated $11,000. Plaintiff's answer thereto was his discharge in bankruptcy and that by virtue of the discharge he was released from all obligations under said contract and final decree. On June 25, 1938, over objection of plaintiff, the superior court made the order from which this appeal is taken.

Plaintiff now contends as follows: (1) that the provisions for monthly payments contained in the final decree are not a judgment for alimony or support and maintenance but that it is based solely upon the contract between the parties; (2) that defendant is estopped now to assert that the final decree is of the nature of a judgment for support and maintenance for the reason that she had contended at various stages of the litigation that the judgment was based upon the property settlement contract; and (3) res adjudicata in that the issuance of the writ of prohibition by the Supreme Court was a determination that the order for said monthly payments was not for support money.

[1, 2] The contention that the monthly payments of $100 were not "support money" cannot be maintained. That defendant was entitled to be supported by plaintiff was conceded by plaintiff himself when he executed the contract for separate maintenance immediately following the separation. That contract contains no provision that defendant was entitled to money for any reason other than plaintiff's obligation arising from the marital status. They had intermarried more than six years prior to the separation. Upon their marriage they constituted a social unit. Plaintiff's obligation to support defendant arose immediately out of such unity and that obligation was to continue as long as they both should live. By the contract he relieved the court of the task of determining the extent and amount of defendant's support. Having thereby settled that question as between them, there being no children, and their terms having been confirmed by the court, the final decree determined that plaintiff should pay the money specified for the support and maintenance of defendant. This was a final adjudication of plaintiff's obligation to defendant arising out of the marriage and memorialized by their contract.

That the defendant was to have no further claims against plaintiff's earning power or upon his estate at his death other than those contained in the decree, was a substantial consideration passing to the plaintiff for his promise to make the payments mentioned in the contract. Moreover, not only did plaintiff promise to make the payments to defendant during her natural life but he requested that the court make an order requiring him to perform the terms and provisions of his contract. In view of the foregoing, we find no reason for holding that the order for the monthly payments contained in the final decree was not an order for the payment of support money, and was, therefore, not dischargeable in bankruptcy.

[3-5] The fact that the judgment is one that may by suit be enforced against plaintiff even in another jurisdiction (Lynde v. Lynde, 181 U.S. 183, 21 S.Ct. 555, 45 L.Ed. 810) does not affect the nature of the obligation upon which the judgment is based (Audubon v. Shufeldt, 181 U.S. 575, 21 S. Ct. 735, 736, 45 L.Ed. 1009) and because the order is based upon the legal obligation of plaintiff to support his wife and because it is "a portion of his current income or earnings" it is held that "the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife than by a court of a different jurisdiction." Since her award of support money is hers of right, it is not barred by a discharge in bankruptcy of her husband. Audubon v. Shufeldt, supra; Wetmore v. Markoe, 196 U.S. 68, 25 S.Ct. 172, 49 L.Ed. 390, 2 Ann.Cas. 265. This is true even though the parties have agreed upon the amount of support to be paid by the husband and have caused the terms of their contract to be embodied in the divorce decree. If, upon a consideration of the entire transaction the court determines that the purpose of the judgment for support money is to guarantee the economic safety of the wife by the husband, then his discharge in bankruptcy does not affect his liability under the judgment. In re Ridder, 2 Cir., 79 F. 2d 524, 103 A.L.R. 719. In the case of Dunbar v. Dunbar, 190 U.S. 340, 23 S.Ct. 757, 47 L.Ed. 1084, the parties entered into a separation contract. Divorce proceedings followed but the provisions of their settlement were not incorporated into the divorce decree. The United States Supreme Court held that the parties had merely defined the amount and extent of the husband's liability to support his wife and that the fact of their having fixed the liability by contract did not alter its essential character and therefore the payments accrued under the contract were not discharged by bankruptcy. Since from the covenants of the parties, it is obvious that their contract was made with reference to and by reason of plaintiff's obligation to support defendant, it is still a valid and subsisting obligation notwithstanding the dis-

charge in bankruptcy. Alimony due or to become due or for the maintenance or support of wife or child remains the obligation of a bankrupt, notwithstanding his discharge. In re Ridder, supra; Bankruptcy Act, sec. 17(2), 11 U.S.C.A., sec. 35(2). In the case of In re Adams, 2 Cir., 25 F.2d 640, it was held that the promise by a man to pay his wife an annuity until her death or marriage in full for her support was not released by his discharge in bankruptcy. The agreement of Mr. Remondino to pay his wife $100 monthly is clearly no less for support than was Mr. Ridder's promise to pay his wife an annuity. The law is not swift to discharge an obligation which has been imposed by the law for the peace and security of society.

[6-8] No question is raised against the proposition that a husband and wife may contract with regard to their properties. It is equally well settled that where monthly payments are to be made for the "support and maintenance" of the wife, such provision constitutes an integral element of their adjustment of their respective obligation and when approved by the court it "becomes immune from subsequent modification". Ettlinger v. Ettlinger, supra. Neither is it any the less a judgment for alimony because the court's order does not so designate it. It is shown to be for that purpose in reciting the language of the contract "for the support and maintenance" of defendant, and in approving the "agreement as to amounts and time of payment. * * * The court was therefore without jurisdiction to thereafter modify its provisions." (Ibid.)

The Tropp case, Tropp v. Tropp, 129 Cal.App. 62, 18 P.2d 385, 387, cited by plaintiff is not in point. The judgment there considered had been discharged because it was for the sum of $50,000 agreed upon by the parties as settlement of their "property" rights which was approved by the court in the divorce decree. That is quite a different matter from an order fixing a reasonable sum to be paid by the husband out of his earnings for his wife's support. In that case, the "substantial monthly payment was provided in the agreement" for the wife's support and was not discharged. This fact established that the $50,000 was a "debt" of a widely different nature from that to support his wife and it was clearly dischargeable in bankruptcy.

Plaintiff suggests that he obtained the decree by reason of the "fault" of his wife. He cites a number of authorities to the effect that it is beyond the power of the court to compel the payment of alimony to the guilty spouse. Lampson v. Lampson, 171 Cal. 332, 153 P. 238; Hogarty v. Hogarty, 188 Cal. 625, 206 P. 79; McKannay v. McKannay, 68 Cal.App. 701, 230 P. 214; In re McKenna, 116 Cal.App. 232, 2 P.2d 429; Marrs v. Superior Court, 137 Cal. App. 579, 30 P.2d 1030; In re Nielsen, 19 Cal.App.2d 305, 65 P.2d 360; Johnson v. Superior Court, 128 Cal.App. 584, 17 P.2d 1055; Gaudio v. Gaudio, 138 Cal.App. 289, 32 P.2d 156; Harwell v. Harwell, 26 Cal. App.2d 143, 78 P.2d 1167; Johnson v. Johnson, 104 Cal.App. 283, 285 P. 902.

[9-11] It is conceded that where the wife is guilty of immoral or unsocial conduct, or where she refuses without reason to conform to the place or mode of living selected by the husband in granting a divorce to the husband there is no authority in the law for such an order. Civ.Code, secs. 136, 139. By the divorce she is completely cut off from any economic advantage as against her former spouse. But, in the case at bar, there is no evidence in the contract that the defendant was guilty of any of the inhibited acts. On the contrary, the contract practically conceded that the separation might have been due to plaintiff's own fault, as is evidenced by his promise to maintain insurance on his life for her benefit, to pay her $500 within six months and to pay her $100 per month as long as she lives. Moreover, plaintiff contemplated that defendant would institute divorce proceedings. He promised to pay all costs of litigation to be instituted by his wife for the purpose of obtaining a divorce.

The contract indicates that there was no property, community, commingled or otherwise, which might explain the promise of plaintiff to make the monthly payments. The modest sums which are provided by the contract and which are the basis of the "supplemental" judgment could have been intended for no purpose other than defendant's "support". But even if she had been at fault, the decree specifically provides for her support and maintenance by plaintiff. It was clearly then within the jurisdiction of the court to confirm the contract upon plaintiff's request.

[12] Defendant is not estopped to contend that the judgment for money in the final decree is for her support and maintenance. By filing her judgment as a claim in the bankruptcy proceedings, plain-

tiff was not acting inconsistently with her present claim. The order of the court could be complied with only by the payment of money and was enforceable only in the event plaintiff had money or other valuable property. In distributing the assets of the bankrupt estate there is no reason why plaintiff's obligation to his wife should not have been treated as fairly as any other obligation owed by him. If the parties had never been separated she might have withheld from the trustee a home and all of those chattels that are exempted for the benefit of a man's family. Civ.Code, sec. 690; 4th Remington, 3d ed., 739; 7th Remington, 5th ed., 825.

In presenting a claim she made no pretenses that the superior court had not ordered plaintiff to make payments as he had consented should be done. Furthermore, by filing such claim, plaintiff suffered no prejudice. Her act indicated a desire on her part to cooperate with plaintiff as she had done with rare patience in allowing him to become in arrears to an amount in excess of $10,000. If we reckon the merits of the parties upon the basis of a "change of front" we might observe that the only radical departure from a position formerly taken is that of plaintiff. When he applied to the superior court for a reduction of the amounts of his monthly payments, he thereby acknowledged the judgment to be for the support of his wife and that he was subject to the order of the court in the performance of such obligations imposed by the judgment. That order to support his wife was made necessary by the nature of his obligation to support her, which in turn was the basis of the provisions of the Civil Code. Secs. 136, 137, 137.5, 159. These statutes were legislative authority for the court's confirming the contract, ordering its performance and thereafter enforcing it.

[13-15] The third point presented by plaintiff, although he terms it estoppel, is in fact a plea of res adjudicata or that the order of the Supreme Court in granting a writ of prohibition against the superior court determined "the law of the case". That writ was issued upon the application of plaintiff at a time when defendant was seeking to enforce her judgment by contempt proceedings. It was brought by plaintiff not against defendant but against the superior court. For reasons not appearing, no answer was filed to plaintiff's petition for said writ. It thus appears that said petition for a writ of prohibition was decided as a default. No pleading presented the claims of defendant. Hence plaintiff's verified petition, we must assume, on its face stated ground for the issuance of the writ. In order for a decision of an appellate court to be res adjudicata, it must be final and the action must have been between the same parties as those who appeared in the trial court. 50 C.J. 712. It is not suggested that the superior court and defendant are in effect identical or that they are in privity. In order for such decision to become the law of the case, it must have been a decision on appeal upon the identical issues tried before the court below. Had the merits of defendant's cause been pleaded, it is not unlikely that a different result would have followed the hearing. In his petition to the Supreme Court plaintiff failed to allege that the final decree followed the contract and provided for "the support and maintenance" of defendant.

The "judgment" is affirmed.

We concur: WOOD, J.; McCOMB, J.

41 Cal.App.2d 161

MARTIN v. PACIFIC SOUTHWEST ROYALTIES, Inc. (MAGDLEN, Interveners).

Civ. 12665.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1940.

1. Estoppel 🔑115

In action for unlawful detainer and to quiet title to land, based on failure of lessee corporation to pay rent required by oil and gas lease, wherein corporation did not plead that lessor waived right to commence action or was estopped from doing so, evidence that although secretary of corporation had been served with notices prior to commencement of action, he had remained silent in reliance upon lessor's promise not to commence action for reasonable length of time was not within the issues and was inadmissible.

2. Courts 🔑11, 17

If the court acquired jurisdiction over defendant's person and simultaneous jurisdiction over the subject matter under either count of complaint which set forth cause of action for unlawful detainer and to quiet title to property, the court had jurisdiction to proceed with the case.

3. Appearance 🔑19(1), 24(1)

Where complaint set forth causes of action for unlawful detainer and to quiet title to the land, and on day complaint was filed plaintiff obtained possession of the land by virtue of writ of possession, defendant who appeared and answered both counts of the complaint "waived" any defect in summons which was entitled "unlawful detainer summons" and required appearance within three days, and the court acquired personal jurisdiction over defendant. Code Civ.Proc. § 1166a.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

4. Quieting title 🔑12(1)

An action to quiet title was "proprietary" in its nature and in no way dependent upon possession.

See Words and Phrases, Permanent Edition, for all other definitions of "Proprietary".

5. Quieting title 🔑28

The superior court had jurisdiction of action to quiet title to realty.

6. Election of remedies 🔑3(1)

Where complaint set forth causes of action for unlawful detainer and to quiet title to the land, plaintiff could not have been compelled to elect as to which of the causes of action would be relied upon, since there was no fatal inconsistency between the actions which both concerned the same subject matter, one being "possessory" and the other "proprietary" in nature.

See Words and Phrases, Permanent Edition, for all other definitions of "Possessory".

7. Pleading 🔑49
Process 🔑34

The fact that complaint was entitled as an unlawful detainer action and the summons was entitled as an unlawful detainer summons did not determine the character of the action.

8. Election of remedies 🔑7(1)
Judgment 🔑18(4)

Where both unlawful detainer and quiet title counts of complaint were in fact answered by defendant thus putting all material allegations of both counts in issue, and evidence introduced was equally applicable to both counts, plaintiff could not be held to have "elected" to proceed on unlawful detainer count, because complaint was entitled as an unlawful detainer action and summons was entitled as an unlawful detainer summons, and hence judgment for plaintiff which would be supported by the quiet title count was not void on ground that the unlawful detainer count was defective.

See Words and Phrases, Permanent Edition, for all other definitions of "Elected".

9. Appeal and error 🔑934(2)

The District Court of Appeal was required to presume that judgment was based solely upon count of complaint which supported the judgment if other count of complaint was defective.

10. Quieting title 🔑7(2)

Where lessor, as required by oil and gas lease gave written notice to lessee to comply with terms of lease in matter of payment of rentals, and at expiration of time provided by lease within which lessee might comply with the terms of the lease, lessor exercised option to terminate lease, the lessor was entitled to have title to the premises quieted.

11. Mines and minerals 🔑77

General rule that the law abhors forfeitures does not apply to oil and gas leases.

12. Mines and minerals 🔑79(7)

In action for unlawful detainer, based on lessee's failure to pay rent required by oil and gas lease, trial court's failure to find a specific amount due to lessor was not abuse of discretion where no application was made for stay of execution to permit redemption of the leasehold estate. Code Civ.Proc. § 1174.

13. Mines and minerals 🔑79(7)

In action for unlawful detainer based on lessee's failure to pay rent required by oil and gas lease, lessee which did not as authorized by statute file an application for relief against forfeiture of lease could not complain that he was not given opportunity to prevent forfeiture. Code Civ.Proc. § 1179.

14. Appeal and error 🔑1056(2)

In action for unlawful detainer and to quiet title to land based upon lessee's failure to pay rent required by oil and gas lease, wherein it was established that lessor properly exercised her option to forfeit lease, action of trial court in excluding testimony concerning value of leasehold with its improvements was not prejudicial to lessee as applied to count seeking to quiet title, since proof of value of the leasehold would not be a defense to that count.

15. Appeal and error 🔑1056(2)

In action for unlawful detainer and to quiet title based upon lessee's failure to pay rent required by oil and gas lease, action of trial court in excluding testimony concerning value of leasehold with its improvements was not prejudicial as applied to unlawful detainer count where defendant made no application for relief from forfeiture of the lease pursuant to statutory authorization. Code Civ.Proc. §§ 1174, 1179.

16. Appeal and error 🔑1034

The fact that plaintiff was designated "Matilda L. Throop, Guardian of the Estate of Florence M. Martin, Incompetent," instead of as "Florence M. Martin, by her Guardian, Matilda M. Throop", was a technical error which was not prejudicial to defendant.

17. Stipulations 🔑18(2)

In action which was commenced by a guardian of incompetent and subsequently was prosecuted by the incompetent upon being restored to competency, error in designation of party plaintiff in the guardian's pleadings was "waived" when defendant entered into stipulation substituting incompetent as individual plaintiff.

18. Stipulations 🔑18(2)

Any error in proof of authority of guardian for incompetent to take action concerning realty belonging to incompetent was "waived" by stipulation substituting the incompetent as a plaintiff in the action since the incompetent was the "real party in interest".

See Words and Phrases, Permanent Edition, for all other definitions of "Real Party in Interest".

19. Insane persons 🔑42(3)

Incorrect description of incompetent ward's property in guardian's inventory would not prevent her from taking proper steps to recover all of the assets of ward.

20. Mines and minerals 🔑79(7)
Quieting title 🔑44(4)

In action for unlawful detainer and to quiet title to land, based on lessee's failure to pay rent required by oil and gas lease, evidence consisting of deed to lessor's predecessor and certified copy of decree of distribution in predecessor's estate which showed that the property was distributed to the lessor was sufficient to prove lessor's ownership of the property.

21. Appeal and error 🔑843(2)

Issues presented by defendant's contention that judgment in action for unlawful detainer and to quiet title to land, deprived defendant of right given by terms of oil and gas lease to defendant, to remove personalty located on leased premises were "moot questions" where plaintiff in another action recovered money judgment against defendant and personalty in question was seized under writ of execution and sold to plaintiff and judgment in the other action had become final.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

22. Abatement and revival 🔑83, 84

A plea in abatement based on pendency of another action between same parties involving same cause of action must be presented by demurrer or answer and if not so presented is "waived." Code Civ.Proc. §§ 430, 434.

23. Abatement and revival 🔑83, 84

Defendant who failed to plead pendency of another action either by demurrer or answer "waived" right to introduce evidence concerning pendency of such action. Code Civ.Proc. §§ 430, 434.

24. Constitutional law 🔑46(1)

The courts will not pass on constitutionality of a statute if the merits of the case may be fairly determined without so doing.

25. Mines and minerals 🔑79(6)

Where oil and gas lease provided that if lessee failed to pay rental and failure continued for 30 days after notice of default, lease should be terminated at option of lessor and rights of lessee should be forfeited, the lease was terminated upon lessee's default in payment of rent for more than 30 days after notice of default and demand for payment was served upon it, and all rights of the lessee were forfeited.

26. Judgment ⚷252(1)

Where oil and gas lease contained provision entitling lessor to such attorney's fees as might be incurred in clearing record title from cloud created by recorded lease, and copy of lease was attached to complaint and incorporated therein by reference, and the defendant by its answer placed all allegations of complaint in issue, fact that the complaint which contained prayer for general relief contained no prayer for attorney's fees did not preclude lessor from recovering attorney's fees.

27. Judgment ⚷252(2)

Where an answer has been filed and issue joined, regardless of deficiency of the prayer to a complaint, court may grant the plaintiff any relief consistent with issues raised by pleadings.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Matilda L. Throop, guardian of the estate of Florence M. Martin, incompetent, against the Pacific Southwest Royalties, Inc., for unlawful detainer and to quiet title to property, wherein Robert J. Magdlen and another, trustees for certain royalty unit holders in Pacific Southwest Royalties, Inc., Well No. 1 and/or Campbell Well No. 1 intervened. Subsequently Florence M. Martin was substituted in place of Matilda L. Throop, guardian of the estate of Florence M. Martin, as plaintiff. From judgment for the plaintiff, defendant and interveners appeal.

Affirmed.

Maurice C. Myers, of Long Beach, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

I. Henry Harris and Robert J. Magdlen, both of Los Angeles, for interveners.

WOOD, Justice.

The complaint in this action sets forth two causes of action, one for unlawful detainer and the other to quiet title to the property which is the subject of the unlawful detainer action. The appeal is from a judgment rendered in favor of plaintiff.

An oil and gas lease was executed on May 31, 1932, by Charles F. Martin and Florence M. Martin, husband and wife, as lessors to defendant as lessee, covering lot 8, block "B" of Summers Villa tract in the county of Los Angeles. The lease provided that defendant should pay a monthly rental of one-sixth of all oil, gas and other hydrocarbon substances produced, saved and sold from the leased premises. In 1935 Charles F. Martin died. The decree of distribution which was subsequently made during the probate of his estate distributed all of his interest in the above described lease and real property to Florence M. Martin. Thereafter Mrs. Martin was duly adjudged to be incompetent and Matilda L. Throop was appointed guardian of her estate. In 1937 defendant defaulted in the payment of the one-sixth royalties required by the lease to be paid as monthly rental and ever since has continued to be in default. A notice of default and demand for payment of the rental was served upon defendant on July 20, 1937, and upon defendant's failure to make payment in compliance with the demand, a notice of termination of the lease and a three-day notice to quit the premises were served on September 1, 1937. All of the notices were duly served upon the secretary of defendant corporation. On September 10, 1937, Matilda L. Throop, as guardian of the estate of Florence M. Martin, incompetent, commenced the present action. Defendant was served with an unlawful detainer summons requiring it to appear and answer the complaint within three days. Defendant's answer placing all of the material allegations of the complaint in issue was filed within the three day period. Upon filing the action plaintiff secured a writ of possession under the provisions of section 1166a of the Code of Civil Procedure and obtained possession of the leased premises. Defendant's motion to vacate the order granting the writ of possession upon the ground that section 1166a was unconstitutional was denied. Permission was thereafter given defendant to file a supplemental answer alleging that the section was unconstitutional in that it deprived persons of property without due process of law. At the time of trial plaintiff was permitted, over defendant's objection, to amend her complaint to include allegations of fraud, deceit, false accounting and theft of oil. Plaintiff, however, failed to prove such allegations during the trial. By its judgment the court decreed that plaintiff was entitled to immediate possession of the premises in question; that defendant be required to deliver to plaintiff a quitclaim deed to the real property; that all of defendant's right, title and interest under the oil and gas lease be terminated, and that plaintiff be awarded $500 as attorney's fees. Subsequently, in 1938, Florence M. Martin, who had been restored to competency, was substituted as party plaintiff in place of Matilda L. Throop.

[1] During the trial defendant sought to introduce evidence to the effect that although the secretary of the defendant corporation had been duly served with the three notices prior to the commencement of this action he had remained silent concerning them in reliance upon plaintiff's promise not to commence any action for a reasonable length of time. The action of the court in sustaining plaintiff's objection to the introduction of such evidence is now assigned as error. Since no waiver or estoppel of any kind was pleaded by defendant, such evidence was clearly outside the issues and was properly excluded by the court.

[2-5] The contention of defendant that at no time did the court have jurisdiction over the person of defendant and the subject matter of the controversy simultaneously cannot be sustained. The complaint was filed on September 10, 1937, and on the same day plaintiff obtained possession of the disputed premises by virtue of the writ of possession. The summons was served on defendant three days later. Upon the authority of Big Bend Land Co. v. Huston, 98 Wash. 640, 168 P. 470, defendant contends that the service of the summons after defendant had been ousted from possession did not confer jurisdiction upon the court to determine the unlawful detainer action. It will be noted that in Big Bend Land Co. v. Huston the action was for unlawful detainer only and did not include a cause of action to quiet title as in the instant case. Although the facts were similar in that plaintiff obtained possession of the premises in dispute by virtue of a writ of restitution prior to serving the summons upon defendant, a distinguishing feature lies in the fact that the defendant in the Washington case did not make a general appearance by filing an answer to the complaint. The only appearance made by the defendant was a special one for the purpose of moving to quash the writ of restitution. The Washington court concluded that since the sole purpose of an unlawful detainer action is to obtain possession of premises wrongfully withheld the court had no jurisdiction to determine the controversy under the circumstances because plaintiff was already in possession of the premises. However, in the case now before us our consideration is not limited to determining whether the court had jurisdiction of the subject matter under the unlawful detainer count alone but extends as well to the quiet title count. If the court acquired jurisdiction over defendant's person and simultaneous jurisdiction over the subject matter under either count of the complaint its right to act cannot be questioned. As regards jurisdiction over defendant's person, it is of no consequence that the summons was entitled "unlawful detainer summons" and required an appearance within three days. When defendant appeared and answered both counts of the complaint the court acquired personal jurisdiction over the defendant and any defects in the summons were waived. Harrington v. Superior Court, 194 Cal. 185, 228 P. 15. If it be assumed that the court did not acquire jurisdiction over the subject matter of the unlawful detainer action because plaintiff was in possession of the premises before the summons was served on defendant, nevertheless, the quiet title cause of action was proprietary in its nature and in no way dependent upon possession. Unquestionably the superior court has jurisdiction over actions to quiet title to real property.

[6-9] Defendant contends that neither of the three notices which were served on defendant prior to commencing this action was a proper notice upon which to found an unlawful detainer action and that plaintiff made an election of remedies in the trial court, electing to rely solely upon the unlawful detainer count and not upon the quiet title count. Since the "three day notice to vacate" which was served on defendant merely demanded possession of the premises and did not, in the alternative, demand the payment of the rental then due, defendant argues that the judgment is erroneous. If it be conceded that the notice was defective as the basis for an unlawful detainer action, the defect is not fatal to the judgment. In the first place, defendant's position with respect to the alleged election of remedies is untenable. Plain-

tiff could not have been compelled to elect as to which of the two causes of action he would rely upon. Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, 71 A.L.R. 871; Wilson v. Rigali & Veselich, 138 Cal.App. 760, 33 P.2d 455. There was no fatal inconsistency between the two causes of action, which both concerned the same subject matter, one being possessory and the other proprietary in nature. Defendant's claim that plaintiff in fact made an election is not borne out by the record. The fact that the complaint was entitled as an unlawful detainer action and the summons entitled as an unlawful detainer summons does not determine the character of the action. Both the unlawful detainer and the quiet title counts of the complaint were in fact answered by defendant, thus putting all material allegations of both counts in issue. The evidence introduced was equally applicable to both counts. The theory upon which the case was tried is to be ascertained by reference to the issues framed by the pleadings and the findings made by the court. J. M. Brown, Inc., v. W. P. Fuller & Co., 28 Cal.App. 676, 153 P. 960. The findings of fact are clearly sufficient to sustain a judgment based upon the quiet title count. Assuming the unlawful detainer count to be defective, we must presume that the judgment was based solely upon the quiet title count, the one which supports it. Watson v. Lawson, 166 Cal. 235, 135 P. 961.

[10, 11] Defendant complains of the failure of the trial court to find the specific amount of the rent unpaid, the finding being merely that the defendant was in default in the payment of rent. In paragraph 15 of the lease it is provided: "In the event of any breach of any of the terms or conditions of this lease by the lessee, as to the time of commencing operations or as to the payment of rentals or royalties, and the failure to remedy the same within thirty (30) days after written notice from the lessor so to do, then at the option of the lessor, this lease shall forthwith cease and terminate, and all rights of the lessee in and to the said land shall be at an end". And in paragraph 20 it is further provided: "If the lessee shall fail to perform any of the other terms or conditions of this lease at the time and in the manner hereby required, and which failure shall continue for thirty (30) days after notice in writing requiring the performance thereof, then and thereupon this lease shall be terminated and lessee shall forfeit all rights hereunder. The lessee shall pay to the lessor the royalty herein provided, on the twentieth (20) day of each and every month for the preceding calendar month." The lessor gave written notice to comply with the terms of the lease in the matter of the payment of rentals, and at the expiration of thirty days, the lessee having failed to comply with the terms of the lease, the lessor exercised its option to terminate the lease. Having exercised her right to terminate the lease plaintiff was in position to have her title to the premises quieted. There can be no question concerning the charge that defendant had failed to comply with the terms of the lease, for it is admitted that at the time of the first notice it was in arrears in the sum of $938.93, and at the time of the commencement of the action the balance due was $1,253.23. Defendant was not in position to assert that plaintiff could not declare a forfeiture. In this regard is it to be noted that the general rule that the law abhors forfeitures is not applicable to oil and gas leases. John v. Elberta Oil Co., 124 Cal.App. 744, 13 P.2d 538; Hall v. Augur, 82 Cal.App. 594, 256 P. 232.

[12, 13] Defendant's complaint concerning the failure of the court to find the specific amount due appears to be applicable, if at all, to the unlawful detainer count, but even as applied to this count it is apparent that defendant is not in position to complain for the reason that no application was made for a stay of execution to permit the redemption of the leasehold estate. It is provided in section 1174 of the Code of Civil Procedure that the court in an unlawful detainer action may in its discretion order that execution shall not issue until five days after the entry of the judgment so that the defendant may pay the judgment and be restored to his estate. The record discloses no abuse of discretion on the part of the court. Section 1179 of the same code provides for relief against the forfeiture of a lease if an application for such relief be filed within thirty days after the forfeiture has been declared by the judgment of the court. Defendant did not file an application for such relief at any time and is therefore not now in position to complain that he was not given opportunity to prevent the forfeiture.

[14, 15] Defendant was not prejudiced by the ruling of the court excluding testimony concerning the value of the lease-

hold with its improvements. Since plaintiff properly exercised her option to forfeit the lease, proof of the value of the leasehold would not be a defense to the quiet title action. Even if the judgment had been based upon the unlawful detainer action defendant would not be in position to complain, since no application for relief from the forfeiture was made in accordance with the provisions of sections 1174 and 1179 of the Code of Civil Procedure.

[16, 17] The plaintiff was designated in the pleadings as "Matilda L. Throop, Guardian of the Estate of Florence M. Martin, Incompetent". Defendant now claims that such designation of the party plaintiff was erroneous. Conceding that the action should properly have been entitled "Florence M. Martin, by her Guardian, Matilda M. Throop", the failure to so caption the complaint was purely a technical error in no way prejudicial to defendant. Furthermore, the error was waived when defendant entered into the stipulation substituting Florence M. Martin as the individual plaintiff.

[18-20] It is argued that since the inventory and appraisement in the guardianship proceeding incorrectly lists the property in question as Lot 9 instead of Lot 8, Block "B" of Summers Villa tract, there was no evidence of the guardian's authority to take any action concerning Lot 8. It is also claimed that there is no proof of ownership of the property here involved. Any error in the proof of the guardian's authority was waived by the stipulation substituting Florence M. Martin as the plaintiff in this action, for the latter was the real party in interest. Moreover, an incorrect description in the guardian's inventory would not prevent her taking proper steps to recover all of the assets of the ward. So far as proof of ownership is concerned, there is ample evidence that the plaintiff Florence M. Martin was the owner of the property in controversy. A grant deed by N. E. and Elizabeth Townsend conveying the property to Chas. F. Martin was received in evidence. The certified copy of the decree of distribution in the matter of the estate of Charles F. Martin which was introduced in evidence shows that the property correctly described as Lot 8, was distributed to Florence M. Martin.

[21-23] The questions raised by defendant's contention that the judgment wrongfully deprived it of the right, given defendant by the terms of the lease, to remove the personal property located upon the leased premises have become moot. On August 12, 1938, plaintiff Florence M. Martin, in an action commenced in the municipal court of the city of Long Beach, recovered a judgment in the sum of approximately $1,900 against the defendant herein. The personal property in question was seized under a writ of execution, sold to plaintiff and a marshal's certificate of the sale duly issued to her. Since that judgment has long since become final, the questions now raised concerning property in which defendant no longer has any interest have become moot. Shimpones v. Stickney, 219 Cal. 637, 28 P.2d 673. Contrary to the contention of defendant, the court did not err in excluding proffered testimony concerning the pendency of the municipal court action. A plea in abatement based upon the pendency of another action between the same parties, involving the same cause of action, must be presented by demurrer (Code Civ.Proc., sec. 430) or by answer (Code Civ.Proc., sec. 434), and if not so presented it will be deemed to have been waived (Code Civ. Proc., sec. 434; 1 Cal.Jur., p. 35). Defendant failed to plead the pendency of the other action either by demurrer or answer and therefore must be deemed to have waived the point now raised.

[24] In view of our conclusions we deem it unnecessary to decide whether or not section 1166a of the Code of Civil Procedure is constitutional. "It is settled as a general principle that courts will not pass on the constitutionality of an act of the legislature if the merits of the case in hand may be fairly determined otherwise without so doing". 11 Amer.Juris., Constitutional Law, par. 94.

[25] Under the express conditions of the lease, if defendant failed to pay the rental and such failure continued for thirty days after notice of default, the lease was to terminate at the option of the lessor and all the rights of the lessee thereunder would be forfeited. Admittedly defendant was in default in the payment of rent for more than thirty days after notice of default and demand for payment was served upon it. The lease was therefore terminated and all rights of defendant forfeited, as the trial court properly held. If we assume, without deciding, that section 1166a of the Code of Civil Procedure is unconstitutional the result is in nowise preju-

dicial to defendant, for when plaintiff acquired possession of the property by virtue of the writ authorized by the section, defendant no longer had any rights in the property. In Reeves v. Watson, 124 Cal. App. 534, 12 P.2d 1050, 1052, an action for unlawful detainer, a receiver was appointed to take charge of the property after the service of a three days' notice under section 1161 of the Code of Civil Procedure. On appeal it was charged that the appointment of the receiver was void by reason of the failure to comply with the governing code provisions. The reviewing court held that the defendant was not prejudiced, since he was guilty of an unlawful detention of the leased property. The court remarked: "We do not believe they can question the act of respondents in placing a receiver in possession of their own property even though the statutory provisions relative to the appointment of a receiver were ignored".

[26, 27] Defendant's final contention is that the court erred as a matter of law in awarding plaintiff $500 as attorney's fees. It is urged in reliance upon Flournoy v. Everett, 51 Cal.App. 406, 196 P. 916, that attorney's fees are not recoverable in an unlawful detainer action. That case is to be distinguished from the present case, however, for the plaintiff in the Flournoy case failed to allege facts upon which any liability for attorney's fees could be based. In the instant case it appears from paragraph 21 of the lease, a copy of which was attached to the complaint and incorporated therein by reference, that defendant agreed to pay plaintiff such attorney's fees as might be incurred in clearing the record title from the cloud created by the recorded lease. The fact that the complaint, which contains a prayer for general relief, contained no prayer for attorney's fees is immaterial, for defendant by its answer placed all the allegations of the complaint in issue. It is established that "when an answer has been filed and issues joined, regardless of the deficiency of the prayer to a complaint, the court may grant plaintiff any relief consistent with the issues raised by the pleadings." Pedro v. Soares, 18 Cal. App.2d 600, 64 P.2d 776, 779; Code Civ. Proc., sec. 580.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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41 Cal.App.2d 275

PEOPLE v. ALEXANDER.

Cr. 1730.

District Court of Appeal, Third District, California.

Oct. 26, 1940.

Rehearing Denied Nov. 9, 1940.

See 106 P.2d 916.

1. Homicide ⚷86

The crime of assault with intent to commit murder requires the presence of both the intent to commit a violent injury, which is a necessary part of the assault, and the specific intent to kill. Pen.Code, § 240.

2. Homicide ⚷156(1)

In prosecution for assault with intent to commit murder, criminal negligence may be shown to establish the intent to commit a violent injury, which is a necessary part of the assault. Pen.Code, § 240.

3. Homicide ⚷230

Evidence that accused telephoned to and threatened to murder wife, who had obtained interlocutory decree of divorce and custody of child, and went to wife's residence and stood on front porch and fired shot which narrowly missed wife who was running up stairway in house, as against evidence that accused intended to commit suicide but that shot missed him and almost struck wife, sustained conviction for assault with intent to commit murder. Pen.Code, § 240.

4. Criminal law ⚷1159(2)

Appellate court cannot substitute its judgment for findings of jury unless evidence is so clearly false and unbelievable that reasonable minds may not differ on its inherent improbability.

5. Homicide ⚷164

In prosecution for assault with intent to commit murder, where accused contended that he did not intend to harm wife, but fired shot with intent to commit suicide but that shot missed him and almost struck wife, evidence, that accused carried on his telephone answering service practically alone and thereby became fatigued and susceptible to a mental breakdown which might induce thoughts of self-destruction, was properly excluded as being remote and speculative.

6. Criminal law ⚷338(1)

In prosecution for assault with intent to commit murder, where accused contended that he did not intend to harm wife, but fired shot with intent to commit suicide, but that shot missed him and almost struck wife, letter which was written by accused to wife and which contained some memoranda relating to accused's business was properly excluded as having no bearing upon the question of suicide, with respect to which it was offered by accused.

7. Criminal law ⚷413(1)

In prosecution for assault with intent to commit murder, where accused contended that he did not intend to harm wife, but fired shot with intent to commit suicide but that shot missed him and almost struck wife, letter written by accused a few hours after the shooting, addressed to an undertaker and advising him about accused's funeral, was properly excluded as not constituting a "suicide note" and as being a "self-serving declaration."

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Serving Declaration".

8. Homicide ⚷286(1)

In prosecution for assault with intent to commit murder, trial court's instructions stating material elements necessary to prove the crime, and applying the rules as to necessary intent to the particular facts, sufficiently instructed jury regarding the specific intent to kill necessary to constitute the crime. Pen.Code, § 240.

9. Criminal law ⚷1171(2)

In prosecution for assault with intent to commit murder, where district attorney in opening statement stated that prosecution would prove by two persons that accused said that he would make a better job of the shooting next time, but no witnesses were produced to establish such fact, the remark could not constitute prejudicial "misconduct" in absence of a positive showing of a deliberate attempt to misstate the case.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

10. Criminal law ⚷1037(1), 1144(10)

In prosecution for assault with intent to commit murder, where district attorney in opening statement stated that prosecution would prove by two persons that accused said that he would make a better job of shooting next time, but no witnesses were produced to establish such fact, appellate court was required to assume that it was district attorney's honest belief that he would introduce the evidence, in absence of showing that he deliberately injected false accusations in opening statement, and conviction would not be reversed, especially where no objection was made to the remark and the alleged misconduct was not called to attention of court or jury at close of prosecution's case.

11. Criminal law ⚷911, 1156(1)

The granting of a new trial lies largely in sound discretion of trial judge, and his ruling will not be disturbed in absence of clear abuse of discretion.

12. Criminal law ⚷935(1)

In prosecution for assault with intent to commit murder, where trial judge stated in reviewing evidence that there was evidence of specific intent to kill necessary to commit the crime and, therefore, that he would not set aside the verdict, his denial of new trial was not an abuse of discretion, notwithstanding he stated when sentencing accused that, from a factual basis, he did not know whether accused had the deliberate intent necessary to commit the crime. Pen.Code, § 240.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Sam Alexander was convicted of an assault with intent to commit murder, and he appeals.

Affirmed.

A. M. Mull, Jr., and Lawrence G. Dorety, both of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was convicted of an assault with intent to commit murder, and from the judgment of conviction and the order denying a new trial, this appeal is taken. For reversal it is urged that the evidence is insufficient to justify a conviction of an assault with intent to commit murder; that the court erred in excluding certain evidence; in giving and refusing to give certain instructions, and in denying a new trial.

Inasmuch as appellant devotes considerable attention to the claim of insufficiency of the evidence it is necessary to set forth the evidence in some detail.

Appellant and Mrs. Averil Alexander had been married for about ten years and were the parents of an eight-year-old daughter. Upon moving to Sacramento, Mr. and Mrs. Alexander established a telephone answering service, and by close attention they built up a business of some value. Mrs. Alexander obtained outside employment, but apparently put her earnings into the business. Except for the times that Mrs. Alexander could relieve him, appellant devoted his entire time to the business, which required a twenty-four hour attendance. By reason perhaps of this long confinement, appellant became morose and addicted to the excessive use of liquor, and the parties separated in November, 1939. December 15th, Mrs. Alexander obtained an interlocutory decree. On December 29th, the shooting hereinafter related took place.

After the separation the wife moved to an apartment in another part of the city taking the daughter with her, she having been awarded the temporary custody of the child.

About 8 o'clock in the evening of December 29th, appellant telephoned to his wife and asked if she would let the daughter go with him to see the outdoor Christmas trees. The wife objected, but finally agreed to ask the daughter if she cared to go. In this conversation, according to the testimony of the wife appellant said, "* * * Well, if you won't let me have her I am coming out there and murder you, and I am not fooling, I mean what I say." The daughter then came to the telephone and told her father she did not care to go with him. About a half hour later appellant appeared at the house where his wife and daughter were living. The front door opened into a hallway, to the left of which was a living room. A stairway enclosed by a balustrade led to an upper floor. A flight of three steps in the hallway and to the right of the front door led up to a landing, then a turn left with nine steps to another landing, then another left turn and five steps brought one to the second floor. The door bell was answered by a Mr. Daniels who was in the living room, who invited appellant in, but he refused, saying he wished to speak to his wife. Mrs. Alexander came to the door but did not open the screen door. Appellant remained standing on the porch near the railing about eight feet from the door. The discussion was resumed about the daughter accompanying appellant to see the Christmas trees and he asked that the daughter be called. Mrs. Alexander objected, saying she did not want the child to stand out in the cold, and asked appellant to come in. He then replied, "Averil, this is my last request to come out here and talk to me, or else,—" whereupon he put his hand in his overcoat pocket. He pulled out a revolver, and Mrs. Alexander turned and ran upstairs. She heard the screen door open, and after reaching the last five steps, she crouched on the stairs, and a shot rang out and a bullet passed near her head and imbedded itself in the wall on the other side of the stairway. Daniels, who was seated in the living room to the left of the hall, heard Mrs. Alexander running up the stairs and looked up and saw her on the stairs, and appellant standing in the doorway. He then heard the shot and saw appellant with the revolver in his hand. Daniels went toward the door and appellant told him to keep out of the trouble or he would be next. Daniels then kicked the door shut and jumped back into the living room. A Mrs. Kelsey, who was seated in the living room, heard Mrs. Alexander say, "Bud, you wouldn't," and heard her running up the stairs, and also heard Alexander say to Daniels, "Don't come any closer, or I'll get you too."

Appellant remained on the porch a minute or two and then left. The next evening Alexander was arrested in his room in a local hotel. At that time he gave the name of Adams to the officers. The gun was found in his possession. When asked about the shooting of the night before he said he had been having domestic troubles and had been drinking and asked if his wife was injured.

The foregoing constitutes a brief narrative of what occurred. It is the claim of appellant that he went to the home of Mrs. Alexander with the intention of committing suicide, and the shot intended for himself missed its mark and passed over Mrs. Alexander.

[1, 2] As pointed out by appellant the crime here charged requires the presence of two intents, first, the intent to commit a violent injury, which is a necessary part of the assault. Sec. 240, Pen.Code. To establish this intent criminal negligence may be shown, and there seems no doubt that that element of the crime was established

in the case. It is in establishing the specific intent to kill that appellant contends the People failed.

Appellant points to his testimony wherein he declared his intention in taking his gun from his pocket was suicide; that he did not intend to harm his wife, and he did not aim the gun at her. As to this line of testimony the jury could, and evidently did, entirely disbelieve him.

[3] Furthermore, to show appellant did not intend to harm his wife, it is claimed appellant had the gun in his possession for over a month but had not attempted to use it, although his wife had left him and secured an interlocutory decree of divorce, and his daughter had apparently lost her affection for him. It is also claimed Mrs. Alexander was not particularly frightened by his speech or manner as he stood near the open door, and further it is pointed out only one shot was fired from a gun capable of firing six shots. Also, after firing the shot he made no immediate effort to escape, standing on the porch a minute or two before leaving. Even these facts, persuasive as they appear under the able presentation by counsel for appellant are susceptible of interpretation, and the jury did not accept the view of appellant. The jury may have placed more emphasis upon the telephone message to Mrs. Alexander from appellant when he told her about a half hour before he arrived, "I am coming out there and murder you, and I am not fooling, I mean what I say." The jury may have recalled that appellant, before firing the shot, advanced about eight feet from the railing of the porch to a point near the door, and actually opened the screen door, and also, that as Mrs. Alexander crouched on the stairway near the second landing, the bullet came so close to her she felt the compression of the air. Appellant also said to his wife as he insisted she come out onto the porch to talk to him, "Averil, this is my last request to come out here and talk to me,—or else," and then started to withdraw the revolver from his pocket. The remark to Daniels by appellant immediately after the shot was, "You keep out of this or you are next." Upon his arrest the next day he gave a fictitious name. When asked by the police why he did it, meaning the shooting at his wife, he did not then say he had tried to kill himself, but said he had been drinking or he wouldn't have done it, and that he had been having trouble with his wife, and then asked if she was injured. None of these acts are conclusively those of an innocent man. The jury saw appellant upon the stand, they heard the witnesses, and were amply supported by the evidence, if they believed it, in finding defendant guilty as charged.

[4] As has often been said, an appellate court cannot substitute its judgment for the findings of the jury unless the evidence is so clearly false and unbelievable that reasonable minds may not differ upon its inherent improbability. We have no such situation here.

[5] Appellant complains of the exclusion of certain evidence in some five or six particulars. One is that the defense should have been allowed to have shown that defendant carried on his business practically alone, and thereby became fatigued and susceptible to a mental breakdown, which might induce thoughts of self-destruction. This is of course remote and speculative.

[6, 7] Objection is made to the exclusion of two letters, one written to the wife which contained some memoranda in regard to the business, which had no bearing upon the question of suicide for which it was offered by appellant. The second memorandum was written by defendant a few hours after the shooting. It was addressed to a local undertaker and advised him about appellant's funeral. Neither could this be said to have been a suicide note, and was subject to further objection that it was a self-serving declaration. People v. Munro, 14 Cal.App.2d 446, 58 P.2d 955; 8 Cal.Jur., p. 105, sec. 198.

[8] Appellant also claims that the jury were not properly instructed in regard to the specific intent necessary to constitute the crime here charged. An examination of the instructions given, however, seems sufficiently clear upon that question. Among others, this was given:

"The material elements necessary to prove in the crime of assault with a deadly weapon with intent to commit murder are:

"One. That the assault was in fact committed with a deadly weapon.

"Two. That the assault was committed with malice aforethought and for the purpose of accomplishing a wilful, deliberate and premeditated killing, or was committed with malice aforethought under circumstances indicating to you an abandoned and malignant heart.

"Both elements must unite and if the prosecution fails to establish to a moral certainty and beyond a reasonable doubt any one of these elements, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established both of said elements, then you must acquit the defendant Sam Alexander."

"If you believe from the evidence that the defendant Sam Alexander did not commit an assault upon the person of Averil Alexander with a deadly weapon with intent to commit murder or if you believe from the evidence that the defendant Sam Alexander did commit an assault upon Averil Alexander with a deadly weapon without the intent to commit murder, then it is your duty to find the defendant Sam Alexander not guilty of an assault with a deadly weapon with intent to commit murder."

"If you believe from the evidence that the defendant Sam Alexander intended to commit suicide and had no intent to assault Averil Alexander, and fired a gun with the sole intent to kill himself, then you must find the defendant not guilty."

"As to the intent or intention with which an act is committed, if you find that such act was committed, such intent or intention is a matter entirely within the province of the jury, who must, from a full and careful consideration of the testimony and from all of the circumstances connected with the commission of the act, arrive at a determination as to whether such act was committed with a criminal intent."

[9, 10] Appellant also claims that the district attorney in his opening statement to the jury stated that the prosecution would prove by two persons that the defendant said that he would make a better job of the shooting next time. No witnesses were produced to establish this fact.

In the absence of a positive showing of a deliberate attempt to misstate the case, such remark cannot constitute prejudicial misconduct. People v. Berryman, 6 Cal.2d 331, 57 P.2d 136; People v. Emme, 120 Cal.App. 9, 7 P.2d 183. Also no objection was made to this remark nor was the alleged misconduct called to the attention of the court or jury at the close of the prosecution's case. We cannot assume that a public official deliberately injected false accusations in his opening statement. In the absence of any showing we must assume it was that officer's honest belief that he would introduce such evidence. It may have been that the witnesses were not available or that owing to the development of the trial such evidence might by him have been deemed unnecessary and immaterial.

[11, 12] Some question also is raised as to the statement of the trial judge when, at the sentencing of the defendant, he stated that from a factual basis he did not know whether the defendant had the deliberate intent necessary to commit the crime, but nevertheless denied a new trial. In reviewing the evidence, however, the trial court had stated there was evidence of intent and therefore he would not set the verdict aside. The granting of a new trial lies very largely in the sound discretion of the trial judge and this court will not disturb this finding in the absence of clear abuse of discretion. The trial judge in this case is a jurist of sound judgment and wide experience in the trial of both criminal and civil matters, and there was clearly no abuse of any discretion upon his part.

Counsel for appellant have very ably presented the points upon which they rely for reversal, but the facts are so strong, and the conclusions that the jury have reached are so amply supported, and the trial was so fairly conducted that we can find no error justifying a reversal.

For the foregoing reasons, therefore, the judgment and order are affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

41 Cal.App.2d 290

CITY OF MILL VALLEY v. SAXTON, City Treasurer.

Civ. 11512.

District Court of Appeal, First District, Division 2, California.

Oct. 29, 1940.

1. Municipal corporations 🔑277, 911

A city could acquire, operate, and issue bonds to finance a municipal bus line running to another city, under express constitutional grant of power, though the service would partly benefit nonresidents and nontaxpayers. Const. art. 9, § 19.

2. Municipal corporations 🔑277

If a city is given power to sell excess utility service, the means of performance whereby the service can be made and supplied are necessarily implied in the grant of power to sell. Const. art. 9, § 19.

3. Municipal corporations 🔑63(1)

In determining city's right to operate municipal bus line, court will assume, not that city will misuse the power by giving transportation free, but that city will exercise the power fairly and in accordance with the purposes of enabling statutes. Gen. Laws 1937, Act 5178, §§ 1, 2; Act 5233, § 862.15; Const. art. 4, § 31; art. 9, § 19.

4. Constitutional law 🔑29

The constitutional provision authorizing municipalities to establish and operate public works is itself a sufficient grant of power, without necessity of legislative enabling act. Const. art. 9, § 19.

5. Municipal corporations 🔑277, 911

The statutes granting cities power to own and operate bus lines, and to issue bonds for improvements necessary to carry out the municipality's powers, authorize operation and maintenance of, and issuance of bonds to finance, municipal bus lines running to another city. Gen.Laws 1937, Act 5178, §§ 1, 2; Act 5233, § 862.15.

6. Municipal corporations 🔑63(1)

The question of necessity or convenience of city's acquisition and operation of transportation system is for the city's legislative body to decide, and there is no judicial function involved.

7. Mandamus 🔑103

In proceeding for writ of mandate to compel treasurer to issue bonds for financing municipal bus lines, court could not deny the writ on assumption that city would arbitrarily operate its busses over another city's streets without other city's consent. Code Civ.Proc. § 1085; Const. art. 9, § 19.

8. Officers 🔑110

Where public officer's duty is clearly defined by statute and is purely ministerial, no question of discretion arises, and official may not refuse to perform a duty enjoined by law upon the mere suspicion that his act might enable some other official to breach his duty. Code Civ.Proc. § 1085.

9. Amicus curiæ 🔑3

In granting writ of mandate to compel execution of bonds for municipal bus lines, District Court of Appeal would not state whether petition by amicus curiæ for intervention, which had been denied upon general grounds without opinion, was sufficient, since to do so would be mere "obiter".

See Words and Phrases, Permanent Edition, for all other definitions of "Obiter".

Proceeding by the City of Mill Valley against Stanley R. Saxton, Treasurer of the City of Mill Valley, for writ of mandate to require respondent to sign and execute municipal bonds.

Peremptory writ granted.

H. C. Symonds, City Atty., of Mill Valley, for petitioner.

Thomas C. Nelson, of San Francisco, for respondent.

Milton Marks, of San Francisco (Morris Lowenthal, of San Francisco, of counsel), amicus curiae in opposition to petition for writ of mandate.

Milton Marks, of San Francisco, for petitioner Earle N. Dotson in intervention.

NOURSE, Presiding Justice.

The petitioner seeks a writ of mandate to require the respondent to sign and execute certain municipal bonds authorized by the electors of the city to issue for the purpose of raising funds to acquire and operate a municipal transportation system, or bus line, between Mill Valley and San Francisco, and intermediate points. The city treasurer rests upon his demurrer to the petition, without answer. His position in brief is that the city should not be permitted to expend funds of the taxpayers for a service which in part would be for the benefit of nonresidents and nontaxpayers.

The controversy rests on section 19 of article XI of the Constitution, adopted October 10, 1911, which we quote in full: "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

[1, 2] Respondent relies on Taylor v. Dimmitt, 336 Mo. 330, 78 S.W.2d 841, 98 A.L.R. 995, and Dyer v. Newport, 123 Ky. 203, 94 S.W. 25; holding that a city could not construct works beyond its boundaries to supply public utility service to nonresident consumers. We are not impressed with the applicability of those cases in view of our constitutional grant of power, nor with the reasoning of the opinions generally. If a city is endowed with the power to sell excess utility service, the means of performance whereby the service can be made and supplied are necessarily implied in the grant of power to sell. It would serve no purpose to analyze the other cases cited by respondent holding that under the particular statute involved the attempted grant of the power was in violation of some constitutional limitation, or that the statute was not open to the construction contended for. The annotations on the subject appearing in volume 49 A.L.R., page 1239, and in volume 98 A.L.R., page 1001, must be read in the same light. The conclusion of the author that a city may not furnish public utility service beyond its corporate limits "in the absence of statutory authority" is a generalization which is not controverted here. It was because of this principle that our Constitution and statutes were enacted to expressly confer such power.

[3] The respondent attacks the installation of the system on the grounds that it would require the taxpayers of the city to support the transportation system not only for its own inhabitants but also for those of the traveling public outside its boundaries. This it is said might be a gift of public funds for private purposes and hence contrary to the provisions of article IV, section 31, of the Constitution. Conlin v. Board of Supervisors, 99 Cal. 17, 33 P. 753, 21 L.R.A. 474, 37 Am.St.Rep. 17, and Goodall v. Brite, 11 Cal.App.2d 540, 54 P. 2d 510, are cited in support of the argument. Neither case is in point. They involved instances of direct gifts of public funds for private purposes. Here we have a case where public service is exchanged for a compensation and it will not be assumed that the city will misuse the power by giving the transportation free. On the contrary, it will be presumed that the city will exercise the power fairly and in accordance with the purposes of the statutes. That nontaxpayers living outside the boundaries of the city may thus obtain an advantage at the risk of the taxpayers within the city is no more serious obstacle to the validity of the scheme than that nontaxpayers living within the city limits may enjoy the same advantage. But if this feature of the general scheme is objectionable on the ground stated, it goes to the entire plan of public utility service both within and without the municipal boundaries. If the plan is economically unsound for this reason, the objections raised are administrative and legislative, rather than judicial. We have here to consider only that the Constitution and the statutes have conferred the power upon the city and the wisdom of the legislation is not a matter for us to decide.

[4, 5] Amicus curiae advance the point that the constitutional section is not self-executing and that hence the city is without the power to act in the absence of a legislative enabling act. It is then contended that, since certain sections of the Municipal Corporations Act fail to mention bus lines specifically, the city is without power to establish them. Both the premise and the conclusion are erroneous. The Constitution expressly authorizes "any" city to establish and operate public works for "transportation". It expressly author-

izes such city to furnish "such services to inhabitants outside its boundaries". Here is the grant of power. If the legislature should attempt by statutory enactment to deny or withhold that power as to any special class of cities its act would be clearly unconstitutional. If it attempted the same result indirectly by failing to mention the power in some corollary legislation, its act to that extent would have no effect on the constitutional grant. Counsel relies on Oro Electric Corp. v. R. R. Comm., 169 Cal. 466, 147 P. 118 and People v. Willert, 37 Cal. App.2d Supp. 729, 93 P.2d 872, both relating to the third clause of section 19 which covers the subject of the regulation of public utilities owned and operated by private persons or corporations. The cases do not touch upon the portions of the section with which we are concerned and have no relation to the issue before us. Utah Rapid Transit Co. v. Ogden, 89 Utah 546, 58 P. 2d page 1, is also cited. There the section of the Utah constitution involved was a grant to municipalities to confer upon themselves certain powers through the adoption of a municipal charter—similar to sections 6, 8, 11, etc., of article XI of our state Constitution. There is no similarity between the provisions of the Utah constitution and section 19, and the case cited has no bearing on the question presented—it merely held, in harmony with numerous decisions in this and other states, that a municipality may exercise only such functions as may be conferred upon it by the Constitution, its charter, or legislative enactment. Other cases cited by counsel are of like purport, and it would serve no purpose to prolong the discussion because here the power has been expressly conferred on the city by the Constitution.

Counsel for amicus curiae cites numerous authorities from other jurisdictions holding generally that the rendering of public utility service to nonresidents of a municipality is such an unusual thing that it will not be construed to be a proper municipal function unless expressly so declared in specific terms. We may accept the reasoning of the opinions as of the time they were rendered, but our Constitution has made them inapplicable in this jurisdiction by its express delegation of the power.

In harmony with our interpretation of this section of the Constitution, cases holding legislative grants to municipalities to construct, operate, and aid transportation systems beyond the municipal boundaries are Walker v. City of Cincinnati, 21 Ohio St. 14, 8 Am.Rep. 24; Chicago B. & Q. R. R. Co. v. County of Otoe, 16 Wall. 667, 21 L.Ed. 375, 381. It is not necessary to decide what should be the interpretation of the section if the primary service was intended to be for the benefit of nonresidents of the municipality, because the record does not present such a case.

We have heretofore stated that counsel's conclusion that the Municipal Corporations Act did not cover the activities proposed by the petitioner was erroneous. Section 862.-15 of the act, Deering's Gen.Laws No. 5233, reads: "To acquire, own, construct, maintain and operate bus lines, street railways, steam railway spur tracks, telephone and telegraph lines, gas and other works for light, power and heat; public libraries, museums, gymnasiums, parks, and baths * * *." If this legislation adds anything to the constitutional grant to operate public works for "transportation" it must follow as of course that it must be interpreted in the light of the further grant found in the Constitution and that the statutory reference to the operation of "bus lines" must contemplate that such "services" may be furnished to "inhabitants outside its boundaries".

[6] A similar argument is made by respondent in reference to the Municipal Bond Act of 1901, Deering's Gen.Laws No. 5178. It is said that, since the act makes no specific mention of transportation, it must be assumed that the legislature did not intend to confer upon the cities of this class power to issue bonds for that purpose. Section 2 of the act declares that whenever the city authorities determine that the public interest and necessity demands the construction of "any municipal improvement, including bridges, waterworks, * * * or other works, property or structures, necessary or convenient to carry out the objects, purposes and powers of the municipality * * *." the city may order the submission of the proposition of incurring a bonded debt to the electors. We have seen that one of the "powers" of the city is to operate a public bus line. The city has regularly declared that the public interest or necessity demands the acquisition of such a transportation system as "necessary or convenient to carry out" these objects and powers. Again the instrument of "power" springs from the Constitution. The question of necessity or

convenience is for the legislative body of the city to decide. There is no judicial function involved.

[7] The argument is made by amicus curiae that the respondent should not execute the bonds until the city and county of San Francisco has given its consent to the operation of the bus line as proposed by petitioner. It rests on those provisions of section 19 reading: "provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance". The argument is that, since the city and county of San Francisco owns and operates a transportation system within its own limits, the petitioner should not be permitted to operate a competing system over the streets of San Francisco without the latter's consent. The argument is not persuasive. The plan proposed by petitioner, as outlined in the initiating ordinance, is to operate a bus line "between Mill Valley and San Francisco". So far as this record discloses, there has been expressed no intention to operate such service over any street or highway of the city and county of San Francisco. It is possible that all passengers would be deposited at the city limits and there avail themselves of such means of transportation as the city and county of San Francisco might provide. We cannot assume that the petitioner will arbitrarily operate its busses over the streets of San Francisco without the latter's consent, and it would therefore be an assumption contrary to the facts presented by the record if we were to say that the proposed plan of the petitioner contemplated service "to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants".

[8] But a more serious question is whether the point is properly before us for consideration. This is a petition for a writ of mandate to require the respondent to sign and execute the bonds. The writ issues to compel a public officer to perform a duty specially enjoined upon him by law. Code Civ.Proc. § 1085. Where the duty of a public officer is clearly defined by statute and is purely ministerial, no question of discretion arises. It is the statutory duty of the city treasurer to sign and execute municipal bonds which have been legally authorized. It is the duty of the city council to cause them to be issued and sold, and to expend the proceeds. It is not competent for a public official to refuse to perform a duty enjoined upon him by law upon the mere suspicion that his act might enable some other official to breach the duty imposed upon him. Hence, the argument of counsel for amicus curiae (which is found in the argument alone, and not in any pleading) that the city treasurer might believe that the proceeds of the bonds might be unlawfully used by the city council in the operation of a bus line over the streets of San Francisco is a mere suspicion or conjecture that the council might fail to perform its duty. It is no defense to these proceedings.

[9] Some allegations were made by amicus curiae in a petition for intervention which he now states were charges of fraud upon the city officials. Counsel now asks that we state in this opinion that we did not find these allegations insufficient. The petition for intervention was denied upon general grounds without opinion, and it must be deemed to have been denied upon any ground in issue that would support the decision. We cannot say at this time that it was denied upon grounds other than that it failed to plead facts sufficient to entitle the petitioner to the relief prayed for. To do so now would be mere obiter.

Let a peremptory writ of mandate issue as prayed.

We concur: STURTEVANT, J.; SPENCE, J.

FLAHERTY v. STATE BAR.

S. F. 16416.

Supreme Court of California.

Nov. 4, 1940.

Rehearing Denied Dec. 2, 1940.

Attorney and client ⚿58

Evidence warranted conclusion that attorney, who was engaged in securities business, assumed a "fiduciary relationship" toward owner of a claim as result of agreement whereby claim was intrusted to attorney for sale, and that attorney, in converting claim to his own use, committed a breach of attorney's trust obligation to owner, and justified suspending attorney from practice for one year. Code Civ.Proc. § 287, subds. 2, 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Fiduciary Relationship".

In Bank.

Proceeding by James G. Flaherty against the State Bar of California to review a decision of the Board of Governors of the State Bar of California recommending that petitioner be suspended from the practice of law for a period of one year.

Petitioner suspended for one year.

Morgan J. Doyle, of San Francisco, for petitioner.

Claude Minard, of San Francisco, for respondent.

PER CURIAM.

This proceeding was instituted before local administrative committee No. 4 of The State Bar of California, for the city and county of San Francisco. Petitioner was charged with the conversion of claim No. 3310 in the principal amount of $6,359.68 against the California Mutual Building and Loan Association owned by one R. E. Pitcher. The local administrative committee found that petitioner converted said claim to his own use and recommended that he be suspended from the practice of law for a period of six months. The board of governors of The State Bar of California adopted the findings of the local administrative committee but recommended that petitioner be suspended for a period of one year.

The following is a summary of the facts appearing in the record as found by the local administrative committee. Petitioner was admitted to practice law in California on November 15, 1932. For a number of years prior thereto, and at the time of his admission to practice, petitioner had been engaged in the unlisted securities business in San Francisco. He continued to operate his securities business for several years after his admission to practice until March of 1936, when he was adjudged a bankrupt. The alleged conversion occurred on April 2, 1935. Petitioner was not actively engaged in the practice of law during the period from 1932 to 1936, but was identified as an attorney at law by appropriate listing in the San Francisco Telephone Directory and by the appearance of his name on the door of law offices maintained by an attorney having offices in the same building directly opposite the offices used by the petitioner in connection with his securities business. Petitioner devoted all of his time from 1932 to 1936 to the operation of his securities business and referred matters of a legal nature about which he was consulted at various times to the attorney with whom he had a law office association.

In April of 1935, R. E. Pitcher was the owner of claim No. 3310 in the principal amount of $6,359.68 against the California Mutual Building and Loan Association, then in the process of liquidation under the supervision of the building and loan commissioner of the state of California. Shortly prior to April 2, 1935, Pitcher had received a printed notice of petitioner's facilities for the collection or sale of claims against insolvent building and loan associations, and on said last-mentioned date Pitcher called on petitioner to discuss the sale of his said claim. Pitcher informed petitioner that he desired to sell his claim for fifty cents on the dollar and agreed to leave the claim with petitioner for a period of two or three weeks subject to the understanding that if petitioner was unable to dispose of it within that time at the price stated, it would be returned to Pitcher. Petitioner agreed to accept Pitcher's claim in accordance with the foregoing understanding and said claim was thereupon delivered to petitioner who gave Pitcher a form of receipt which stated that said claim was "to be sold at fifty cents on the dollar and proceeds accounted for".

At the same time Pitcher executed an assignment of his interest in the claim to petitioner and also a second assignment similar in form, with the exception that the name of the assignee was left blank.

On the same date that Pitcher delivered said claim to petitioner, the latter, without the knowledge or consent of Pitcher, and contrary to the instructions given to and accepted by the petitioner, transferred the claim into his name on the records of the Oakland office of the building and loan commissioner, and thereupon, without the knowledge or consent of Pitcher, converted said claim to his own use by applying the full face value thereof, together with other similar claims in varying amounts, in payment of the purchase price of two parcels of real property which were included in the assets of the insolvent California Mutual Building and Loan Association.

During a period of several months subsequent to April 2, 1935, Pitcher made numerous visits and telephone calls at the office of petitioner to ascertain when his claim would be sold and the proceeds paid to him. At no time on the occasion of these inquiries did petitioner inform Pitcher that he had converted the claim to his own use, but, on the contrary, misrepresented to Pitcher, and to a man named Murphy, who shared an interest in the claim with Pitcher, that he was negotiating for its sale. On one occasion when Pitcher demanded the return of his claim petitioner explained that it was in San Jose and that he would arrange its return on the following day.

On May 7, 1935, petitioner paid Pitcher the sum of $500 and promised to pay the balance in full as soon as the claim had been sold. On September 25, 1935, Pitcher, having failed to collect the balance due or obtain the return of his claim, refunded the $500 payment to petitioner in the form of a cashier's check and demanded the return of his claim.

In the latter part of 1935, the exact date being in dispute, when Pitcher questioned petitioner about his claim and explained that he was leaving San Francisco, petitioner agreed to deposit the proceeds of the sale of the claim in Pitcher's bank account. Petitioner wrote on the receipt dated April 2, 1935, the notation, "Proceeds, if sold, to be deposited in Crocker's First National Bank, San Francisco".

On December 30, 1935, petitioner paid to Pitcher the sum of $317.98 representing a 5 per cent liquidating dividend issued and paid about that time to those holding outstanding claims against the insolvent California Mutual Building and Loan Association and representing the dividend which would have been paid to Pitcher if his claim had not been prevoiusly liquidated by the petitioner. It was about the time of this payment that Pitcher first learned that his claim had been used by petitioner in connection with certain real estate transactions between petitioner and the office of the building and loan commissioner.

On April 17, 1937, a second payment of $317.98 representing a similar five per cent liquidating dividend was made to Pitcher by petitioner after Pitcher had engaged an attorney and cited petitioner to appear before the bond and warrant clerk's office in San Francisco to show cause why a warrant should not be issued for his arrest. In addition to this second payment, petitioner promised at that time to pay the agreed value of the claim in instalments and no warrant was issued.

In the meantime, and in March of 1936, petitioner discontinued the operation of his securities business and was adjudged a bankrupt. Pitcher filed no appearance in the bankruptcy proceeding and when no payment other than the two checks, each in the amount of $317.98 were received from petitioner, Pitcher, in March of 1938, presented the matter to the San Francisco grand jury, but no indictment was returned.

There is a direct conflict in the testimony of Pitcher and that of the petitioner regarding the agreement entered into between the parties on April 2, 1935, when the claim was deposited with petitioner and the two forms of assignment were executed by Pitcher. Pitcher testified that the claim was to be sold by petitioner within two or three weeks at fifty cents on the dollar and if this could not be accomplished, that the claim would be returned to him. Petitioner testified that on April 2, 1935, the California Mutual Building and Loan Association claims were selling on the market at forty-five cents on the dollar; that Pitcher wanted fifty cents, and in consideration of this possible five-point advantage, he agreed to permit petitioner to use the claim for his personal purposes subject to the understanding that if the market reached fifty cents he would be paid that price for his claim, and if not, that a similar claim of like value would be returned to him. The local administrative committee resolved this conflict in the evidence against petitioner.

The record in this proceeding discloses that petitioner was suspended from the practice of law in California for a period of three months on June 2, 1938, by an order of this court upon recommendation by the board of governors of The State Bar of California for misconduct committed in February of 1936, arising out of the filing with the commissioner of corporations of California a false report in connection with his securities business. No petition for a review of said disciplinary proceeding was filed by petitioner in this court, and the formal order of suspension of petitioner for a period of three months was made by this court at that time upon the recommendation of the board of governors of The State Bar of California.

In submitting their recommendation for disciplinary action in this matter, both the local administrative committee and the board of governors state that they considered the record of petitioner as a member of The State Bar including the disciplinary proceeding above mentioned, and that the violations in both proceedings were committed while petitioner was engaged in the unlisted securities business and not while acting as an attorney and counselor at law.

The observation is made in the report of the local administrative committee that while this latter fact does not lessen the seriousness of petitioner's acts in either of the two proceedings, it is a circumstance that should be noted in determining the extent of the discipline to be recommended in this proceeding. Said committee also stated that it had considered the testimony of petitioner to the effect that many thousands of transactions cleared through his office while engaged in the unlisted securities business, since his admission to practice law, and that only two charges of wrongful conduct against petitioner had been reported to the office of The State Bar.

Petitioner contends that the evidence produced before the local administrative committee is insufficient to support the findings of fact adopted by said committee and approved by the board of governors and that the conclusion of the board of governors based upon the findings of the local administrative committee approved and adopted by said board, that the conduct of petitioner involved a breach of trust, is both contrary to the evidence and contrary to law.

After a careful review of the entire record in this case we are forced to the conclusion that the findings of fact of the local administrative committee are amply supported by the evidence. It seems to us more consonant with rational conduct, that Pitcher would have delivered his claim to petitioner for sale at fifty cents on the dollar if and when that price could be obtained, and with the understanding that as soon as the purchase price was received for said claim, the same would be paid to Pitcher, than that Pitcher, who was a total stranger to petitioner should authorize petitioner to use said claim in connection with the real estate transaction in which Pitcher was in no wise interested without any definite arrangement as to when Pitcher would receive the amount which he was demanding for said claim. It was obviously no advantage to Pitcher to permit petitioner to use his claim in connection with the real estate transaction, as petitioner, according to his own testimony, had not agreed to pay Pitcher any additional sum for the right to use said claim in connection with said transaction. If petitioner was telling the truth, Pitcher authorized him to use his claim in connection with the real estate transaction in which Pitcher was not interested, with the understanding that if and when the market price of said claim reached fifty cents on the dollar, petitioner would pay Pitcher the value of said claim in cash on that basis, and in the event that the market price of said claim did not reach fifty cents on the dollar, petitioner would return to Pitcher a claim or claims of the same value as the claim which Pitcher delivered to petitioner.

Regardless of the slight inaccuracies in the testimony of Pitcher and the witness Murphy, which we do not think affected their credibility as witnesses, their testimony relating to the nature of the transaction with petitioner and his conduct up to the time of the institution of this proceeding, appears to us to be convincing, and we think that the members of the local administrative committee were clearly justified in arriving at the conclusion expressed in their findings of fact which were approved and adopted by the board of governors.

We agree with the conclusion reached by the local administrative committee and the board of governors that petitioner assumed a fiduciary relationship toward Pitcher as a result of the agreement of April 2, 1935; that in converting the property of Pitcher to his own use, and in misrepresenting the true facts regarding the disposition of said claim, petitioner committed a flagrant breach of his trust obligation to Pitcher and a violation of his oath and duties as an attorney and counselor at law within the meaning of subdivisions 2 and 5 of section 287 of the Code of Civil Procedure of the state of California, as provided by said section at the time of the filing and service of the order to show cause in this proceeding, and we are of the opinion that the discipline recommended by the board of governors to be imposed upon petitioner for such misconduct is less severe than is warranted by the facts and circumstances in connection with this case. However, we are not disposed to override the recommendation of the board of governors, and the order in this case is, that petitioner shall be, and he is, hereby suspended from the practice of law in the state of California for a period of one year, said suspension to take effect at the expiration of thirty days from the filing of this decision.

16 Cal.2d 436

KYNE v. KYNE et al.

S. F. 16402.

Supreme Court of California.

Oct. 28, 1940.

Rehearing Denied Nov. 25, 1940.

1. Gaming 🔑23

The court will not recognize a betting contract and will not aid the parties thereto, but will leave them where it finds them.

2. Gaming 🔑5

Wagering agreements, consisting of election bets placed with a betting commissioner who was a party to the agreements as well as stakeholder and who charged commission on all stakes, were "illegal contracts" which would not be recognized by the courts and as to which the courts would not aid the parties thereto. Pen.Code, §§ 337a, 659; St.1939, p. 310, § 11504.

See Words and Phrases, Permanent Edition for all other definitions of "Illegal Contracts".

3. Gaming 🔑23

The general rule that courts will not recognize betting contracts and will not aid the parties thereto is applicable where a party seeking relief must rely upon the illegal contract even though his alleged rights are sought as against a third party.

4. Gaming 🔑23

The defense of illegality of betting contracts is open to the parties to the contract and to those claiming under them.

5. Gaming 🔑29

In proceeding on writ of execution levied on moneys in the hands of a betting commissioner which purportedly comprised moneys wagered by bettors with commissioner on outcome of an election and which were to be used to pay wagers after deduction of commissions charged by commissioner, wherein the winning bettors filed third-party claims, judgment creditor stood in the position of the commissioner and was claiming under him and might resist the claims of the bettors to the moneys on any ground of illegality that the commissioner might have urged. Pen.Code, §§ 337a, 659; St.1939, p. 310, § 11504; Code Civ.Proc. § 689.

6. Execution 🔑194(1)

In proceeding on execution levied against funds in hands of a betting commissioner, which purportedly comprised moneys wagered on outcome of an election, claimants who filed third-party claims based on wagers which had been placed with the commissioner and had been won by the claimants had burden of proving that their claims to the moneys were superior to the claim of the commissioner. Code Civ.Proc. § 689.

7. Gaming 🔑29

Where execution was levied on moneys in hands of a betting commissioner, which purportedly comprised moneys wagered on outcome of an election, claimants who were winners of the election bets, and who filed third-party claims to the moneys, could not enforce their claims, since in order to sustain burden of proving their claims to be superior to any claim that the commissioner might have to the money, they would be required to rely upon the wagering agreements. Pen.Code, §§ 337a, 659; St.1939, p. 310, § 11504; Code Civ.Proc. § 689.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Proceeding by Tom Kyne, Jr., a minor, by and through Ruth Filipello, his guardian ad litem, against Tom Kyne on a writ of execution levied on moneys of the defendant, wherein R. M. Wilson and others filed third-party claims. From a judgment for the third-party claimants, the plaintiff appeals.

Reversed, with directions.

Prior opinion, 98 P.2d 738.

Rehearing denied; HOUSER, J., dissenting.

Philander B. Beadle, Allen Spivock, and Samuel Hauser, all of San Francisco, for appellant.

John J. Taheny, of San Francisco, for third-party claimants and respondents.

Laurenz J. Kreuger, of San Francisco, for respondent Tom Kyne.

SHENK, Justice.

Tom Kyne, Jr., aged three years, recovered a money judgment against defendant Tom Kyne in the sum of $7,702.87 in an action to establish paternity and for support. On November 10, 1938, execution was levied upon coins and currency to the amount of $10,000 in the possession of said defendant. The sheriff retained sufficient of this money to satisfy the plaintiff's claim. R. M. Wilson, Julius Wild and Earl Eby filed third party claims to said money totaling $7,695. The plaintiff filed a petition for a hearing to determine title to the property levied upon. After hearing, the court entered judgment for the third party claimants. The plaintiff appealed from the judgment. The third party claimants will be referred to as the respondents.

The claims of the respondents arose out of the following facts: The defendant was and had been for many years a self-styled "betting commissioner". He maintained a place of business for the purpose of accepting wagers on the happening of events. He accepted bets made, received the stakes risked, and issued receipts stating the terms of the wagers. His method was, if possible, to cover wagers by making offsetting wagering agreements with other bettors. His remuneration was a commission of five per cent charged on all deposits or stakes.

On November 8, 1938, a general election was held in California. On or prior to that date each of the respondents had made certain wagers with the defendant as to the outcome of the voting for gubernatorial and senatorial candidates. The vote cast for such candidates determined that Wild, who had staked $1,500, won $1,500. He claimed $3,000 of the money taken under execution levy by the sheriff. Eby staked $790 and won $790, making his claim $1,580. Wilson staked $1,650 and won $1,465, a total of $3,115.

On November 10, 1938, the defendant Kyne took a valise containing $10,000 in coins and currency to his place of business. This purportedly comprised all the moneys wagered by various bettors on the outcome of the election and was to be used to pay the winners after deducting the 5 per cent commission. The sheriff under the levy took $7,702.87 of this money. The balance was sufficient for and was used by the defendant to pay off other winners, but without retaining any commissions. The only persons placing bets on said election with the defendant who were not paid their winnings were the respondents herein. The court adjudged that $500 of said sum of $7,702.87, representing 5 per cent on the total deposits of $10,000, belonged to the defendant Tom Kyne, and that each of the respondents was entitled to the total amount of his claim, namely, his stake and his winnings, less a proportionate amount of the $500 commission.

The appeal presents the question whether, in the proceeding to determine title, they whose claims of title rested upon the successful outcome of an unlawful wagering agreement may recover the amount wagered and the winnings, or either of them, from the sheriff who has seized the stakes and the winnings from the stakeholder on behalf of a judgment creditor of the person with whom the unlawful wager was made. The record shows and the question assumes that the defendant from whom the money was seized was both the stakeholder and the other betting party to the unlawful agreement.

[1] The general rule is that the courts will not recognize such an illegal contract and will not aid the parties thereto, but will leave them where it finds them. This rule has been rigidly enforced in this state to deny any relief in the courts to parties seeking to recover either their stakes or their winnings under a wagering contract which is in violation of law,

whether the party against whom the relief was sought was a party to the wager or a stakeholder for the parties to the wager. Johnston v. Russell, 37 Cal. 670; Gridley v. Dorn, 57 Cal. 78, 40 Am.Rep. 110; Schenck v. Hirshfeld, 22 Cal.App. 709, 136 P. 725; Matthews v. Lopus, 24 Cal.App. 63, 140 P. 306; 6 Cal.Jur., p. 150; see, also, 13 Cor.Jur., p. 492; 17 Cor.Jur.Secundum, Contracts, § 272, p. 656, and cases cited.

[2, 3] The wagering agreements here involved were illegal contracts to which the rule will apply. Pen.Code, secs. 337a, 659; sec. 11504, Elections Code St.1939, p. 310, formerly sec. 60, Pen.Code. The respondents do not dispute the rule nor the illegality of the wagering agreements. They contend that the rule is inapplicable, when a third party steps in and the recovery is sought against such third party; that the judgment is supported by the application of the exception to the rule, namely, that a third person, not a party to the illegal contract, may not invoke the defense of illegality, and that the plaintiff or the sheriff was a third party as to whom the defense was properly denied by the trial court. The plaintiff relies on the well-settled extension of the general rule to cases where the party seeking relief must rely upon the illegal contract even though his alleged rights are sought as against a third party.

[4] The respondents assert that it was not necessary, in order to prove their title to the money, to place any reliance upon the wagering agreements; that it was necessary to show only that they deposited certain money with the defendant to be applied for their account, and that the defendant conceded that he held the money for their account. The controversy, however, is not between the defendant and the respondents as claimants, but is between the latter and the plaintiff. The authorities stating the general rule observe that the defense of illegality is open to the parties to the contract and to those claiming under them. See 13 Cor.Jur., p. 508, § 458, 17 C.J.S., Contracts, § 283.

[5] In the present contest the plaintiff, a judgment creditor of the defendant, stands in the defendant's shoes, is a person claiming under the defendant, and therefore may resist the claims of the respondents to the money possessed by the defendant on any ground of illegality that the defendant might have urged. The defendant, under the general rule adopted in this state, could have urged illegality of the contracts here involved. None of the cases relied upon by the respondents is controlling. They are cases (see Catts v. Phalen, 2 How. 376, 43 U.S. 376, 11 L.Ed. 306; Kearney v. Webb, 278 Ill. 17, 115 N.E. 844, 3 A.L.R. 1631; Re Brown, 147 Kan. 395, 76 P.2d 857, 116 A.L.R., p. 1012; Matta v. Katsoulas, 192 Wis. 212, 212 N.W. 261, 50 A.L.R. 291, and cases cited in note, p. 293 et seq. See, also, 27 Cor.Jur., p. 1079, sec. 343), which involve acts of fraud perpetrated by an agent or fiduciary as to which he will be held accountable, or the deposit of moneys with an agent to be used for gambling purposes but which were not so used, or the deposit of property won by one party to an illegal contract with a third person for delivery to the other party to the illegal contract. For example, a bank will not be permitted to invoke the illegality of a contract between two individuals and thereby retain money which was the fruit of the illegal transaction and which was deposited by one of them for the account of the other. Roselle v. Beckemeir, 134 Mo. 380, 35 S.W. 1132. The present is not such a case. Neither the plaintiff nor the defendant was a bailee within the meaning of the exception and the authorities relied upon by the respondents. The defendant, either as a bettor or a stakeholder, was a party to the illegal contracts, and as such was in no different position than the respondents. That is, the court will not lend its aid to extricate him or the respondents from the position in which they find themselves, but will leave both parties where it finds them.

The respondents quote section 524 of the Restatement of the Law of Contracts, as follows: "Where money is deposited with a stakeholder by parties to a wager, either party can recover the money deposited by him even after the happening of the condition upon which it was agreed that the money should be paid to the other party. Under no circumstances can either party recover more from the stakeholder; and the stakeholder is discharged from all duty if he pays the winner of a wager before receiving notice of repudiation thereof by the loser." The "pocket supplement" to the Restatement containing the California annotations shows by citation of the decisions hereinabove referred to that that statement is not the rule adopted in this state. Furthermore, the statement is confined to facts different from the facts here shown, inasmuch as the defendant was both a stakeholder and a party to the wagering agreements.

[6, 7] In the proceeding before the trial court the burden was upon the respondents, third party claimants, to prove that their claims to the money were superior to the defendant's claim. Sec. 689, Code Civ.Proc. This they could not do without reliance upon the wagering agreements. That being the case, the respondents were not entitled to prevail and the court was required to leave the parties where it found them. Berka v. Woodward, 125 Cal. 119, 127, 57 P. 777, 45 L.R.A. 420, 73 Am.St.Rep. 31; Butler v. Agnew, 9 Cal.App. 327, 332, 99 P. 395.

The foregoing considerations dispose of all the contentions on the appeal. The judgment is reversed with directions to the trial court to enter judgment denying any relief to the third party claimants.

We concur: GIBSON, C. J.; EDMONDS, J.; CARTER, J.; CURTIS, J.; MOORE, Justice pro tem.; YORK, Justice pro tem.

GARVEY et al. v. BYRAM, Tax Collector of Los Angeles County. *

Civ. 12866.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1940.

Hearing Granted Dec. 26, 1940.

1. Taxation 🔑679(5)

The statutes authorizing public auction of land acquired for tax delinquency were intended as a declaration of public policy and to promote the public welfare rather than to aid a delinquent tax debtor to evade his duty of paying or redeeming. Pol.Code, §§ 3834.20–3834.25, as added by St.1939, pp. 1918, 1920.

2. Evidence 🔑60

In determining validity and effect of statutes authorizing public auction of lands acquired for tax delinquency, court must presume that former owner will be honest rather than dishonest, will redeem if possible, and will pay taxes if he has the money. Pol.Code, §§ 3834.20–3834.25, as added by St.1939, pp. 1918, 1920; Code Civ.Proc. § 1963, subds. 4, 20.

3. Taxation 🔑784

Though deed from state to purchaser of tax title, if valid, wipes out all liens, equity will protect a lienor who, in good faith, has loaned money to tax debtor.

4. States 🔑119
Taxation 🔑49

The statutes authorizing sale at public auction of lands acquired for tax delinquency are not unconstitutional as making a "gift" to individual by permitting former owner to buy, and do not violate constitutional provision requiring all property to be taxed in proportion to its value. Pol. Code, § 3771, and §§ 3834.20–3834.25, as added by St.1939, pp. 1918, 1920; Const. art. 4, § 31; art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

5. Taxation 🔑679(6), 784

Under statute directing tax collector to sell property held under tax deeds to the highest bidder so long as bid is not less than minimum price fixed, record owner may bid and purchase, and upon his receiving a deed from the state, his land is cleared of all tax liens. Pol.Code, § 3771, and §§ 3834, 3834.20–3834.25, as added by St.1939, pp. 1918, 1920.

◆

Petition by Richard Garvey, Jr., and the County of Los Angeles, for writ of mandate against H. L. Byram, Tax Collector, Collector of the County of Los Angeles, to require issuance of deed to property purchased by petitioner Garvey. On respondent's demurrer.

Peremptory writ granted.

J. H. O'Connor, Co. Counsel, A. Curtis Smith, Deputy Co. Counsel, and Richard Garvey, Jr., in pro. per., all of Los Angeles, for petitioners.

Landels, Weigel & Crocker, of San Francisco, and Walter S. Home, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent files his general demurrer to the original pleading of petitioner who seeks a writ of mandate to require respondent to issue a deed to certain property purchased by petitioner Garvey. In substance, it is alleged that Garvey was at all times since the first Monday of March, 1933, the owner of and in possession of a small parcel of land, about one-sixth of an acre, situated in Los Angeles county, hereinafter referred to as the Garvey lot, free and clear of all encumbrances except the lien for taxes and the deed issued to the state of California hereinafter mentioned.

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* Subsequent opinion 115 P.2d 501.

On September 1, 1933, the board of supervisors fixed the rate for county taxes, which, when applied to said Garvey lot and extended on the roll, amounted to $2.91. Said sum having been assessed against Garvey and his lot, and having remained unpaid, the lot was "sold to the state" on June 30, 1934, pursuant to section 3771 of the Political Code. Subsequent to the sale to the state, taxes were levied for succeeding fiscal years, including 1938–1939, which when applied to said lot and extended upon the roll amounted in the aggregate of $17.20 exclusive of penalties, interests and costs, no part of which was ever paid.

Thereafter, on the first day of July, 1939, the owner not having redeemed, the property was deeded to the state, for the amount of all taxes, penalties and costs, for which the lot was sold to the state at the tax sale on June 30, 1934.

On February 26, 1940, respondent notified the board of supervisors in writing of his intention to sell the lot pursuant to the provisions of new sections 3834.20 to 3834.25 of the Political Code, St.1939, p. 1920. The notice contained a description of the lot and the minimum price of $10 for which it was to be offered. On the following day, the board, by resolution, approved the proposed sale and transmitted a certified copy of the resolution to the tax collector within five days after its action. Further, in pursuance of said statutes, on March 5, 1940, respondent forwarded a copy of the resolution to the state controller for his authorization. On the 6th day of March, the controller authorized the sale and pursuant thereto and in compliance with section 3834 of the Political Code, St.1939, p. 1918, the tax collector gave written notice of the intended sale. At that time no other taxing agencies had levied taxes or assessments upon said lot. At the time and place fixed in the notice of sale, the lot was offered for sale at public auction. Petitioner Garvey offered the sum of $18, the highest bid made, which exceeded the minimum price proposed and approved by the tax collector, the board of supervisors and the state controller, although it was less than the amount of all delinquent taxes. Following the sale, respondent refused to execute a deed to Garvey on the ground that the new sections (Pol.Code, 3834.20 et seq.) do not contemplate the purchase of lands acquired by the state as the result of a tax sale, by a person who was the record owner at the time the delinquent taxes involved became a lien upon the land and he continued as the "record" owner and in possession at all times thereafter. He contended then, as he does now in support of his demurrer, that to permit the sale to Garvey would violate public policy, also would violate article IV, section 31, and article XIII, section 1 of the Constitution.

Respondent has continued in his refusal to deliver such deed to Garvey after demands made upon him by petitioners. Other appropriate facts are alleged to warrant an original consideration by this court of the issues presented.

[1] Respondent contends that a literal construction of section 3834.25 of the Political Code is contrary to public policy. That section is as follows: "If the property is not redeemed before the sale, the tax collector shall sell the property at public auction to the highest bidder at the time and place fixed in the notice of intended sale; but no bid shall be accepted for a sum less than the minimum price fixed in the resolution of the board of supervisors." Added by Stats. 1939, ch. 529, pp. 1917, 1920, sec. 2. He argues that the consequences to flow from such literal construction would not serve the public welfare; that the issuance of the writ would tend to discourage the payment of taxes, put a premium on tax delinquencies and discourage redemption; and that by reason of the too frequently defective tax titles, strangers are discouraged from purchasing at tax sales and for that reason owners attend with greater assurance that their properties will be "sold" to them while strangers stand in doubt. But at the time of enacting the new sections, section 3817 had for many years been a part of the Political Code and it was the only method whereby an owner could directly procure a release of his lands from the lien of de-

linquent taxes. The degree of success or failure of the entire scheme of taxation and tax collection was familiar to the legislature in 1939 when the new sections were added to allow the record owner of tax deeded land to bid for and to purchase such land at an auction sale by the state. It follows that the enacting of the new sections must perforce have been purposed as a declaration of public policy and to promote the public welfare rather than to aid a delinquent tax debtor to evade his duty of paying or redeeming.

Because the new statutes might assauge the asperities of tax lien foreclosures, the public interest was none the less served. At the time of the enactment of the new sections the entire world had witnessed an economic collapse. After October, 1929, the entire nation suffered from an extraordinary financial depression. Income was reduced by more than 40 per cent and realty values suffered amazing diminution. Not only did the cost of government continue but taxes were levied to furnish relief to the less fortunate. In this calamitous situation, literally thousands of land owners found themselves unable to meet their obligations to the numerous tax levying entities. As a consequence of this economic convulsion and depression, there are now about 100,000 parcels of realty in Los Angeles county alone that have been deeded to the state for delinquent taxes. In the entire state, 2,500,000 acres and 300,000 parcels passed to the state upon default in payments of accrued taxes. This condition precipitated another. Not only did the various tax-levying entities fail to collect the delinquent taxes, but, because those parcels vested in the state ceased to be revenue producing, other lands had to be taxed more to raise required revenue. This, of course, increased the burdens of government for such other owners.

Also, as long as tax deeded properties continue to be held by the state they remain unimproved. This retards the development of communities where lie these tax deeded lands, making them a two-fold liability. Hence, it is clearly to be seen that a restoration of all lands held by the state for delinquent taxes to the active tax rolls is a "consummation devoutly to be wished" for such would without doubt multiply state revenues from land tax levies.

[2] The argument made by respondent that strangers will hesitate while owners will purchase at tax sales with greater assurance is predicated upon the assumption that the owner will be dishonest; that he will prefer to take his chances at a sale rather than to enjoy the certainty of redemption prior to a sale, which can be done pursuant to section 3817 of the Political Code by paying all taxes, interest, penalties and costs. Young v. Patterson, 9 Cal. App. 469, 99 P. 552. We cannot act upon such assumption. We must presume that a landowner will be honest rather than dishonest; that he will meet his obligations rather than default; that if financially able, he will avoid the accumulation of penalties and interest, and minimize the chances of losing his lands at a sale by the state, which can be done by a redemption. The presumption is that he will pay taxes on his land if he has the money.

Since the expiration of moratory statutes (Stats.1939, ch. 154, § 3817d of the Political Code) the ease of selling these tax deeded lands to the "owner" or permitting him to redeem by the route of repurchasing will be increased. Because of his faith in or attachment to the deeded land, and because his purchase from the state would secure his title against attack the "owner" is the most readily available market. While he has already appraised the land and would probably improve it, the public would be slow to buy and tardy to develop lands purchased suddenly from the state in view of the traditionally defective tax titles. The enormous list of deeded lands held by the state has resulted largely from the moratory statutes of §§ 3817b to 3817b5, Political Code. To restore them to the tax rolls will tend to reduce taxes for others. The hardship imposed upon other taxpayers by allowing an owner to redeem his land by a "purchase" at the sale under the new sections, as presented by State v. Graham, 17 Neb. 43, 22 N.W. 114, is more apparent than real. The delinquencies of some taxpayers has been an ever-present evil since the founding of the state.

Section 3817 allows redemption at any time before sale by the state. The fact that, in the past, tax debtors defaulted one, two, three or four years and could redeem by paying some penalties and interest, with the unpaid taxes, did not avoid hardship upon the state and the people. Such custom and the statute providing for it were not deemed to be violative of public welfare. Because a new method was devised to meet a crisis does not alter the quality of relief accorded by the old redemption statute (sec. 3817). If, under the new sections, the owner can clear his title of tax liens, by paying less than all accrued taxes he does so by paying at least the price fixed by the board of supervisors and the tax collector, with the approval of the state controller. We see no difference in character between the new sections and the moratory statutes that for six years allowed taxes to remain unpaid without penalty. In either case, the individual received a special benefit from the state. In both cases the public weal is promoted by conferring such special benefit.

[3] Prior to the enactment of the new sections, an owner was not permitted to purchase his land from the state or from the state's vendee to the detriment of junior lienors. Kelsey v. Abbott, 13 Cal. 609; Moss v. Shear, 25 Cal. 38, 85 Am.Dec. 94; McMinn v. Whelan, 27 Cal. 300; Coppinger v. Rice, 33 Cal. 408; Bernal v. Lynch, 36 Cal. 135; Barrett v. Amerein, 36 Cal. 322; Garwood v. Hastings, 38 Cal. 216; Reily v. Lancaster, 39 Cal. 354. "It is well settled that one who is under a moral or legal obligation to pay the taxes is not in a position to become a purchaser at a sale made for such taxes. If such person permits the property to be sold for taxes, and buys it in, either in person or indirectly through the agency of another, he does not thereby acquire any right or title to the property, but his purchase is deemed one mode of paying the taxes." Christy v. Fisher, 58 Cal. 256, at page 258. Blackwell on Tax Titles, 4th Edition, page 443, thus declared the rule formerly prevailing: "Any person who owes a positive duty to the state to pay the taxes on a particular tract of land cannot become a purchaser at a sale of the property for such taxes; or, if he does in form buy at such sale, he does not thereby acquire any right or title to the property better or stronger than what he had before, but his purchase is deemed merely a mode of paying the taxes, and leaves the title in precisely the position it would have occupied if the payment had been made before, instead of after, the land was put up for sale. This rule rests on such obvious principles as to require no justification." But even then, a "delinquent" was not wholly forbidden to purchase from the state. In McMinn v. Whelan, supra, it was held that purchase by the owner would only amount to the payment of the tax which it was his duty to have paid. Such is substantially the holding of all the cited cases whose primary aim was to protect the mortgagee against the stealthy purchase from the state by the tax-debtor-mortgagor. The new sections contain no provision whereby the private incumbrance is to be imperiled. If Garvey had mortgaged his lot to John Doe prior to the purchase from the state the mortgage would have all the validity and effect after delivery of the deed to Garvey as before. While it is the rule that a deed from the state to a purchaser of the tax title, if valid, wipes out all liens (Griggs v. Hartzoke, concurring opinion, 13 Cal.App. 429, 434, 109 P. 1104), yet it is also true that equity will protect a lienor who, in good faith, has loaned his money to the tax debtor.

Under the administration of the new sections, the owner may enjoy an easy way out of the tax lien; but his burdens are not otherwise lightened. The aim of the legislature was that the delinquent relieved of the unpaid taxes would, under an improved public economy, develop his land and pay future levies. The new sections were added to meet an unusual condition which had become chronic. There is nothing in the new sections essentially contradictory of section 3817 which provides the mode of redemption. The latter is more advantageous. In the one case, he is certain of retaining his title, while in the other he may lose it to a stranger. As a redemptioner he must pay the taxes originally assessed against him with approval of the board of supervisors; as a purchaser, he must, in competition with other bidders, pay no less than a minimum price fixed by that board in the light of six years' developments. He may pay even much more than the cost of redemption would have been. If, at the sale, he is able to "buy" his land from the state, we must presume that he has gained wealth rather than that he has waited for the legislature to enact a statute whereby he can "evade" his taxes. After he has re-established his title by the purchase, we must presume that he will act as an ordinarily prudent and honest man (Code Civ.Proc., sec. 1963, subd. 4; subd. 20) that he will pay debts that are liens upon his lands; that he will avoid penalties, costs and interest; and that he will not run the risk of forfeiture by allowing his land to be sold at auction to the highest bidder. Thus, we conclude that the new sections do not contravene the public policy of this state as expressed in older decisions but rather are they the result of a wise and thoughtful judgment of the legislature in meeting a crisis in public economy. To whatever extent the taxes of Garvey were "remitted" by his purchase from the state, it must be held that the legislature calculated greater benefits to the commonwealth.

[4] Petitioners contend that the new sections are repugnant to the Constitution. Art. IV, sec. 31, and art. XIII, sec. 1. Article IV restricts the legislature from making "any gift or authorizing any public money" to any individual. But the new sections do not make a gift of anything. The state has by foreclosure acquired title to Garvey's land. It must sell it. The proper agencies have fixed a minimum price upon it. Some one must pay that price or more. Garvey paid more. If the state takes less than Garvey's bid, the public treasury will be deprived of the difference. If a stranger bid less than Garvey, it was Garvey who made a gift of his excess and not the state which made a gift to Garvey. In the state's possession, the land is worthless; in Garvey's possession, the land may be developed thereby increasing the taxes upon it and upon neighboring lands as well, another "gift" from Garvey to the state.

Respondent quotes the Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788, as authority that the state made a gift to Garvey by selling the lot for less than the cost of redemption. The case is not in point. There the state had by law become entitled to the payment of a specific sum as an inheritance tax upon the estate of decedent. The state's right to receive from Leland Stanford's estate the amount of inheritance taxes vested promptly upon the decease of Mr. Stanford. The money was not immediately paid to the treasurer. More than a year after the entry of the order to pay the taxes, the legislature amended the inheritance tax statute, which amendment was specifically intended to exempt certain heirs and the university from the obligation to pay the taxes theretofore ordered by the court. That amendment was held to be discriminatory, retroactive and violative of said section 31 of article IV. But the new sections present an entirely different question. They add to the power of the state to get money from a delinquent tax debtor if more money cannot be had from one who is a stranger to the tax title.

A consideration of section 1 of article XIII discloses that this section, likewise, is not violated by the new sections. The principle embodied in section 1 is familiar to all taxation schemes. Every state aims at assessing taxes against every citizen on a common basis, not to "make fish of one and fowl of another". It is the aim of both the states of the union and the federal government to levy uniform taxes upon the people. But, notwithstanding the universal purpose to exact of all citizens the same toll in proportion to the values of their properties and the amounts of their incomes, it is a fact of universal cognizance that the practical administration of the tax gathering power in some cases is thwarted in its attempt to apply the law with uniformity. When legal actions were instituted under the old statute (Stats.1895, p. 339) to collect in personam, often did the state receive far less than the demand and sometimes nothing. It was not contended then that the failure to collect the total due violated the clause requiring proportionate taxation. Of course, neither was a legislature then or now empowered to remit a tax that had been levied, as exemplified in the case of Wilson v. Supervisors, 47 Cal. 91. Neither then nor now was counsel for the tax collector authorized to accept less than the amount of levy as illustrated by the County of Sacramento v. Central Pacific R. Co., 61 Cal. 250. The right to the tax money having vested, no agency or department of the state was empowered to alienate that right. But with this constitutional safeguard thus supported by the Supreme Court, it frequently occurs that tax collections fail, lands are forfeited to the state and taxpayers generally are ultimately required to pay more than their "proportionate share". It was to lighten the additional burden thus cast upon the class of steady taxpayers that the Code sections under attack were enacted. The application of these provisions will of necessity increase the spread of tax collections when the enormous list of tax deeded lands shall have been returned to the rolls by "sales" to the record owners, if not to strangers, by the succeeding successful levies and by the substantial collections that will result from such "sales".

[5] In view of the foregoing, it appears clear to us that section 3834.25 means ex-

actly what it says, that the tax collector shall sell the property held under tax deeds to the highest bidder so long as the bid is not less than the minimum price fixed by the tax collector and approved by the board of supervisors; that the record owner may bid and purchase; and that upon his receiving a deed from the state, his land is cleared of all tax liens.

It is, therefore, ordered that a peremptory writ of mandate issue requiring respondent, by good and sufficient deed, to convey the said Garvey lot to petitioner Richard Garvey, Jr.; petitioners to recover their costs.

We concur: WOOD, J.; McCOMB, J.

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41 Cal.App.2d 953

PEOPLE v. McGAHA.

Cr. 3380.

District Court of Appeal, Second District, Division 2, California.

Oct. 24, 1940.

Criminal law 🔑1182

Where there was no appearance on appellant's behalf by brief or otherwise on return date of order to show cause why appeal should not be dismissed after lapse of time for filing briefs, judgment appealed from must be affirmed. Pen.Code, § 1253.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding by the People against Roy Venoy McGaha. Judgment for plaintiff, and defendant appeals.

Affirmed.

William W. Larsen, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

July 31, 1940, the transcripts on appeal were filed in this court. Thereafter, the time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed was issued, returnable October 23, 1940. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order of the trial court denying motion for new trial are, and each of them is, affirmed.

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41 Cal.App.2d 260

PEOPLE v. MILLS.

Cr. 398.

District Court of Appeal, Fourth District, California.

Nov. 2, 1940.

Hearing Denied Nov. 19, 1940.

1. Criminal law 🔑1024(1)

The statute requiring appellate court to consider rulings adverse to the state upon request by Attorney General even on defendant's appeal, does not require court to grant such request unless properly and timely made, and does not tend to permit issues to be divided and presented piecemeal. Pen.Code, § 1252.

2. Criminal law 🔑1133

Where conviction was reversed, and state did not even mention exclusion of evidence during original presentation of the appeal, petition for rehearing on request of Attorney General, for purpose of considering rulings excluding evidence, would be denied. Pen.Code, § 1252.

◆

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

On petition for rehearing.

Petition for rehearing denied.

Prior opinion, 106 P.2d 216.

Harden, Hervey & Holt, of San Diego, for appellant.

Earl Warren, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., George F. Holden, Dist. Atty., of Anaheim, and Martell Thompson, Deputy Dist. Atty., of Santa Ana, for respondent.

PER CURIAM.

The respondent has petitioned for a rehearing herein on the sole ground that the attorney general now requests, pursuant to Penal Code section 1252, that this court consider and pass upon several rulings of the trial court, whereby certain evidence was excluded, which were adverse to the state. This request is now made for the first time. As the case was originally presented the respondent did not even mention the fact that any evidence had been excluded and confined its argument to certain legal issues raised by the appellant which had no connection with the sufficiency of the evidence. Without questioning our decision on the issues submitted, the respondent seeks to have that decision set aside to the end that new and additional issues may now be considered.

Section 1252 imposes upon an appellate court the duty of considering rulings adverse to the state when requested so to do by the attorney general, even though the appeal is taken by the defendant. That is a salutary provision, its purpose is obvious, and its benefits, in the event of a new trial, may be considerable.

[1] However, this section undoubtedly contemplates that it is to be invoked and such a request made, when the cause is presented and before it is submitted for decision upon an appeal. It was surely never intended by this section to make it the duty of an appellate court to grant such a request unless the same was properly and timely made. It was not intended thereby to permit the issues to be divided and presented piecemeal, or to permit one of the parties to rely and submit his case upon some of the issues and, in the event of an adverse decision on those issues, to have further hearings and further decisions upon new issues which might later be raised. Such a procedure would not only impose unnecessary work on the courts but would work an injustice on other litigants whose cases would be correspondingly delayed.

[2] While the issues now raised happen to be very pertinent in the instant case, we are of the opinion that any benefits that might accrue from considering them at this time would be far outweighed by the evils that might well be expected to follow the setting of such a precedent.

For the reasons given, the petition for a rehearing is denied.

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41 Cal.App.2d 35

MARTIN (CONTINENTAL CASUALTY CO., Intervener) v. CLINTON CONST. CO. et al.

Civ. 11222.

District Court of Appeal, First District, Division 2, California.

Nov. 2, 1940.

Hearing Denied Dec. 2, 1940.

Appeal and error ⚷832(4)

In action against contractor and its truck driver by subcontractor's employee for injuries sustained when employee was run over by truck, contractor who failed at trial to procure an order limiting the effect of an award of the Industrial Accident Commission showing medical expenses incurred by the employee and admitted in evidence could not limit effect of award on petition for rehearing. St.1937, pp. 273–275, §§ 3850–3862.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

On petition for rehearing.

Rehearing denied.

Prior opinion, 105 P.2d 1029.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Cooley, Crowley & Supple, of San Francisco, for respondent Dan W. Martin.

Keith & Creede, of San Francisco, for respondent Continental Casualty Co.

PER CURIAM.

The petition for rehearing is denied. The defendant quotes from our opinion [105 P.2d 1029, 1032]: "While doing so he was led to the spot where the accident happened.

Nearby stood a pole on which the wires were supported which served the vibrators. As he passed that pole the plaintiff paused to inspect conditions at that point. However, McCloy walked on. While the plaintiff was inspecting said pole, the defendants suddenly" etc. It then claims we have misstated the record. We think not. Plaintiff's Exhibit A is before us. It is drawn to scale. The evidence of the plaintiff, as shown by his marks on that exhibit, is that when he paused a few seconds he was 32 feet from the pole and was facing east. He then turned and walked 35 or 40 feet to the west. There the accident happened. Obviously our statement, quoted above, was not inexact when, it will be remembered, we are dealing with the area of an island containing many acres.

It is likewise clear that said passage contained nothing tending to make erroneous anything said in our opinion on contributory negligence or assumed risk.

The defendant also contends that we were in error in holding that the entry of judgment in favor of the plaintiff was not prejudicial error. Its contention is based on the fact that the only showing as to medical expenses consisted of a portion of the award of the Industrial Accident Commission which was introduced in evidence by the plaintiff in intervention. But at no time did the defendant ask for an order limiting the effect of that evidence. Therefore, it may not do so now. 10 Cal.Jur. 816. Such rule is of much importance when actions are brought and defended under the provisions of sections 3850–3862 of the Labor Code, St.1937, pp. 273–275.

41 Cal.App.2d 271

HOFFART et al. v. HONIG.

Civ. 6444.

District Court of Appeal, Third District, California.

Oct. 25, 1940.

1. Appeal and error ⊂⇒1015(2)

On appeal from order granting plaintiff's motion for new trial on ground of insufficiency of evidence to sustain an allegedly inadequate verdict for plaintiff, order was binding on appellate court even though evidence on the issue of damages was not in conflict, where inferences fairly deducible from such evidence were such that different conclusions with respect to the proper amount of damages might rationally have been reached by men equally sensible and impartial.

2. Death ⊂⇒104(4)

In determining amount of damages to be awarded to surviving wife and child of one whose death allegedly resulted from negligence of defendant, jury was properly directed to consider not only financial support, if any, which wife and child would have received from decedent except for his death, but also pecuniary value of society, comfort, care, protection, and right to receive support, if any, which wife and child had lost by reason of death, and in connection with these matters the age, physical condition, and respective expectations of life of the decedent, his wife, and child at the time of death, and the earning capacity of decedent and his disposition toward wife and child.

3. New trial ⊂⇒72

Where the verdict is against the weight of the evidence, it is the duty of the trial court to set aside the verdict on motion for new trial; the rule that verdict will not be disturbed for insufficiency of the evidence, unless it appears without substantial conflict that there is no evidence to sustain the verdict, applying only on appeal.

4. New trial ⊂⇒75(5)

Where the trial court found that the damages awarded for wrongful death were inadequate, the court did not abuse its discretion in granting plaintiff's motion for new trial on the ground of insufficiency of the evidence; the rule that to warrant a new trial the award of damages must be so erroneous as to shock the conscience applying only to excessive damages. Code Civ.Proc. § 657.

5. New trial ⊂⇒75(5)

The trial court did not abuse its discretion in granting a new trial on the ground of inadequacy of a verdict awarding only $5,000 damages for the negligent killing of a man 26 years of age, who left a surviving wife and child.

◆

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Action by Catherine Ann Hoffart and Ileane Ann Hoffart, a minor, by Catherine Ann Hoffart, her guardian ad litem, against John Honig, for the wrongful death of the husband of Catherine Ann Hoffart and father of Ileane Ann Hoffart. Trial to the jury resulted in a $5,000 verdict in favor of plaintiffs. Defendant appeals from order granting plaintiffs' motion for new trial.

Affirmed.

Butler, Van Dyke & Harris, of Sacramento, for appellant.

Archibald D. McDougall, of Sacramento, and C. C. McDonald, of Woodland, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an appeal from an order granting a motion for new trial.

This action was before this court on a previous occasion. Hoffart v. Southern Pac. Co., 33 Cal.App.2d 591, 92 P.2d 436. We there upheld an order granting a motion for new trial on the sole issue of damages. The facts of the case are fully stated in that opinion. The husband of plaintiff Catherine Ann Hoffart, and father of plaintiff Ileane Ann Hoffart, was killed when the automobile in which he was a guest was struck by a train. Defendant was the owner and driver at the time, and his negligence was established. The case was retried by a jury upon the sole issue of damages, and a verdict of $5,000 was rendered in favor of the surviving wife and minor child. Thereafter, a motion for new trial upon the part of plaintiffs was made and the trial court granted said motion upon the ground that the evidence was insufficient.

The oft-quoted rule governing an appellate court under such circumstances is thus stated in 2 California Jurisprudence, page 908, section 535: "If there is an appreciable conflict in the evidence, action of the court in granting a new trial is conclusive in the appellant court; and even where there does not appear to be a conflict in the evidence, the action of the trial court will not be disturbed where there appears to flow from the general surrounding circumstances of the case, probable justification for discrediting or giving no weight to testimony which, on its face, may bear all the earmarks of probability. The appellate court does not interfere with the action of the trial court in granting a new trial, even when the evidence on which it has acted may consist of depositions and documentary and oral evidence. However, if, upon undisputed facts found, but one correct conclusion of law is possible, and the superior court, mistaking the law, orders a new trial, its order will be reversed."

[1, 2] It is the contention of appellant that this case comes within the exception to the rule which is found in the last sentence of the quotation. He urges that there is no conflict in the evidence respecting the damages, and that the granting of the motion was therefore erroneous. We cannot say here that but one conclusion can be drawn from the evidence relating to the issue of damages. The various facts which the jury (and the court on motion), might consider in arriving at their verdict, are detailed properly in the following instruction which was given: "In determining that pecuniary loss you may consider not only the financial support, if any, which plaintiffs Catherine Ann Hoffart and Ileane Ann Hoffart would have received from the deceased Melchoir V. Hoffart except for his death, but also the pecuniary value of the society, comfort, care, protection and right to receive support, if any, which each plaintiff has lost by reason of the death. In weighing these matters, you may consider the age of the deceased and of each plaintiff, the physical condition of deceased and of each plaintiff as it existed at the time of the death and immediately prior thereto; their respective expectancies of life as shown by the evidence; the disposition of the deceased, whether it was kindly, affectionate or otherwise; whether or not the deceased showed an inclination to contribute to the support of the plaintiffs; the earning capacity of the deceased; and such other facts shown by the evidence as throw light upon the pecuniary value of the support, society, care, comfort, and protection which each of the plaintiffs reasonably might have expected to received from the deceased had he lived."

[3] It cannot be seriously denied that different inferences might be drawn from such facts which would result in verdicts of varying amounts. This removes the case from the exception to the rule, and places it in the same category as any action where there is conflicting evidence. In the case of Taylor v. Rodriquez, 10 Cal. App.2d 608, 52 P.2d 494, the trial court

granted a motion for new trial upon the ground of the insufficiency of the evidence, holding that a verdict of $30,000 was insufficient. Affirming the order, the court said: "The rule relied upon by defendant that the verdict of the jury will not be disturbed on the ground of insufficiency of the evidence unless it appears without substantial conflict that there is no evidence to sustain the verdict is a rule for the appellate courts and it has no application to the trial court. *In the trial court, where the verdict appears to be against the weight of the evidence, it is not only within the discretion of the trial court, but it is that court's duty to set aside the verdict on motion for new trial.* * * * The contention of defendant is that this was an uncontested case *and that there was no conflict in the evidence, and that for these reasons the court manifestly abused its discretion and 'substituted its opinion for that of the jury.' The trial court did not substitute its opinion; it merely granted a new trial.* It must be remembered, also, that even though there is no conflict in the evidence, if the inferences fairly deducible therefrom are such that different conclusions might rationally be drawn therefrom by men equally sensible and impartial, *as in this case with regard to the amount of the award for damages,* the same rule must be applied as where the conflict arises directly from the evidence."

[4, 5] It is contended by appellant that there must be some evidence in the record to show that the verdict was "shockingly inadequate", before the motion of this character can be granted. He apparently had in mind the rule relating to *excessive* damages, which is specially derived from section 657 of the Code of Civil Procedure. In such cases the courts have sometimes stated that the damages must be so excessive as to "shock the conscience", before a new trial may be granted. On the other hand, where the damages are held to be *inadequate,* a new trial may be granted upon the broad ground of the insufficiency of the evidence, and the question as to whether or not the inadequateness is "shocking" in character has nothing to do with the determination of the matter by this court. 8 Cal.Jur., p. 833, § 87. We might add that in our opinion an award of $5,000 for the negligent killing of a man twenty-six years of age, who leaves a surviving wife and child, might well be considered by the trial court as inadequate compensation.

The authorities cited by appellant all deal with the questions which were settled upon the former appeal, and it is unnecessary to discuss them here.

We conclude that there was no abuse of discretion upon the part of the trial court in granting the motion, and the order is therefore affirmed.

We concur: PULLEN, P. J.; PARKER, Justice pro tem.

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41 Cal.App.2d 318

PEOPLE v. YODER.

Cr. 3370.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1940.

Hearing Denied Dec. 2, 1940.

1. Gaming 🔑98(1)

Evidence that police officer found five or six men grouped about defendant at garage, that defendant had in his pocket a "scratch sheet" and "betting markers" in shirt collar, that such papers were customarily used in recording wagers on horse races, and that defendant stated to officer that defendant had been taking bets on horse races at garage for two weeks, warranted conviction for unlawfully occupying building for purpose of recording wagers on horse races. Pen.Code, § 337a, subd. 2.

2. Criminal law 🔑254

A trial judge trying case without jury must draw reasonable inferences from the evidence presented.

3. Criminal law 🔑260(11)

The finding of trial court trying case without jury cannot be disturbed on appeal if circumstances shown in evidence reasonably justify the finding.

4. Criminal law 🔑409

In prosecution for unlawfully occupying building for purpose of recording wagers on horse races, admission of police officer's testimony that defendant told officer that defendant had been taking bets on races at garage for two weeks was not error, notwithstanding that corpus delicti was not proved beyond reasonable doubt, where prima facie showing of corpus delicti was made.

5. Criminal law ⚿409, 535(2)

The prosecution need not prove corpus delicti beyond reasonable doubt before presenting evidence of admissions or confessions, but prima facie showing is sufficient to justify introduction of such evidence.

◆

Appeal from Superior Court, Los Angeles County, Frank G. Swain, Judge.

Eugene Farrell Yoder was convicted for unlawfully occupying a building for the purpose of recording wagers on horse races, and he appeals.

Affirmed.

Leland E. Zeman, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged by information with the crime of violating subdivision 2 of section 337a of the Penal Code in that he unlawfully occupied a building for the purpose of recording wagers on horse races. At a trial before the court without a jury he was found guilty. He now prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

It is contended that the evidence is insufficient to justify the conviction. The action was tried upon the transcript of the testimony and the exhibits received at the preliminary examination. From this transcript it appears that the only witness examined was police officer Miller, who testified that he went to a garage at 248 Winston street in the city of Los Angeles and there found five or six men grouped about defendant. As Miller approached the garage with another officer defendant ran through the garage to Wall street and on for several blocks to a point on Maple street, where he was caught by one of the officers; defendant threw several objects away as he ran and when caught had in his pocket a "scratch sheet" and in the collar of his shirt some "betting markers". From the testimony of the officer it appears that the papers found on defendant's person were those customarily used in recording wagers on horse races. Concerning a conversation with defendant the officer testified: "He stated he had been taking bets on horse races there for about two weeks to help pay his probation fine, he was on probation for bookmaking and that he received twenty per cent of the takes which was about, take was about $150.00 a day."

[1-3] The prosecution presented sufficient evidence when it established that defendant occupied a room with a paper for the purpose of recording bets on the result of horse races. It was the function of the trial judge, as a trier of facts, to draw reasonable inferences from the evidence presented. If the circumstances shown in evidence reasonably justify the finding of the trial court it may not be disturbed on appeal. People v. Newland, Cal.Sup., 104 P.2d 778. We are satisfied that the finding of the trial court is supported by the evidence.

[4-5] Defendant contends that the corpus delicti was not established and that the court erred in receiving testimony concerning the conversation between the police officer and defendant. There is no merit in this contention. It was not necessary for the prosecution to prove the corpus delicti beyond a reasonable doubt before presenting evidence of admissions or confessions. A prima facie showing was sufficient to justify the introduction of the evidence. People v. Tuttle, 27 Cal.App.2d 647, 81 P.2d 571.

The judgment and the order are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

41 Cal.App.2d 461

PACIFIC CONSTRUCTION FINANCE CO., Limited, v. KRAMER.

Civ. 12787.

District Court of Appeal, Second District, Division 2, California.

Nov. 8, 1940.

1. Appeal and error ⚷479(1)

A writ of supersedeas will not issue unless it is necessary to preserve the rights of the parties pending determination of an appeal.

2. Appeal and error ⚷479(1)

Supersedeas would not issue to restrain defendant from proceeding with trial of action until determination of plaintiff's appeal from an order granting defendant's motion for change of venue, since only right of plaintiff involved in appeal was right to have action heard in court wherein plaintiff filed complaint, and the right would not be jeopardized by failure to issue the writ.

3. Appeal and error ⚷1180(2)

A reviewing court in reversing an order granting motion for change of venue will also reverse any judgment theretofore entered by the lower court even if the appellant has appeared and contested the action.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Pacific Construction Finance Company, Limited, against Samuel E. Kramer, also known as S. E. Kramer. From an order granting motion for change of venue, the plaintiff appeals. On plaintiff's petition for a writ of supersedeas to restrain defendant from proceeding with trial of the action until determination of the appeal.

Petition denied.

Ira Ratner, of Los Angeles, for appellant.
T. H. Canfield, of Santa Barbara, for respondent.

McCOMB, Justice.

On petition for writ of supersedeas.

This is an original application for a writ of supersedeas to restrain respondent from proceeding with the trial of an action entitled as above now pending before the superior court of Santa Barbara county, being action No. 31870 in said court, until the determination of its appeal from an order granting respondent's motion for a change of venue.

The essential facts are:

April 26, 1940, petitioner filed a complaint in the superior court of Los Angeles county. June 25, 1940, the superior court of Los Angeles county granted respondent's motion for a change of venue to the superior court of Santa Barbara county. June 27, 1940, the clerk of the superior court of Los Angeles county transmitted all of the papers and pleadings in the action to the clerk of the superior court of Santa Barbara county. June 29, 1940, petitioner appealed to this court from the order of the superior court of Los Angeles county granting the motion for a change of venue.

This is the sole question for determination:

Has petitioner shown this court a valid reason for the issuance of a writ of supersedeas?

[1] This question must be answered in the negative. The law is established in California that a writ of supersedeas will not issue unless it is necessary to preserve the rights of the parties, pending the determination of an appeal. Cunning v. Carr, 66 Cal.App. 149, 152, 225 P. 481; O'Brien v. Municipal Court, 140 Cal.App. 362, 364, 35 P.2d 395.

[2] In the present case the only right of the petitioner which is involved in the appeal now pending before us is the asserted right to have the action heard in the superior court of Los Angeles county. In the absence of a writ of supersedeas, this right will not be jeopardized, for, in the event appellant does not prevail here, such right would not exist. On the other hand, in the event petitioner is successful and obtains a reversal of the order granting the motion for a change of venue, the action will be tried in the superior court of Los Angeles county, and this, even though the case may have already been tried in the superior court of Santa Barbara county.

[3] An appellate court in reversing an order granting a motion for a change of venue will also reverse any judgment theretofore entered by the lower court, even if the appellant has appeared and contested the same. Howell v. Thompson, 70 Cal. 635, 637, 11 P. 789; see, also, 25 Cal.Jur., 1926, 918, § 50.

For the foregoing reasons, it is ordered that the petition for a writ of supersedeas herein be and the same is hereby denied. The denial of the petition for a writ of supersedeas is made without reference to any of the questions which may be presented to this court upon the appeal from the order of the lower court.

We concur: MOORE, P. J.; WOOD, J.

41 Cal.App.2d 430

PEOPLE ex rel. LABACHOTTE v. MORRIS.

Civ. 11437.

District Court of Appeal, First District, Division 2, California.

Nov. 8, 1940.

Rehearing Denied Dec. 7, 1940.

Hearing Denied Jan. 2, 1941.

1. States 🔑51

The Initiative Act creating a State Board of Chiropractic Examiners, which contained provisions for "staggered terms" of one, two, and three years, and which provided that the Governor should appoint the board members within sixty days from the effective date of the act on December 21, 1922, contemplated, in view of uniform interpretation of the act that the terms of the original board members should begin on the date when they were appointed, which was February 10, 1923, rather than on December 21, 1922, and hence the terms of all board members expire on February 10th of any particular year, rather than on December 21. St.1923, p. lxxxviii, §§ 1, 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Staggered Terms".

2. Statutes 🔑219

If there was uncertainty in the Initiative Act creating a State Board of Chiropractic Examiners, with reference to the date when the terms of the board members should begin, uniform construction with respect to the date of the terms, placed on the act by every Governor and Secretary of State in office since the act was adopted, was entitled to great respect. St.1923, p. lxxxviii, §§ 1, 2.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Proceeding in quo warranto by the People of the state of California, on the complaint of Roy G. Labachotte, relator, against Franklin Morris for the purpose of challenging the right of the defendant to the office of member of the State Board of Chiropractic Examiners. From an adverse judgment, the defendant appeals.

Judgment reversed, with directions to enter judgment for defendant.

Hugh K. McKevitt and Newell J. Hooey, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., Leon French, Deputy Atty. Gen., and Frank V. Kington, of Redwood City, for respondent.

SPENCE, Justice.

This proceeding in quo warranto was brought for the purpose of challenging the right of the defendant to the office of member of the state board of chiropractic examiners. The cause was tried upon stipulated facts and resulted in a judgment decreeing that the defendant was not entitled to said office and that the relator was entitled thereto. Defendant appeals from said judgment.

Defendant Franklin Morris was appointed by the governor as a member of said board on April 5, 1939, to succeed the relator, Roy G. Labachotte, who was then in office. The trial court held that the relator was entitled to said office upon the theory that the term of the relator had not expired.

The state board of chiropractic examiners was created by an initiative act which became effective December 21, 1922. See Stats.1923, p. lxxxviii.

Section 1 of said act provides in part, "A board is hereby created to be known as the 'state board of chiropractic examiners,' hereinafter referred to as the board, which shall consist of five members, citizens of the state of California, appointed by the governor."

Section 2 of said act provides in part: "Within sixty days of the date upon which this act takes effect, the governor shall appoint the members of the board. Of the members first appointed, one shall be appointed for a term of one year, two for two years, and two for three years. Thereafter, each appointment shall be for the term of three years, except that an appointment to fill a vacancy shall be for the unexpired term only. Each member shall serve until his successor has been appointed and qualified."

On February 10, 1923, and within the sixty-day period provided in said section 2, the then governor appointed the original board of five members and designated the term of each of said members. One Albin Peterson was appointed for the one-year term and he was the original holder of the office to which the relator and the defendant are now asserting their respective claims.

It was stipulated upon the trial that every governor and every secretary of state holding office since the effective date of the act "construed and interpreted said Chiropractic Act to mean that the terms of office of the original members appointed to the State Board of Chiropractic Examiners were to and did commence on February 10, 1923, and that the term of office of the original member appointed to said board for one year terminated on February 10th, 1924, and that the term of office of the two original members appointed for a term of two years terminated on February 10, 1925, and that the term of office of the two original members appointed for the term of three years terminated on February 10th, 1926, and that thereafter the terms of office of each subsequent and successive member appointed was for the term of three years and that said terms of office terminated on February 10th of each corresponding three-year period thereafter."

Photostatic copies of the "Executive Records" of the state of California relating to said board were placed in evidence. The history of the particular office in question is shown thereon as follows: Albin Peterson, appointed February 10, 1923, for a term of one year, which term expired February 10, 1924; G. K. Gilkerson, appointed July 9, 1924, for a term of three years, which term expired February 10, 1927; Samuel J. Howell, appointed March 16, 1927, for a term of three years, which term expired February 10, 1930; Samuel J. Howell, reappointed December 31, 1930, for the term of three years, which term expired February 10, 1933; Raymond C. Foy, appointed February 10, 1933, for a term of three years, which term expired February 10, 1936. Said Raymond C. Foy was not reappointed thereafter but, in accordance with the provisions of section 2 of the act, he continued to serve until the relator was appointed as his successor on December 31, 1938. As to the date of expiration of the term to which the relator was appointed, said executive records show only the following: "Feb. 10, 19—". The same records show the appointment of defendant on April 5, 1939, for the term expiring "Feb. 10, 1942", vice "Roy Labachotte, T. E.", the "T. E." meaning term expired.

Defendant contends that the terms of the original members of the board commenced on February 10, 1923, the date of the original appointments; that the terms of office thereafter ran with the office rather than with the appointees; that the relator's appointment on December 31, 1938, was only for the balance of the term into which Foy was when holding over, which term began on February 10, 1936, and expired February 10, 1939; that the relator's term expired on February 10, 1939, and relator was merely holding over into the following term when defendant was appointed on April 5, 1939, for the balance of said term which commenced on February 10, 1939, and will expire on February 10, 1942; that the appointment of defendant for the balance of said term was a valid appointment and therefore the trial court erred in decreeing that defendant was not entitled to said office.

Plaintiff apparently concedes that under the act the terms of office ran with the office rather than with the appointees. This must be true as any other construction of the act would defeat the obvious purpose of rotation in office at regular intervals as indicated by the provisions for staggered terms. But plaintiff apparently takes the position that the terms of the original board members commenced on December 21, 1922, the effective date of the act, and not at the time of the appointment of said original board members. Under this view, the first term into which Foy held over expired on December 21, 1938, and thereafter, and at the time of the appointment of relator on December 31, 1938, Foy was holding over into the following term which commenced on December 21, 1938, and would not expire until December 21, 1941. It is thus apparent that the question of whether relator or defendant is now entitled to the office depends upon the determination of the date of the expiration of the term for which relator was appointed and this question in turn depends upon the determination of the date upon which the original terms commenced. If the original terms commenced on December 21, 1922, the effective date of the act, then relator's appointment on December 31, 1938, was an appointment for the balance of a term expiring December 21, 1941, and relator is entitled to the office. On the other hand, if the original terms commenced on February 10, 1923, the date of the original appointments, then relator's appointment on December 31, 1938, was an appointment for the balance of a term expiring February 10, 1939, and defendant's appointment on April 5, 1939, having been made after the expiration of relator's term, was an appointment for the balance of the term expiring February 10, 1942, and defendant is entitled to the office.

The parties have cited numerous authorities in support of their respective contentions but owing to the different situations presented by the various statutes under consideration in said authorities, we find none of them directly in point. Perhaps the leading case in this jurisdiction in Boyd v. Huntington, 215 Cal. 473, 11 P.2d 383, which case has been discussed at length by both parties. The court was there dealing with the two statutes relating to the board of dental examiners. Neither of said statutes contained the provision found in the statute here directing the appointment of the board by the governor "within sixty days" and providing that "Of the members first appointed, one shall be appointed for a term of one year, two for two years, and two for three years." The statutes there did provide, however, for staggered terms and for rotation in office and it was necessary to determine the date of the commencement of the terms in order to carry out the legislative intent. Under the situation presented by statutes before it, the court concluded that the terms commenced on the effective date of the act. It was there said at page 479, of 215 Cal., at page 385 of 11 P.2d, "The law is well established that a term begins not necessarily from the date of appointment, but from the time fixed by the lawmakers for it to begin." We may imply from the language of the court that the time of the commencement of a term under any given statute is to be determined by the intent of the lawmakers as found from a consideration of such statute as a whole.

[1,2] As we read the statute under consideration, we believe that it contains a definite implication that the terms of the original board members should commence upon the date of the first appointments rather than upon the effective date of the act. Such was the uniform construction placed upon said act by every governor and every secretary of state in office since the act was adopted. If it may be said that there is uncertainty in the language of the act in this regard, such contemporaneous construction is entitled to great respect. People v. Southern Pacific Co., 209 Cal. 578, 290 P. 25; Riley v. Thompson, 193 Cal. 773, 227 P. 772; Riley v. Forbes, 193 Cal. 740, 227 P. 768; City of Pasadena v. Railroad Commission, 192 Cal. 61, 218 P. 412; Colonial Mut. C. Ins. Co., Ltd. v. Mitchell, 140 Cal.App. 651, 36 P.2d 127; 23 Cal.Jur. 775, sec. 151. As was said in United States v. Philbrick, 120 U.S. 52, at page 59, 7 S.Ct. 413, at page 417, 30 L.Ed. 559: "* * * contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and, since it is not clear that that construction was erroneous, it ought not now to be overturned." As we find no authorities involving statutes containing precisely similar wording, it would serve no useful purpose to extend this opinion by a discussion of said authorities. We believe, however, that the views herein expressed find support in the language used in some of said authorities. See State v. Stonestreet, 99 Mo. 361, 12 S.W. 895; People v. Reinberg, 263 Ill. 536, 105 N.E. 715, L.R.A.1915E, 401, Ann.Cas.1915C, 343; State v. Williams, 222 Mo. 268, 121 S.W. 64, 17 Ann.Cas. 1006; 46 Cor.Jur. 965. Furthermore, we find nothing in the opinion in Boyd v. Huntington, supra, which is at variance with said views.

We therefore conclude that the term of office of the relator expired on February 10, 1939, and that at the time defendant was appointed on April 5, 1939, relator was merely holding over into the term which commenced on February 10, 1939, and will expire on February 10, 1942; that the appointment of defendant was a valid appointment for the balance of said term; and that the trial court should have entered its judgment in favor of the defendant.

The judgment is reversed with directions to the trial court to enter its judgment in favor of the defendant.

We concur: NOURSE, P. J.; STURTEVANT, J.

41 Cal.App.2d 315

TAYLOR v. PARSONS et al.

Civ. 12528.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1940.

1. Malicious prosecution ⟹51

To state a cause of action for malicious prosecution, it is necessary that facts be alleged showing a final termination of the proceeding instituted against plaintiff.

2. Malicious prosecution ⟹36

A dismissal at a preliminary hearing of a felony case does not constitute a "final termination" of the proceedings, which is an essential matter to be alleged to state a cause of action for malicious prosecution.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Termination".

3. Malicious prosecution ⟹51
Pleading ⟹225(2)

An amended complaint, alleging that, when charge of embezzlement came before justice of the peace on preliminary examination, evidence was presented and the case dismissed, did not allege a "final termination" of the criminal proceeding, and, in absence of any other allegation of a final termination, an essential allegation of a cause of action for malicious prosecution was absent from the complaint, and the trial court properly sustained a demurrer thereto without leave to amend.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by George Taylor against J. H. Parsons and another for malicious prosecution. From a judgment for defendants, plaintiff appeals.

Affirmed.

Motion to dismiss denied 102 P.2d 1096.

Walter Gould Lincoln, of Los Angeles, for appellant.

Harold M. Davidson, of Alhambra, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining of a demurrer without leave to amend to plaintiff's complaint as amended in an action for malicious prosecution, plaintiff appeals.

The appeal is on the judgment roll alone. The amended complaint alleged in substance that March 28, 1938, defendants swore to a complaint charging plaintiff with embezzlement; that a warrant was thereupon issued by a justice of the peace March 29, 1938; that plaintiff was arrested, placed in jail, and admitted to bail; that, when the matter came before the justice of the peace May 19, 1938, on preliminary examination, evidence was presented and the case dismissed.

Paragraph IV of the complaint as amended read thus:

"That neither defendant herein has any intention to, nor will swear to, nor cause any complaint to be sworn to, charging this plaintiff with the same crime as charged in the said affidavit and complaint of March 28th, 1938; that neither defendant has any intention to, nor will cause any warrant to be issued, charging this plaintiff with the said crime as set out in the said affidavit, complaint and warrant of March 28th, 1938; that neither defendant has any intention to, nor will cause this plaintiff to be hereafter arrested upon the same alleged crime as caused his arrest on the 29th day of March, 1938."

This is the sole question necessary for us to determine:

Did plaintiff's complaint as amended allege a "final termination" of the proceeding that defendants had instituted against plaintiff?

This question must be answered in the negative. The only allegations in plaintiff's pleadings relative to a final termination of the case are those set forth in paragraph IV of the amended complaint as quoted above. Obviously there is not any allegation in that paragraph of the complaint of a final termination of the proceeding instituted against plaintiff. It contains merely conclusions of the pleader as to what the defendants' intention was. There is no allegation of fact.

[1, 2] The following established principles of law are applicable:

(1) In order to state a cause of action for malicious prosecution, it is necessary that facts be alleged showing a final termination of the proceeding instituted against plaintiff. Haydel v. Morton, 8 Cal.App.2d 730, 733, 48 P.2d 709; Eustace v. Dechter, 28 Cal.App.2d 706, 710, 83 P.2d 523; Wilson v. Troy, 19 Cal.App.2d 156, 158, 64 P.2d 1141.

(2) A dismissal at a preliminary hearing of a felony case does not constitute a final

termination of the proceedings. Wilson v. Troy, 19 Cal.App.2d 156, 158, 64 P.2d 1141.

[3] Therefore, applying the above-mentioned rules of law, plaintiff's pleading in alleging the dismissal of the criminal proceeding instituted against him by defendants did not allege a final termination of the criminal proceeding, and, since there is no other allegation of a final termination of such proceeding, an essential allegation of a cause of action for malicious prosecution was absent from his complaint, and the trial court properly sustained the demurrer thereto without leave to amend.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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41 Cal.App.2d 298

PEOPLE v. SOULES.

Cr. 1742.

District Court of Appeal, Third District, California.

Oct. 29, 1940.

Hearing Denied Nov. 28, 1940.

1. Homicide 🔑238

Evidence *held* to authorize conviction of second degree murder, not mitigated by defendant's intoxication.

2. Homicide 🔑188(5)

In murder prosecution, where evidence clearly negatived self-defense and showed that defendant was the aggressor, deliberately armed himself with shotgun, and killed an unarmed and intoxicated man without justification or cause, evidence of former unprovoked assaults by victim upon other persons was properly rejected though defendant was permitted to testify that victim's general reputation for peace and quiet was not too good. Pen.Code, § 188.

3. Homicide 🔑188(5)

Generally, in homicide prosecution, proof of turbulent, violent and dangerous character, to show that person was more likely to have been the aggressor in an affray resulting in his death, must be established by evidence of his general reputation for peace and quiet in his community rather than evidence of specific assaults.

4. Criminal law 🔑366(2)
Witnesses 🔑274(1)

As exceptions to general rule excluding evidence of previous acts of violence by deceased in homicide prosecution, such evidence is competent when part of the res gestæ or as proper cross-examination of witness for prosecution who has testified that deceased was a man of good reputation for peace and quiet.

5. Homicide 🔑188(5)

The trial court has a sound discretion to determine whether a prima facie showing of good faith by defendant has been established to warrant the reception of evidence of prior acts of violence by deceased upon other persons.

6. Homicide 🔑308(2), 340(1)

In murder prosecution, instruction that killing is first-degree murder if willful, deliberate and premeditated, and "if it is not willful, deliberate and premeditated then it is murder in the second degree, provided * * * that it is willful, unlawful, felonious, and with malice aforethought," was neither erroneous nor prejudicial.

7. Homicide 🔑308(2)

In murder prosecution, jury was correctly told that malice, either express or implied, must be shown to have existed on part of defendant to constitute murder of either the first or the second degree.

8. Homicide 🔑308(2)

In murder prosecution, distinction between first and second degrees was properly declared to be the presence or absence of premeditation and deliberation.

9. Criminal law 🔑800(6)

In murder prosecution, the word "willfully" was properly defined in the exact language of statute. Pen.Code, § 7, subd. 1.

10. Criminal law 🔑1172(6)

In murder prosecution, the giving of instructions on circumstantial evidence was not prejudicial, even though killing was admitted and there was an eyewitness.

11. Criminal law 🔑1186(4)

The giving of inapplicable instructions on a subject upon which there is no evidence is not reversible error unless it appears that defendant was actually prejudiced. Const. art. 6, § 4½.

12. Homicide ⚷297

In murder prosecution, court properly charged in statutory language that homicide is justifiable under enumerated circumstances, but that when defendant is the assailant or is engaged in mutual combat, he must in good faith endeavor to decline further struggle, where there was substantial evidence that defendant was the aggressor. Pen.Code, § 197.

13. Homicide ⚷151(1)

Where homicide was conclusively established, defendant had burden of showing that it was justifiable. Pen.Code, § 1105.

14. Criminal law ⚷730(14)

In murder prosecution, striking from the record a remark of defendant's attorney that victim was acting "as if he had something to drink just like any drunken Indian" was harmless, in absence of evidence that victim was an Indian.

15. Criminal law ⚷323

There is no legal presumption that a man is more dangerous under the influence of liquor merely because he may have some Indian blood in his veins. Pen.Code, § 22.

16. Criminal law ⚷730(1)

Where remarks of district attorney were stricken from record and jury was instructed to disregard them, they may not ordinarily be relied upon as reversible error.

17. Homicide ⚷347

Evidence *held* not to warrant reducing conviction from second degree murder to manslaughter.

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Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Elmer Soules was convicted of second degree murder and he appeals.

Affirmed.

T. F. Peterson, of Eureka, and H. William Ott, of Fortuna, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was tried and convicted by a jury of the crime of murder of the second degree for shooting and killing Wesley Henry. From the judgment which was accordingly rendered this appeal was perfected.

The defendant, Elmer Soules, owned and operated the Buckhorn Service Station near Blue Lake in Humboldt county. He slept in a bedroom adjacent to the gas station. A young man by the name of Charles Sellers worked at the gas station for the defendant and shared his bedroom with him. The deceased, Wesley Henry, had lived in that vicinity for many years. He and the defendant had been acquainted for more than a year. They occasionally associated together in a friendly manner. No trouble had ever existed between them. Prior to the homicide Henry was licensed to carry a revolver. We assume that privilege was granted for a lawful purpose. He did not have the revolver in his possession at the time of the homicide.

About 7 o'clock on the evening of February 10, 1940, Mr. Henry visited the defendant's gas station to repair an automobile tire. Soules did not have the necessary tools with which to repair the tire, but he offered to take Henry in his machine to Blue Lake for the purpose of securing the necessary repairs. Before leaving the Buckhorn Service Station they drank liquor together from a bottle. They spent nearly the entire night drinking liquor together at various saloons in Blue Lake. They were on the friendliest of terms. No trouble arose between them. Mr. Henry voluntarily left his revolver in the custody of a bartender at a saloon in Blue Lake. He did not have the weapon at the time of the homicide. Having spent the night drinking together, they returned to the defendant's gas station about 3 o'clock the following morning. Henry was somewhat under the influence of liquor. Soules did not show the effect of excessive drinking. When they arrived, the defendant left Henry asleep in his automobile and entered the bedroom where Charles Sellers was sleeping in a separate bed. Soules turned on the light and awakened Sellers, telling him that he had brought Henry home with him, but that he left him asleep in the parked car. Sellers suggested that it was a cold night and that Henry might freeze out there. The defendant then went out and brought Henry into the bedroom and urged him to take off his clothes and get into bed. Henry removed his boots and jacket and lay down on the defendant's bed. Soules sat down in a rocking chair situated seven or eight feet from the bed. He carried on a conversation with Mr. Henry for a few minutes. The subject of that conversation is not related, but it was not important, for no witness says there was any indication of controversy or ill will between them. After a short period of time the defendant told Henry to go to sleep. A little later he told him to move over so that he could get into bed. Mr. Henry promptly did so. The defendant remained seated in the chair. After a brief silence, the defendant, who may have been brooding over some imaginary wrong, said to Henry: "If you fool around here you will get filled full of shot." No cause for that threat appears in evidence. Henry made no reply. Charles Sellers, who was the only living eyewitness to the affair, except the defendant, declared that he had related everything of importance that occurred at that time. He gave no reason for the defendant's threat to fill Henry full of shot. A few moments later, without provocation, the defendant arose and crossing the room he picked up a loaded shotgun from behind the kitchen door, and returning to the chair he again seated himself, holding the gun across his knees and pointing it toward the bed where Henry lay with his back toward him. The same threat was repeated without any response. Mr. Sellers then asked the defendant if the gun was loaded. He said, "You're darned right, it's loaded." Sellers then advised the defendant not to fool around with a loaded gun. Soules replied that he was not fooling. In the meantime the defendant sat in the chair with his finger on the trigger and the gun pointed in the direction of Mr. Henry as he lay with his back toward Soules. Finally, Henry turned over after several such threats had been made and started to get up, remarking that he did not like that kind of talk and that he would take that gun away from him. Henry sat on the edge of the bed and pulled on his boots. Then he stood up and staggered around to get his balance. Apparently he was somewhat intoxicated. He took a short step or two in the direction of Soules as he still sat with the gun, in the rocking chair. As Henry got upon his feet, the defendant declared that "Nobody is going to take this gun away from me." He promptly fired, striking Henry in the abdomen. Henry fell to the floor and died within a few moments. The defendant stood looking at the form of his victim without saying a word. Sellers sprang from his bed, exclaiming, "My God, Red, what have you done." The defendant remained silent for a few moments, and then replied, "I hated to do this but I had to." He did not suggest any reason why he had to shoot Henry. Upon the advice of Sellers, the defendant surrendered himself to the sheriff and made a statement of the affair, in which he corroborated Mr. Sellers' story in most of its details. He said that Henry was drunk and that he put him to bed. He claimed that he insisted on Henry taking off his clothes, which he refused to do. He admitted that there was "no quarrel" between them, but he said that when he told Henry to get up and take off his clothes he "jumped up all of a sudden" and said "he was going to clean up on me". That statement was not corroborated by Sellers. The defendant said he was afraid of Henry, but he gave no reason for that pretended fear. He certainly did not fear him enough to get out of the rocking chair in which he sat when the deceased arose from the bed. Soules admitted that he was sitting in the chair when he shot the deceased. There was nothing in Henry's previous conduct to lead the defendant to fear him. While the deceased was still lying in bed with his back to the defendant, and before Henry had said a word, Soules got up and armed himself with a loaded shotgun and returned to the chair where he sat with it pointed toward the bed and with which he threatened to shoot the deceased. Mr. Henry was unarmed, as the defendant knew. He had made no previous threats or demonstrations against the defendant. Clearly the defendant was in no danger. As a reasonable person, he must have known that fact. The killing of Wesley Henry appears to have been an unprovoked and unjustifiable homicide.

[1] The only circumstance that might mitigate the killing of Henry is the possibility that the defendant may have been drunk. But he does not claim that he was then drunk. His sole pretense of an excuse was that he had to shoot in necessary self-defense. Sellers testified that he acted and talked like a sober man. The jury was fully instructed upon the legal effect of intoxication. It was the sole province of the jury to determine whether the defendant was drunk or sober. The verdict implies that the jury did not believe the defendant was so intoxicated as to mitigate the crime of killing Wesley Henry. There is an abundance of evidence to support that conclusion.

The appellant seeks a reversal of the judgment on the grounds that (1) the court erred in giving to the jury and in refusing to give certain instructions; (2) the court erred in excluding defendant's offer to prove that the deceased was a dangerous man by showing he was guilty of former acts of violence against other persons, and (3) the district attorney was guilty of prejudicial misconduct in his argument to the jury.

[2] The court properly rejected defendant's offer to prove that the deceased was a dangerous man of violent temper by evidence of former unprovoked assaults upon other individuals. He had previously been permitted to testify that the general reputation of the deceased for peace and quite was "not too good". The defendant was then asked if he had heard of specific instances when the deceased assaulted other persons. Upon request of the court to more specifically indicate the nature of the evidence sought to be elicited the defendant's attorney offered to prove that his client had heard that Wesley Henry, the deceased, assaulted Caesar Pido with a rock; that upon another occasion he threatened to blow a hole in Frank Williams "big enough to ride a horse through", and that, at another time, he "had discharged a gun and blown a man's heel off". To that offer the prosecution objected on the ground that the evidence was incompetent. The objection was properly sustained. No sufficient foundation was laid for the introduction of evidence of former specific acts of violence upon other persons. Under the circumstances of this case the court was justified in exercising its discretion to reject the proffered evidence. The testimony of Charles Sellers, who was present at the time of the homicide, clearly indicates that the defendant was the aggressor and that there was no occasion for him to reasonably fear an assault or bodily harm at the hands of the deceased.

It is true that, in some jurisdictions, under proper circumstances, evidence of prior specific acts of violence by the defendant upon other individuals may be shown in a subsequent trial for murder where the accused admits the homicide and first establishes a prima facie case of necessary self-defense. Evidence of prior acts of violence by the defendant upon other persons, of which the accused has previous knowledge, is sometimes admitted, after proof that the defendant had knowledge that the deceased previously threatened him, on the theory that such evidence, in view of the former threats, would reflect some light on the question of whether the defendant killed his antagonist in the honest belief that he was about to receive great bodily harm at his hands. It is asserted, in support of the competency of such evidence of prior acts of violence against other persons, that knowledge of the fact that a person who had previously threatened the defendant, was a violent, turbulent and dangerous man, would furnish some cause for a man to reasonably assume that he was about to receive great bodily harm from him, and therefore justify killing him, provided the surrounding circumstances otherwise warranted that conclusion. In other words, it is argued that knowledge of the fact that an antagonist is a bad and dangerous man may reasonably increase one's fear of him.

[3] It is, however, apparent that even if such evidence is competent, under certain circumstances, it should be received with caution for the reason that it is remote, weak, collateral to the real issue, confusing to the jury, unsatisfactory and difficult to rebut. To entitle such evidence to any substantial weight it would be necessary to adduce proof of the circumstances of each previous affray to fairly determine whether the deceased was warranted in acting as he did. For those reasons the great weight of authority holds that evidence of such prior specific acts of violence by the deceased upon other persons is not admissible upon trial of a subsequent offense. It is almost uniformly held that proof of the turbulent, violent and dangerous character of a person, offered for the purpose of concluding therefrom that he was more likely to have been the aggressor in an affray which resulted in his death, must be established by evidence of his general reputation for peace and quiet in the community where he resides. The same rule is usually applicable to evidence of a violent nature adduced in assault and murder cases to corroborate the defendant in his claim that he acted in necessary self-defense, believing from the circumstances of the particular case, as a reasonable man, that he was about to be assaulted and that he was likely to be killed or to receive great bodily harm. People v. Griner, 124 Cal. 19, 56 P. 625; People v. Henderson, 28 Cal. 465; State v. Sella, 41 Nev. 113, 168 P. 278, 285; 25 Calif.Law Rev. 459, 467; 121 A.L.R. 382, note; 26 Am.Jur.

393, § 347; 13 Cal.Jur. 693, § 77; 30 C.J. 230, § 467.

[4] There are certain well-recognized exceptions to the rule that evidence of previous acts of violence by the deceased against other persons may not ordinarily be shown. Such evidence is competent when it is a part of the res gestae of the transaction for which the defendant is being tried. 121 A.L.R. p. 390, subd. III a, note. That evidence is also competent as proper cross-examination of a witness for the prosecution who has first testified that the deceased was a man of good reputation for peace and quiet, inferring thereby that he was therefore not likely to have assailed the defendant, or to have threatened his life. People v. Carmichael, 198 Cal. 534, 547, 246 P. 62; 30 C.J. 175, § 397. In the authority last cited it is said in that regard: "Deceased's character must be shown by general repute in the community and not by evidence of specific acts. But on the cross-examination of the state's witnesses defendant is entitled to inquire as to their knowledge or information with respect to deceased or other difficulties in which he was engaged, the purpose of which inquiry being to test their credibility or their knowledge of deceased's character."

It was the defendant in the present case who first offered evidence of the general reputation of the deceased for peace and quiet.

[5] Many authorities hold that before evidence of prior specific acts of violence may be adduced, the defendant is required to make a preliminary showing of his good faith as a reasonable person in believing it was necessary for him to kill his assailant to protect himself against great bodily harm. If it clearly appears that the defendant was the aggressor or that he was in no imminent danger of death or great bodily harm, evidence of prior acts of violence upon other persons by the deceased is not admissible. The trial court has a sound discretion to determine from all of the facts and circumstances adduced whether a prima facie showing of good faith on the part of the defendant has been established sufficiently to warrant the reception of evidence of prior acts of violence upon other persons by the deceased. In 30 C.J., at page 230, it is said in that regard: "In order that evidence of the violent and dangerous character of deceased or the person assaulted may be admissible, there must be a claim of self-defense, supported by some evidence. It is within the discretion of the trial judge to determine when a proper foundation is laid, which according to some authorities may consist in the testimony of defendant alone, but according to other authorities, the unsupported statement of defendant is insufficient. There must be some evidence of some overt act on the part of deceased, of such character as would per se be indicative of dangerous intentions, or it must be shown affirmatively to have been done under circumstances such as to have reasonably led to a belief that it was of that character. Evidence of the dangerous and violent character of deceased is not admissible where at the time such evidence is offered it appears from the evidence already introduced that the defendant provoked the difficulty, or was the assailant, where he was in no danger of loss of life or serious bodily harm, or did not believe himself to be in such danger, or there was nothing to excite the fears of a reasonable man that such danger existed."

In the case of People v. Swigart, 80 Cal.App. 31, 251 P. 343, 349, it was held the court did not err in excluding evidence on behalf of the defendant in a trial for murder, that the deceased had previously violently struck and beaten other individuals. That ruling was unquestionably correct. It appeared that the defendant had no personal knowledge of such alleged acts of violence before the time of the homicide. Any previous acts of violence by the deceased could therefore have had no bearing on the question as to whether the defendant acted in necessary self-defense in killing his adversary, honestly believing in good faith that he was about to receive great bodily harm at the hands of a violent and dangerous man. The court did say that under proper circumstances such evidence of specific acts of violence on the part of the deceased might be shown. But the court adopted the reasoning usually employed to indicate that such evidence is either incompetent or that it should be received with great caution after a foundation for its acceptance had first been laid. The court added that, "The courts of our own state have not as yet gone as far in applying the character rule in instances such as we have here as counsel for the defendant would have us go." The judgment in the Swigart case was affirmed on the ground that the defendant was the aggressor and that he did not kill the deceased in necessary self-defense. The defendant knew that the deceased had threatened to kill him. He deliberately armed himself with a revolver and went to a place where he expected to meet the deceased. He met him there, and, in an affray which ensued, he killed the deceased.

In the case of People v. Thomson, 92 Cal. 506, 28 P. 589, a judgment of conviction of murder of the first degree was reversed because an erroneous instruction, which was given to the jury, confined evidence that the deceased had frequently threatened the life of the defendant with a deadly weapon which he exhibited, to the sole consideration of the question as to whether "the relations existing between the deceased and the defendant were unfriendly". The Supreme Court held that the evidence in that case tended to show that the defendant, having been frequently threatened by the deceased, acted, under the circumstances of that case, in good faith in his belief that he was about to receive great bodily harm at the hands of his assailant when he shot and killed him. The evidence showed that at the time of the homicide the deceased advanced toward the defendant "three or four steps with a pistol raised in his hand".

In a prosecution for murder, where the accused relies on the doctrine of necessary self-defense, and offers proof of prior threats of the deceased to kill him, and the evidence shows that the deceased was actually advancing with a revolver in his hand toward the defendant at the time of the homicide, the jury is entitled to consider the evidence of prior threats to determine whether the defendant, as a reasonable man, was warranted under such circumstances in believing that he was about to be killed or to receive great bodily harm so as to justify him in shooting his assailant in necessary self-defense. There is nothing in the Thomson case in conflict with what we have said regarding the principle of excluding evidence of prior acts of violence against another person, under the circumstances of this case. In the present case no threats against the defendant were ever made by the deceased. No case in California, to which our attention has been called, upholds the contention that evidence of prior specific acts of violence of the deceased against other individuals is competent under such circumstances as are shown by the record in this case.

None of the cases relied upon by the appellant furnishes authority in support of his contention that the court erred in refusing to permit him to prove former specific acts of violence by the defendant upon other persons, under the circumstances of this case.

The case of People v. Pantages, 212 Cal. 237, 297 P. 890, was reversed for the reason, among others, that the court erred in precluding the defendant from showing on cross-examination of the prosecution's witness that his testimony was biased and false because the prosecuting officer promised him, or intimated, that he would be dealt with leniently in the prosecution of several indictments which were then pending against the witness. That rejected evidence was addressed to the veracity of the witness, and it was therefore competent. That case has no application to the principle under discussion in the present case.

In People v. Blackwell, 81 Cal.App. 417, 253 P. 964, it was held to be error to sustain an objection to the question propounded on cross-examination to a witness of the prosecution to elicit evidence that, in consideration for her testimony against the defendant, the prosecuting officer had agreed to dismiss a criminal charge which was then pending against her. Like the Pantages case, supra, that question also affected the credibility of the witness. It was certainly competent. But it has no bearing on the question involved in this case respecting the rejecting of the offer to prove former specific acts of violence of the deceased upon other persons.

The case of People v. Bennett, 79 Cal.App. 76, 249 P. 20, upon which the appellant relies, was determined on exactly the same situation previously mentioned in the two last-cited cases. It has no application to the issue under consideration. There is nothing in any of the cases relied upon by the appellant in conflict with what we have previously said with respect to the incompetency of evidence of former specific acts of violence by the deceased against other persons.

Clearly that evidence was not competent under the circumstances of this case. No adequate preliminary foundation for its reception in evidence was established. The record almost conclusively shows that the defendant did not fear bodily harm at the hands of the deceased; that he had no occasion to fear him, and that he did not kill him in necessary self-defense. Every circumstance of the case refutes the defendant's claim that he acted in necessary self-defense. The testimony of an impartial eyewitness to the entire affair leaves no reasonable doubt that the defendant was the aggressor and that he deliberately armed himself with a loaded shotgun with which he killed an unarmed and intoxicated man without justification or cause. The defendant had no cause to fear the deceased. He had known him for more than a year. He associated with him. He knew that he was unarmed. He spent the night drinking with the deceased on the friendliest of terms. He was so friendly with Wesley Henry that he brought him home, took him into his own bedroom and put him to sleep in his own bed. When the defendant asked Henry to move over so that he could get into bed he obediently did so. Charles Sellers, the unprejudiced eyewitness to the entire affair, related a story from which we must conclude the deceased said and did absolutely nothing that could be construed as a threat against the defendant. The circumstances indicate that the killing of Wesley Henry was prompted by an abandoned and malignant heart, which infers that it was the result of malice. (Sec. 188, Pen.Code.)

The foregoing facts refute the theory of a homicide committed in necessary self-defense, or that the defendant shot and killed Wesley Henry in the belief that he was in danger of then receiving great bodily injury. No preliminary foundation was furnished for the introduction of evidence of former specific acts of violence by the deceased upon other persons. The court did not err in refusing to permit that proffered testimony under the circumstances of this case.

It is contended the court erroneously charged the jury that: "If you believe from the evidence in this case to a moral certainty and beyond a reasonable doubt that the defendant, Elmer Soules, at the time and place alleged in the information, did wilfully, unlawfully, feloniously, and with malice aforethought, kill and murder Wesley Henry, and that said killing was not wilful, deliberate and premeditated, it is your duty to find the defendant guilty of murder in the second degree."

It is asserted the foregoing instruction is contradictory and misleading for the reason that it infers that the defendant might be convicted of murder of the second degree even though he did not wilfully kill his adversary. The jury was very fully instructed upon every essential element of the crime of murder of the first and second degree and of manslaughter. After the jury retired and considered their verdict for some time, they returned into open court and asked the judge to further explain the difference between murder of the first degree and murder of the second degree. The foreman said: "We would like a clearer explanation as to the difference between murder in the first degree carrying the death penalty and murder in the second degree."

The court then reread his instructions upon that subject which had been previously given to the jury. Finally the court said: "If a killing is wilful, deliberate and premeditated it is murder in the first degree; if it is not wilful, deliberate and premeditated then it is murder in the second degree, provided, of course, that it is wilful, unlawful, felonious, and with malice aforethought."

[6-9] We are of the opinion the instructions explaining the distinction between murder of the first and second degrees were not misleading or prejudicial. The jury was clearly and repeatedly told that murder of the second degree is accomplished when "it is wilful, unlawful, felonious and with malice aforethought". That was the last statement the judge made to the jury. It would seem improbable that the jurors could have misunderstood that plain statement of the law. In effect, the court instructed the jury that unless the killing was accomplished wilfully it would not constitute murder of the second degree, nor murder of any degree. The jury was correctly told that malice, either express or implied, must be shown to have existed on the part of the defendant to constitute either murder of the first or the second degree. The distinction between the two degrees of murder was plainly and properly declared to be the presence or the absence of premeditation and deliberation. It is true that the court said "if it is not wilful, deliberate and premeditated" it is murder of the second degree provided "it is wilful, uulawful, felonious and with malice aforethought". The word "wilfully" was properly defined in the exact language of section 7, subdivision 1, of the Penal Code. In the use of the phrase "if

it is not wilful, deliberate and premeditated" the court employed words of a commonly-used phrase conjunctively expressed.

In the case of People v. Pool, 27 Cal. 572, 581, the Supreme Court held that the identical words which are challenged in this case, to-wit: "wilful, deliberate and premeditated," when they are associated with the subject to which they relate, "may be regarded as cumulative, and merely giving force to the subject matter by successive expressions of the same idea". In support of that conclusion the court cited section 1084 of 1 Wharton's Criminal Law. The same construction of that term is likewise explained in 2 Bishop's New Criminal Procedure, page 234, sections 545, 546. In the present case we are satisfied the phrase was used in the conjunctive and that it must have been so understood by the jury, for the court followed that phrase immediately with the statement that second degree murder is accomplished only when "it is wilful, * * * and with malice aforethought". We therefore conclude that the challenged instruction was neither erroneous nor prejudicial.

[10,11] The appellant contends that the court erred in giving to the jury instructions on the subject of circumstantial evidence for the reason that the killing was admitted and that there was an eyewitness to the entire affair. It is asserted this rendered the instructions on that subject inapplicable. Assuming that the instructions on circumstantial evidence were inapplicable, it is not suggested how they could have prejudiced the defendant. We are unable to perceive how they could possibly have prejudiced him. A multitude of authorities hold that even though inapplicable instructions are given to the jury regarding a subject upon which there is no evidence, it does not constitute reversible error unless it appears that the defendant was actually prejudiced thereby. People v. Tyren, 179 Cal. 575, 580, 178 P. 132; People v. Wilt, 173 Cal. 477, 484, 160 P. 561; People v. Ridgeway, 89 Cal.App. 615, 265 P. 349; art. VI, sec. 4½, Const. of Calif.; 17 C.J. 342, sec. 3690. In the authority last cited it is said in that regard: "The giving of instructions, whether correct or not, which are abstract or are not authorized by the pleadings and evidence, will not constitute a ground for reversal where no prejudice results to defendant. The presumption is that an instruction having no application to the case made by the pleadings and proof does not injure defendant."

In the present case, while the defendant did admit that he shot and killed the deceased, and there was an eyewitness to the immediate transaction of the shooting, the motive and intent with which the crime was committed were established by circumstances. We think the court properly instructed the jury with respect to the distinction between direct and circumstantial evidence. If the instructions are not applicable they were harmless. Certainly the giving of those instructions is not reversible error.

[12, 13] The court properly instructed the jury in the exact language of section 197 of the Penal Code to the effect that homicide is justifiable under the circumstances enumerated therein, but that when the defendant is the assailant or is engaged in mutual combat, he must in good faith endeavor to decline further struggle before he is justified in killing his antagonist. The appellant challenges that instruction on the ground that he was not the aggressor and that he was not engaged in a mutual combat with the deceased. There is no merit in this contention. The homicide having been conclusively established, the burden of showing that it was justifiable rested on the defendant. (Sec. 1105, Pen. Code.) The chief excuse of the appellant was that he was compelled to kill Wesley Henry in necessary self-defense, believing he was about to receive bodily harm. The defendant first threatened to "fill the deceased full of shot". Substantial evidence indicates that the defendant was the aggressor. He deliberately armed himself with a loaded shotgun and sat in the chair, threatening to use it. He claimed that the deceased got out of bed and came toward him, threatening to take the gun away from him. Under such circumstances, the doctrine of declining to carry on the affray before the defendant could be excused from killing his antagonist on the ground of justifiable homicide is applicable and proper. The challenged instructions were not erroneous.

[14, 15] In his opening statement to the jury the defendant's attorney, in commenting on the evidence he expected to adduce, said that the deceased threatened the defendant and started toward him acting "as if he had something to drink just like any drunken Indian". On motion of the district attorney the quoted portion of the

statement was stricken from the record. That ruling was harmless. The defendant failed to assign it as error. The remark was disparaging to the character of the deceased. There is no evidence that he was an Indian. Moreover, there is no legal presumption that merely because a man may have some Indian blood in his veins that he is therefore more dangerous under the influence of liquor than individuals of other nationalities. Section 22 of the Penal Code, which prescribes the legal effect of voluntary intoxication upon criminal acts, makes no discrimination with respect to race, color or nationality. All are governed by the same rule. The effect of liquor depends upon individual natures and personal characteristics, not upon the nationality of the consumers thereof. Some famous and exemplary Americans have been proud of their Indian blood and have brought honor to our nation.

[16] We have examined each assignment of alleged prejudicial misconduct of the district attorney in his argument to the jury and find no substantial merit in any of them. The challenged statements appear to have been harmless. Moreover, they were stricken from the record and the jury was instructed to disregard them. Under such circumstances they may not ordinarily be relied upon as reversible error. People v. Berryman, 6 Cal.2d 331, 57 P.2d 136; People v. Swearningen, 168 Cal. 53, 58, 141 P. 822; 17 C.J. 299, sec. 3638.

[17] We are not warranted in reducing the crime from murder of the second degree to that of manslaughter.

The judgment and the order are affirmed.

We concur: TUTTLE, J.; PULLEN, P. J.

16 Cal.2d 532

Ex parte SMALLBONE.

Cr. 4316.

Supreme Court of California.

Nov. 12, 1940.

1. Exemptions ⚷76

There is no exception in the exemption laws which authorizes the satisfaction of an alimony judgment out of the exempt property belonging to the husband, and the court cannot read such exception into the law in the absence of waiver of the exemption by the husband.

2. Exemptions ⚷54

Where exempt property is converted into cash in hands of husband, or such money is being held for him by a third person subject to relinquishment upon husband's demand or stipulation, husband cannot assert that he is not financially able to respond to the decree of the court directing him to pay alimony, attorney's fees, or costs in an action for divorce, and if he fails to pay the award he is guilty of "contempt".

See Words and Phrases, Permanent Edition, for all other definitions of "Contempt".

3. Exemptions ⚷76

Where husband was financially able, from funds accruing from pension payments, to respond to order of court directing him to pay amount of judgment for alimony, attorney's fees and costs recovered against him, without requiring him to sell or incumber specific property exempt from execution, husband was not entitled to discharge from custody on ground that he could not be required to withdraw accrued pension money to discharge his delinquency.

◆

In Bank.

Habeas corpus proceeding by James H. Smallbone to secure discharge from custody under judgment committing him for failure to pay support money due former wife under a final decree of divorce.

Writ discharged, and petitioner remanded to custody.

Raine Ewell, of San Francisco, for petitioner.

Raymond D. Williamson, of San Francisco, for respondent sheriff.

Frederic T. Leo, of San Francisco, for plaintiff in trial court.

MOORE, Justice pro tem.

By this proceeding in habeas corpus the petitioner seeks his discharge from custody under a judgment committing him for his failure and refusal to pay support money due to his former wife under a final decree of divorce entered on January 14, 1938.

Petitioner is a retired employee of the city and county of San Francisco, wherein the decree of divorce and the adjudication in contempt were had. As such retired employee he is entitled to a monthly pension of $100. Several of petitioner's pension installments have accumulated with the pension board, due, so petitioner asserts, to certain legal proceedings taken against him by his former wife. It appears, however, that petitioner has refused to stipulate, as requested by the former wife, to the release of sufficient of the pension money to permit of his compliance with the order of court directing payment of the support money to her. Under such circumstances, the trial court found, among other things, that the reason for the nonpayment of the support money was petitioner's refusal to obey its orders. He was, therefore, adjudged guilty of contempt and ordered committed until he should have purged himself by payment of the support money.

At the oral argument before this court petitioner waived all contentions except the claim that he cannot be required to withdraw his accrued pension money in order to satisfy and discharge his delinquency with respect to the support payments. He bases this contention on the claimed exemption of the pension instalments.

[1] In Ex parte Silvia, 123 Cal. 293, 55 P. 988, 69 Am.St.Rep. 58, it was found that the petitioner was unable to make the required alimony payment without selling or encumbering his homestead. This court there held that since the prisoner had "no means aside from his homestead, in a legal sense [he] has not the ability to pay the alimony, and his continued imprisonment is unlawful". The soundness of this decision has never been questioned. It was cited with approval in Yager v. Yager, 7 Cal.2d 213, 220, 60 P.2d 422; Van Hoosear v. R. R. Commission, 189 Cal. 228, 233, 207 P. 903; Bakeman v. Superior Court, 37 Cal. App. 785, 788, 174 P. 911. There is no exception in the exemption laws which would authorize the satisfaction of an alimony judgment out of exempt property belonging to the husband and it is not the province

of the courts to read such an exception into the law, in the absence of waiver of the exemption by the husband.

[2] But, this need not prove determinative of this proceeding. We are equally satisfied that when exempt property is converted into cash in the hands of the alimony debtor, or such money is being held for him by a third person, subject to relinquishment upon his demand or stipulation, he is no longer in a position to assert that he is not financially able to respond to the order or decree of the court directing him to pay alimony, attorney's fees or costs in an action for divorce. Under such circumstances, a trial court is justified in finding him guilty of contempt for his failure to pay such an award out of any money available, regardless of the source from which it was obtained. In Bruton v. Tearle, 7 Cal.2d 48, 59 P.2d 953, 957, 106 A.L.R. 580, we had occasion to point out that "the decree for alimony, because of such difference in the character of the obligation, may be enforced by more efficient and effective means than those given to the enforcement of judgments at law". In passing, it may be pointed out that it has been elsewhere held that the exemption of pension moneys from execution and other process may not be construed to relieve a husband of his obligation to pay support money. Weigold v. Weigold, 236 App.Div. 126, 258 N.Y.S. 348; Zwingman v. Zwingman, 150 App.Div. 358, 134 N.Y.S. 1077; Monck v. Monck, 184 App.Div. 656, 172 N.Y.S. 401.

[3] We are satisfied that the evidence before the court in the contempt proceeding was sufficient to show that petitioner was financially able (i.e., funds were available to him) to respond to the order of the court directing him to pay the amount of the judgment for alimony, attorney's fees and costs recovered against him, without requiring him to sell or encumber specific property exempt from execution. Under such circumstances, to accept petitioner's contention would be to run counter to the purpose of the exemption statute. Its purpose is not to protect the debtor himself from liability for his debts, but to protect his exempt property from forced sale. The obligation to support a wife is not necessarily, and was not here, terminated upon the entry of the divorce decree. To accept petitioner's contention under the facts here present would permit the delinquent husband to evade such obligation and responsibility by sheltering himself behind legislation not intended for that purpose.

It is, therefore, ordered that the writ of habeas corpus be discharged and that petitioner be and he is hereby remanded to custody until he shall have purged himself of contempt by the payment of the sums named in the orders of the court below.

We concur: GIBSON, C. J.; CARTER, J.; CURTIS, J.; SHENK, J.; MARKS, Justice pro tem.

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16 Cal.2d 490

STEPHENS v. CLARK et al.

Sac. 5397.

Supreme Court of California.

Nov. 6, 1940.

1. Officers 🔑**9**

The statutory provisions dealing with the duties of the State Civil Service Commission with respect to classification and grading of positions are not in conflict with the article of the Constitution dealing with state civil service. St.1913, p. 1036, § 5, as amended by St.1927, p. 1314; Const. art. 24, § 5(b).

2. Officers 🔑**100(1)**

Though state employee was employed as an investigator in the department of motor vehicles at $275 a month when constitutional amendment of December 20, 1934, brought him under civil service, the state personnel board had authority in September, 1935, to give his position the classification of "supervisor of nonresident registration" with substantially the same duties as he previously performed, and on November 7, 1935, to establish a salary range for the position at a minimum of $205 a month and a maximum of $250 a month. St.1913, p. 1036, § 5, as amended by St.1927, p. 1314; Const. art. 24, § 5(b, e).

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus proceeding by Robert E. Stephens against Frank W. Clark and others, to compel the respondents to fix the petitioner's salary at a higher amount and to pay him the sum which would be due on that basis. From a judgment in favor of the petitioner, the respondents appeal.

Judgment reversed, with directions to vacate the writ and dismiss the action.

For prior opinion, see 99 P.2d 316.

Earl Warren, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for petitioner and respondent.

Ralph H. Lewis, Frederic R. Pierce, and Downey, Brand & Seymour, all of Sacramento, for respondents and appellants.

EDMONDS, Justice.

Prior to the adoption of article XXIV of the Constitution, which became effective December 20, 1934, the petitioner was a state employee not under civil service. He brought this proceeding to recover the difference between the salary received by him before that date and the lower amount later specified for his position in the classified civil service. The case is here upon an appeal from a judgment requiring the defendant state officers to fix the petitioner's salary at the higher amount and to pay him the sum which would be due him on that basis.

In 1934, the petitioner was an investigator in the department of motor vehicles, receiving a salary of $275 per month. The constitutional amendment which was adopted by the voters in that year declares that the state civil service shall include every employee of the state, with certain exceptions not applicable to the petitioner. It also provides: "All persons not hereinbefore provided for in subdivision (d) hereof, holding positions subject hereto for more than six months immediately preceding the effective date hereof, shall continue to hold such positions subject to the provisions hereof save that the [state personnel] board in adopting rules relative to classes or grades of the position held by such person shall give each such person such class or grade as it may deem just and such probationary term to commence on the effective date hereof of not less than two months nor more than eight months in the class or grade assigned as it may fix." Sec. 5(e). Petitioner's rights are governed by the provisions of this section.

Acting pursuant to these provisions, in September, 1935, the board gave his position the classification of "supervisor of non-resident registration", with substantially the same duties as the petitioner was then performing. On November 7, 1935, it established a salary range for this position at a minimum and maximum of $205 and $250 per month respectively. Since that date the petitioner has been paid at the maximum rate.

The appellant officers assert that the resolution of the board fixing the salary range for the petitioner's position automatically reduced his salary to the maximum allowed therefor, and also that any claim for back salary is barred by the statute of limitations. In support of the judgment of the trial court in his favor, the petitioner contends that as he had served the probationary period, under the terms of the constitutional amendment he became a permanent civil service employee with a salary rating of $275 per month which was not lowered by the resolution of the board when it classified his position. He argues that as no order was made directly concerning his salary, it could not be reduced by a general salary classification.

The quoted section of the constitutional amendment provides that the positions blanketed into the state civil service shall be classified and graded by the state personnel board, and that all persons holding such positions for more than six months immediately preceding the effective date of the act shall continue to hold such positions, subject to the provisions of the act and the classification and grading given by the board. Although the new legislation does not expressly provide how such classification and grading is to be accomplished, it includes the following: "All laws relating to the State civil service are continued in force in so far as not in conflict herewith subject to the power of the Legislature to amend or repeal such laws and to enact new laws not in conflict herewith." Sec. 5(b).

[1] The State Civil Service Act, Stats. 1913, p. 1035, as amended by Stats.1927, p. 1313, provides that the commission (now the personnel board) shall classify positions to be held under state authority in accordance with the duties attached to such positions. The following requirements are made in this connection: "The commission shall grade all positions within each class with respect to salaries, to the end that like salaries shall be paid for like

duties, and shall establish minimum and maximum salary limits for each grade in its classification of positions, and shall provide by rule for advancement of salary within each grade on the basis of efficiency and length of service. Such classes and grades may from time to time be amended, added to, consolidated, or abolished by the commission, but persons holding positions under the original classification or grade shall not be affected thereby. * * *" Sec. 5. This is not in conflict with the constitutional amendment and it states the manner in which the classification and grading of positions in the state civil service are to be accomplished. Obviously the rules to be adopted by the personnel board "relative to classes or grades" of positions held by non-civil service employees prior to the adoption of the constitutional amendment were to be promulgated in accordance with the State Civil Service Act, supra, and contemplated the establishment of a salary range for each position. It was on November 4, 1937, when the salary range for the position was fixed, that the classification and grading of the position was completed, and the earlier designation of the title of the position which the petitioner held did not operate to set his salary at the amount he was then receiving.

The passage of the constitutional amendment brought several thousand employees into the civil service system, but with no requirement that the classification and grading of their positions be accomplished within the eight months probationary period. Unquestionably, it was no small task to examine into the duties and consider the responsibilities of the persons occupying these positions. There is no evidence whatever that this delay was motivated by any consideration other than a desire to fairly consider the subject before it or that it prejudiced the petitioner's rights in any way. Indeed, it appears that petitioner substantially benefited because of the fact that the salary of his position was not established at an earlier date.

[2] The classification of the position by fixing a salary range was the original determination of the Personnel Board, and petitioner has no right to a salary in excess of the maximum therein provided. This does not result in a reduction of salary under the Civil Service Act, supra; it merely means that the board set up a standard, where none existed before, which must be followed. See Raymond v. Christian, 24 Cal.App.2d 92, 74 P.2d 536.

The judgment is reversed with directions to the trial court to vacate the alternative writ of mandate and dismiss the action.

We concur: CARTER, J.; CURTIS, J.; MOORE, Justice pro tem.; YORK, Justice pro tem.

16 Cal.2d 527

HILL v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

S. F. 16427.

Supreme Court of California.

Nov. 7, 1940.

Rehearing Denied Dec. 5, 1940.

1. Courts 🔑1
Prohibition 🔑10(1)

"Prohibition" may be resorted to only where a court is acting in excess of jurisdiction and there is no other adequate remedy in the ordinary course of law, but "jurisdiction" generally includes for certain purposes the authority or power to act in a case in a particular way.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction" and "Prohibition".

2. Prohibition 🔑3(5), 10(1)

A writ of "prohibition" may sometimes issue to prevent the exercise of unauthorized power where court has jurisdiction of the parties and the subject matter, and in exceptional cases is allowed where there is also a remedy by appeal if the circumstances are aggravated and justify immediate relief.

3. Prohibition 🔑3(5)

Where special administrator sued former executor upon implied contract to repay money allegedly converted to former executor's own use and writ of attachment was issued, and release of the attachment would render worthless any judgment secured by special administrator, remedy of "prohibition" could be properly invoked to prevent trial court from vacating the attachment, as against contention that special administrator had remedy by appeal.

4. Attachment 🔑7

An alleged cause of action by special administrator against former executor for conversion of property of estate was a cause of action "ex delicto" and so would not support issuance of writ of attachment. Code Civ.Proc. § 537, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Delicto".

5. Courts 🔑475(2)

Probate court has exclusive jurisdiction to settle the account of former executor, and an independent action to determine the amount of his indebtedness in the form of an action for money had and received may not be maintained.

6. Action 🔑28

One seeking to recover funds allegedly misappropriated by defendant may waive the tort and sue upon an implied contract for money had and received.

7. Attachment 🔑6

Special administrator's action against former executor upon implied contract to repay money allegedly converted to former executor's own use was a cause of action "ex contractu" which would support issuance of writ of attachment, notwithstanding the action was based on tort of embezzlement, on theory that special administrator could waive the tort and sue upon implied contract for money had and received. Code Civ.Proc. § 537, subd. 1; Probate Code, § 612.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Contractu".

8. Executors and administrators 🔑120(2)

At common law, the authority of an administrator de bonis non did not extend to any property which had been administered by his predecessor, and administrator de bonis non therefore had no office to perform in connection with a conversion of funds, which constituted an act of administration.

9. Executors and administrators 🔑120(2)

At common law, an administrator de bonis non could not maintain an action at law against his predecessor for anything except unadministered effects existing in specie.

10. Executors and administrators 🔑120(2)

Under statutes, an administrator de bonis non must do everything necessary to completely administer the estate, and all the authority vested in his predecessor passes to him, and he may sue his predecessor for mismanagement or any other breach of duty whereby deceased's property was diverted from the due course of administration. Probate Code, § 612.

11. Executors and administrators 🔑120(2)

Under statutes, action by special administrator against his predecessor for mismanagement or any breach of duty whereby property of deceased was diverted from due course of administration is maintainable on theory that although probate court has exclusive jurisdiction of settlement of an executor's account, a cause of action to recover value of property withheld or embezzled is not a demand for an accounting and an accounting is not necessary to determine its validity. Probate Code, § 612.

12. Executors and administrators 🔑120(2)

Alleged cause of action by special administrator against former executor upon implied contract to repay money allegedly converted to former executor's own use was not prematurely brought where based upon specific transactions and amount asserted to be due was definitely stated, notwithstanding former executor's account had not yet been settled by probate court. Probate Code, § 612.

◆

In Bank.

Prohibition proceeding by Albert E. Hill, as Public Administrator of the County of Alameda, State of California, and as special administrator of the estate of W. F. Gibbard, deceased, against the Superior Court of the State of California, in and for the County of Alameda, and the Honorable T. W. Harris, as Judge thereof.

Peremptory writ of prohibition granted.

For prior opinion, see 100 P.2d 526.

Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., and Owen Hotle, Jr., Deputy Dist. Atty., all of Oakland, for petitioner.

A. J. Woolsey, and Walter V. Cairns, both of Oakland, for respondents.

EDMONDS, Justice.

The petitioner in this proceeding for a writ of prohibition is an administrator who brought suit against H. S. Craig, his predecessor, to recover money alleged to have been embezzled from the estate of W. F. Gibbard, deceased. Certain money claimed to be due to Craig was garnished under a writ of attachment. Craig then moved to vacate the attachment upon the ground that the action was prematurely brought. At the hearing of this motion the respondent judge stated that it would be granted. This proceeding was then brought in the District Court of Appeal, which denied the petitioner any relief. The case is here upon an order granting a hearing in this court.

According to the complaint, Craig was appointed executor in 1935. He continued to act in that capacity until December 4, 1939, when his letters testamentary were revoked.

The petitioner, who was later appointed administrator with the will annexed, declares that the superior court has no jurisdiction to discharge the attachment for the reason that it was issued in an action upon both an express and implied contract for the direct payment of money within the meaning of section 537, subdivision 1, of the Code of Civil Procedure. Such an action, he asserts, may be brought at any time because section 612 of the Probate Code provides: "If any person embezzles, conceals, smuggles or fraudulently disposes of any property of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property, to be recovered for the benefit of the estate." The respondents take the position that the order which it is asserted is about to be made is one within the jurisdiction of the probate court and from which an appeal may be taken. For this reason, it is said, prohibition is not the proper remedy. Moreover, on the merits, they contend that the accounts of the former executor must be settled in the probate court before it can be determined what amount, if any, is chargeable against him, and an action brought in advance of that decision is premature.

[1-3] It is elementary that prohibition may be resorted to only in cases where a court is acting in excess of jurisdiction and there is no other adequate remedy in the ordinary course of law. However, in the application of this rule, the term jurisdiction is now generally held to include for certain purposes the authority or power to act in a case in a particular way. Under the modern practice, the writ of prohibition may sometimes issue to prevent the exercise of unauthorized power in a case where the court has jurisdiction of the parties and the subject-matter (Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109; Michel v. Williams, 13 Cal.App.2d 198, 56 P.2d 546) and it is allowed in exceptional cases where there is also a remedy by appeal if the circumstances are aggravated and justify immediate relief. Golden State Glass Corp. v. Superior Court, 13 Cal.2d 384, 90 P.2d 75. In the present case it is alleged that the release of the attachment would render worthless any judgment secured by the plaintiff, and the circumstances which are pleaded in detail justify the procedure which has been invoked.

[4] Upon the merits, the principal question for decision is whether the amended complaint states a cause of action in contract upon which an attachment may issue. By the first count of this pleading it is charged that the defendants converted property of the estate to their own use. Clearly this is a cause of action ex delicto and cannot be the basis for the issuance of a writ of attachment. San Francisco Iron etc., Co. v. Abraham, 211 Cal. 552, 296 P. 82; Jacobs, Malcolm & Burtt v. Railway Co., 71 Cal.App. 42, 234 P. 328.

In the second count of the amended complaint, it is charged that Craig received $95,000 for the use and benefit of the plaintiff and the heirs, legatees and devisees of the estate and that no part of this sum has been paid except the sum of $17,000. By a third cause of action it is alleged that on May 16, 1939, Craig was indebted to the estate in the sum of $67,955.56 for money had and received, and that he executed a contract whereby he promised to pay the estate this amount. The fourth count alleges that on July 15, 1939, Craig owed the estate $78,000 which he then promised to pay. The fifth cause of action repeats the allegations of the preceding one except that the date when Craig was indebted and promised to pay is said to be November 20, 1939. In the sixth count, plaintiff alleges mismanagement of the estate and appropriation of funds in an amount to be ascertained by an accounting.

[5-7] It is conceded that the probate court has exclusive jurisdiction to settle the account of the former executor and an action to determine the amount of his indebtedness in the form of an action for money had and received may not be maintained. Turney v. Shattuck, 96 Cal.App. 590, 274 P. 442; King v. Chase, 159 Cal. 420, 115 P. 207; Smith v. Fidelity & Deposit Co., 130 Cal.App. 45, 19 P.2d 1018.

On the other hand, where the facts show a misappropriation of funds one may waive the tort and sue upon an implied contract for money had and received. Bechtel v. Chase, 156 Cal. 707, 106 P. 81; Hoare v. Glann, 176 Cal. 309, 168 P. 346; Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990. Such an action is based upon the tort of embezzlement, yet the action is one ex contractu, in which the plaintiff may have a writ of attachment. Los Angeles Drug Co. v. Superior Court, 8 Cal.2d 71, 63 P.2d 1124; McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019.

[8, 9] At common law the authority of an administrator de bonis non did not extend to any property which had been administered by his predecessor. A conversion of funds constituted an act of administration and the administrator de bonis non had no office to perform. Reed v. Hume, 25 Utah 248, 70 P. 998; Wilson v. Arrick, MacArthur & M. (11 D.C.) 228, affirmed in 112 U.S. 83, 5 S.Ct. 75, 28 L.Ed. 617; United States v. Walker, 109 U.S. 258, 3 S.Ct. 277, 27 L.Ed. 927; Hodge v. Hodge, 90 Me. 505, 38 A. 535, 40 L.R.A. 33, 60 Am. St.Rep. 285; Vandeventer v. Florida Sav. Bank, 162 Mo.App. 34, 141 S.W. 900; he could not maintain an action at law against his predecessor for anything save unadministered effects existing in specie. Hodge v. Hodge, supra; Yancy v. Yancy, 183 Ky. 512, 209 S.W. 858, 3 A.L.R. 1249; Johnson v. Hogan, 37 Tex. 77; Brown v. Brown, 72 W.Va. 648, 78 S.E. 1040, 47 L.R.A.,N.S., 995.

[10, 11] However, modern statutes have greatly enlarged the authority of such administrators. Woerner, The American Law of Administration, vol. 2, 3d ed., sec. 352, p. 1169. It is now the duty of the succeeding administrator to do everything necessary to completely administer the estate, and all the authority vested in his predecessor passes to him. This necessarily gives him power to call the former representative to account for any money in his possession at the time of his removal because it is unadministered property. He may therefore sue his predecessor for mismanagement or any other breach of duty whereby the property of the deceased was diverted from the due course of administration. In re Herren's Estate, 40 Or. 90, 66 P. 688; Todd v. Willis, 66 Tex. 704, 1 S.W. 803. Such actions are allowed on the theory that although the probate court has exclusive jurisdiction of the settlement of an executor's account, a cause of action to recover the value of property withheld or embezzled is not a demand for an accounting nor is an accounting necessary to determine its validity. And in a number of jurisdictions an administrator de bonis non may maintain an action against his predecessor for an undetermined amount before an accounting in the probate court. Douglas v. Day, 28 Ohio St. 175; State of Missouri to Use of Shields v. Flynn, 48 Mo. 413.

[12] In the second, third, fourth and fifth counts of the complaint, the plaintiff is seeking to recover upon an implied contract to repay money allegedly converted by the former executor to his own use. The action is based upon specific transactions and the amount asserted to be due is definitely stated. So far as these causes of action are concerned the action was not brought prematurely and will support a writ of attachment.

A peremptory writ of prohibition will issue as prayed.

We concur: CARTER, J.; CURTIS, J.; YORK, Justice pro tem.; MOORE, Justice pro tem.

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16 Cal.2d 516

BANK OF CALIFORNIA NAT. ASS'N et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 16436.

Supreme Court of California.

Nov. 7, 1940.

1. Prohibition 🔑10(2)

Prohibition cannot issue to stay trial because of procedural defect of parties unless the defect is jurisdictional.

2. Parties 🔑18

Under common law, joinder of plaintiffs was compulsory where the parties under substantive law were possessed of joint rights.

3. Parties 🔑18, 32

Although "necessary parties" are so interested in the controversy that they should normally be made parties in order to enable the court to do complete justice, if their interests are separable from the rest and particularly where their presence cannot be obtained, they are not "indispensable parties" who are those without whom the court cannot proceed. Code Civ.Proc. § 389.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Parties" and "Indispensable Parties".

4. Parties ⇨18
Trusts ⇨366(1)

Where a number of persons have undetermined interests in the same property, or in a particular trust fund, and one of them seeks to recover the whole, to fix his share, or to recover a portion claimed by him, the other persons with similar interests are "indispensable parties" to the suit. Code Civ. Proc. § 389.

5. Parties ⇨18, 29

Where plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interests of a third person not joined, the third person is an "indispensable party." Code Civ.Proc. § 389.

6. Parties ⇨80(1), 84(1)

Objection that "indispensable parties" have not been joined is so fundamental that it need not be raised by the parties themselves, and the court may of its own motion dismiss the proceedings or refuse to proceed until the indispensable parties are brought in. Code Civ.Proc. § 389.

7. Prohibition ⇨10(1)

A court which attempts to proceed in an action when indispensable parties are not before the court acts beyond its jurisdiction and may be restrained by prohibition. Code Civ.Proc. § 389.

8. Judgment ⇨16
Parties ⇨18, 32

Persons who are interested in an action in sense that they might possibly be affected by the decision, or whose interests in subject matter are such that it cannot be finally and completely settled without them, but whose interests are so separable that a decree may be rendered between parties before the court without affecting those not before the court may be "necessary parties" to complete settlement of the entire controversy but are not "indispensable parties" required to be before the court in order for the court to render a valid judgment. Code Civ.Proc. § 389.

9. Parties ⇨18, 32

Necessary parties should normally be joined in an action and the court will usually require them to be joined in order to carry out policy of complete determination and avoidance of multiplicity of suits, but the rule being one of equity is limited by considerations of fairness, convenience and practicability, and if it is impossible to find the necessary parties or impracticable to bring them in, the action may proceed as to those who are present. Code Civ.Proc. § 389.

10. Wills ⇨248

The probate court in which will was probated could not take cognizance of alleged contract by which testatrix agreed to leave her entire estate to her niece.

11. Specific performance ⇨86

An equity court cannot compel the making of a will pursuant to contract executed by a decedent.

12. Trusts ⇨103(1)

Where decedent fails to distribute her property in accordance with contract and executes will which violates terms of the contract, the decedent's estate may be probated and the property distributed accordingly, but the court will, in an action by the promisee, impose a "constructive trust" upon any particular property in hands of an individual distributee and thereby accomplish substantial result of enforcement of the contract, which may be termed "quasi specific performance" of the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust" and "Quasi Specific Performance".

13. Trusts ⇨359(1)

An action to impose constructive trust upon property of testatrix in hands of individual distributees because of testatrix' breach of contract to devise property in certain manner, is an action against distributees personally and not against the testatrix' estate and is independent of the will and probate proceeding, and each distributee is individually held as a "constructive trustee" solely of the property which came to him and none is interested in the granting or denial of similar relief as to any other.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trustee".

14. Trusts ⇨366(1)

In action to impose constructive trust upon property in hands of distributees of a decedent's estate on ground of decedent's breach of contract to make will disposing of the property in certain manner, each of the distributees is a "necessary party" and the court will generally order each distributee served and brought in unless there is some good reason for not doing so, but the distributees are not "indispensable parties" who are necessary in order that a valid judgment may be entered. Code Civ.Proc. § 389.

15. Judgment ⚷707

In action to impose constructive trust upon property in hands of distributees of decedent's estate because of breach of decedent's contract to dispose of the property in certain manner, judgment, whether favorable or unfavorable, is not binding on distributees who are not made parties to the action and their property interests will not be affected.

16. Specific performance ⚷106(1)

In action for enforcement of agreement by which testatrix agreed to leave her entire estate to her niece, wherein only residuary legatee and executor were served with summons, other parties shown by complaint to own interests in the property and against whom the niece prayed for judgment were merely "necessary parties" and were not "indispensable parties" and hence the court had jurisdiction to proceed without them to determine the rights of the parties before the court. Code Civ.Proc. § 389.

17. Courts ⚷30

The court cannot lose jurisdiction of a proceeding merely because prayer of complaint seeks relief beyond that to which the plaintiff is entitled.

18. Courts ⚷30

In action to enforce agreement of testatrix to devise her entire estate to plaintiff, trial court did not lose jurisdiction to proceed against parties who were served with summons because of fact that plaintiff prayed for judgment against all of the legatees, some of whom were not served, since the court was not bound to follow plaintiff's theory and it would not be presumed that the court would follow an erroneous theory and act beyond its jurisdiction. Code Civ.Proc. § 389.

19. Prohibition ⚷10(2)

The alleged fact that prosecution of action to enforce agreement of testatrix to devise her entire estate to plaintiff against part of distributees of the estate under testatrix' will would cause inconvenience and multiplicity of suits to the injury of executor of testatrix' will was a matter within the discretion of the court to consider in connection with its policy of settling entire controversy in one proceeding, if possible, but did not go to the jurisdiction of the court to proceed as against the parties before it so as to authorize a writ of prohibition. Code Civ.Proc. § 389.

20. Prohibition ⚷28

The determination of the trial court on question whether certain distributees of testatrix' estate who were not made parties to action to enforce agreement of testatrix to devise her entire estate to plaintiff, should be required to be brought into the action, although reviewable in proper manner, could not be attacked on application for writ of prohibition to stay trial of the suit because of absence of the distributees. Code Civ. Proc. § 389.

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In Bank.

Proceeding by the Bank of California, National Association, as executor of the will of Sara M. Boyd, deceased, and another against the Superior Court of the State of California, in and for the City and County of San Francisco, and the Honorable Frank T. Deasy, as one of the Judges thereof, for prohibition to stay trial of a suit to recover estate property on ground of an agreement to make a will disposing of such property.

Alternative writ previously issued discharged and peremptory writ denied.

Prior opinion, 100 P.2d 1110.

Pillsbury, Madison & Sutro, of San Francisco, for petitioner Bank of California, Nat. Ass'n.

Myrick & Deering & Scott and James Walter Scott, all of San Francisco, for petitioner St. Luke's Hospital.

Mitchell Bourquin, Clinton L. Markley, George H. Cabaniss, Jr., and Daniel R. Shoemaker, all of San Francisco, for respondents.

GIBSON, Chief Justice.

This is a petition for a writ of prohibition, to restrain the respondent superior court from proceeding with the trial of an action without bringing in certain parties alleged to be "necessary and indispensable."

Sara M. Boyd, the widow of Colin M. Boyd, died testate in June, 1937, leaving an estate valued at about $225,000. On July 8, 1937, in the superior court in San Francisco, her will was admitted to probate, and petitioner, Bank of California, was appointed executor. The will left individual legacies and bequests amounting to $60,000 to a large number of legatees, including charitable institutions and individuals, some residing in other states and in foreign countries. Petitioner, St. Luke's Hospital, was named residuary legatee and devisee, and thereby received the bulk of the estate.

On October 14, 1937, Bertha M. Smedley, a niece and legatee, brought an action to enforce the provisions of an alleged contract by which decedent agreed to leave her entire estate to the plaintiff. The complaint named as parties defendant the executor and all of the beneficiaries under the will, and prayed for a decree adjudging that plaintiff is, by virtue of the agreement, the owner of the entire estate of the decedent after payment of debts and expenses. It was further prayed that plaintiff's title to the property be quieted; that defendants be ordered to execute deeds to her, and that upon the failure of any defendant to do so the clerk should execute such an instrument.

Summons was served only upon petitioners, the executor and the residuary legatee. No other defendants were served, and none appeared. Petitioners filed separate answers. The action came to trial on November 15, 1939. Immediately upon its opening, petitioners made a motion under section 389 of the Code of Civil Procedure for an order to bring in the other defendants, and to have summons issued and served upon them. The motion was made on the ground that all of the other defendants were "necessary and indispensable parties" to the action, and that the court could not proceed without them. The motion was denied by respondent court. Petitioners then applied for a writ of prohibition to restrain the trial until these other parties should be brought in.

In support of their application, petitioners point out that the complaint challenges the right of every legatee and devisee to share in the estate, and prays for an award of the entire property to plaintiff. It is contended that a trial and judgment without the absent defendants would adversely affect the rights of such parties, would result in a multiplicity of suits, and would subject the petitioning executor to inconvenience, expense and the burden of future litigation.

[1] To test the theory of petitioners, it will be necessary to examine briefly the origin and nature of the rules on required or compulsory joinder of parties. We may eliminate, at the outset, the field of permissive joinder of "proper parties", for there is no doubt that the absent defendants are interested in the issues and subject of the action, and could properly be joined. For the same reason, these legatees, if they had not been named as defendants, could no doubt have intervened in the action. These propositions are conceded by all parties, and the precise issue is thus made clear, whether the absent defendants are not only proper parties but "indispensable parties" in the sense that service upon them or their appearance is essential to the jurisdiction of the court to proceed in the action. Prohibition, of course, cannot issue unless the procedural defect of parties is jurisdictional. See Morrow v. Superior Court, 9 Cal.App.2d 16, 26, 48 P.2d 188, 50 P.2d 66.

[2] At common law, joinder of plaintiffs was compulsory where the parties, under the substantive law, were possessed of joint rights. Joint promisees under a contract, partners, and joint tenants were familiar examples. Equity courts developed another theory of compulsory joinder, to carry out the policy of avoiding piecemeal litigation and multiplicity of suits. Those persons necessary to a complete settlement of the controversy were usually required to be joined, in order that the entire matter might be concluded by a single suit. Obviously, this theory of joinder covered many situations where the substantive rights were not joint, and accordingly joinder would not have been required in an action at law. See Clark, Code Pleading, pp. 241, 242, 245. Generally speaking, the modern rule under the codes carries out the established equity doctrine. Thus, section 389 of the Code of Civil Procedure states: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in * * *." Such statutes have

been interpreted as declaratory of the equity rule and practice. See Clark, Code Pleading, p. 250; Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 671, 284 P. 445; Mitau v. Roddan, 149 Cal. 1, 7, 84 P. 145, 6 L.R.A.,N.S., 275; Solomon v. Redona, 52 Cal.App. 300, 306, 198 P. 643.

[3] But the equity doctrine as developed by the courts is loose and ambiguous in its expression and uncertain in its application. Sometimes it is stated as a mandatory rule, and at other times as a matter of discretion, designed to reach an equitable result if it is practicable to do so. And despite various attempts at reconciliation of conflicting expressions (see, e. g., Ambassador Petroleum Co. v. Superior Court, supra), a great deal of confusion still remains in the cases. See notes, 48 Harv.L.Rev. 995; 23 Cal.L.Rev. 320, 321. Bearing in mind the fundamental purpose of the doctrine, we should, in dealing with "necessary" and "indispensable" parties, be careful to avoid converting a discretionary power or a rule of fairness in procedure into an arbitrary and burdensome requirement which may thwart rather than accomplish justice. These two terms have frequently been coupled together as if they have the same meaning; but there appears to be a sound distinction, both in theory and practice, between parties deemed "indispensable" and those considered merely "necessary". As Professor Clark has remarked: "It has been objected that the terms 'necessary' and 'indispensable' convey the same idea. * * * But a distinction has been drawn. While necessary parties are so interested in the controversy that they should normally be made parties in order to enable the court to do complete justice, yet if their interests are separable from the rest and particularly where their presence in the suit cannot be obtained, they are not indispensable parties. The latter are those without whom the court cannot proceed." Clark Code Pleading, p. 245, note 21. See, also, as to the distinction in the federal courts, Franz v. Buder, 8 Cir., 11 F.2d 854, 856; Atwood v. Rhode Island Hospital Trust Co., 1 Cir., 275 F. 513, 24 A.L.R. 156.

[4, 5] First, then, what parties are indispensable? There may be some persons whose interests, rights, or duties will inevitably be affected by any decree which can be rendered in the action. Typical are the situations where a number of persons have undetermined interests in the same property, or in a particular trust fund, and one of them seeks, in an action, to recover the whole, to fix his share, or to recover a portion claimed by him. The other persons with similar interests are indispensable parties. The reason is that a judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or extent which remains available to the others. Hence, any judgment in the action would inevitably affect their rights. Thus, in an action by one creditor against assignees for the benefit of creditors, seeking an accounting and payment of his share of the assets, the other creditors were held indispensable (McPherson v. Parker, 30 Cal. 455, 89 Am.Dec. 129); and in an action by plaintiff to enforce a trust, where he claimed the property in his own right, to the exclusion of another actual beneficiary, failure to join the latter was held fatal to the judgment. O'Connor v. Irvine, 74 Cal. 435, 16 P. 236. Where, also, the plaintiff seeks some other type of affirmative relief which, if granted, would injure or affect the interests of a third person not joined that third person is an indispensable party. Thus, in an action by a lessor against a sublessee to forfeit a parent lease because of acts of the sublessee, the sublessors (original lessees) were indispensable parties, since a decree of forfeiture would deprive them of their lease. Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 262, 73 P.2d 1163. And in a suit to cancel illegal registration of voters, all voters whose registration was challenged were indispensable parties. Ash v. Superior Court, 33 Cal.App. 800, 166 P. 841. Many other cases, illustrating the reasons for compulsory joinder, may be found. See, e. g., Mitau v. Roddan, supra; Crowell v. Cape Cod Ship Canal Co., 164 Mass. 235, 41 N.E. 290; Lawrence v. Smith, 201 Mass. 214, 87 N.E. 623; Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501, 39 So. 392, 396; Hartley v. Langkamp, 243 Pa. 550, 90 A. 402; Fineman v. Cutler, 273 Pa. 189, 116 A. 819; Matagorda Canal Co. v. Markham Irr. Co., Tex.Civ.App., 154 S.W. 1176; Franz v. Buder, supra; Weeden v. Gher, 316 Ill. 534, 147 N.E. 388; Hauser v. Power, 351 Ill. 36, 183 N.E. 580; notes, 48 Harv.L.Rev. 995; 23 Cal.L.Rev. 320, 340.

[6, 7] All of these persons are, of course, "necessary" parties, but the decisions show that they come within a special

classification of necessary parties, to which the term "indispensable" seems appropriate. An attempt to adjudicate their rights without joinder is futile. Many cases go so far as to say that the court would have no jurisdiction to proceed without them, and that its purported judgment would be void and subject to collateral attack. The objection being so fundamental, it need not be raised by the parties themselves; the court may, of its own motion, dismiss the proceedings, or refuse to proceed, until these indispensable parties are brought in. Hartman Ranch Co. v. Associated Oil Co., supra; Solomon v. Redona, 52 Cal.App. 300, 198 P. 643; Hutchins v. Security Trust, etc., Bank, 208 Cal. 463, 467, 281 P. 1026, 65 A.L.R. 1059; Florida Land Rock Phosphate Co. v. Anderson, supra; Hartley v. Langkamp, supra; Krueding v. Chicago Dock & Canal Co., 285 Ill. 79, 120 N. E. 478; Hauser v. Power, supra; Fineman v. Cutler, supra. It follows that if the court does attempt to proceed, it is acting beyond its jurisdiction and may be restrained by prohibition.

[8, 9] The other classification includes persons who are interested in the sense that they might possibly be affected by the decision, or whose interests in the subject matter or transaction are such that it cannot be finally and completely settled without them; but nevertheless their interests are so separable that a decree may be rendered between the parties before the court without affecting those others. These latter may perhaps be "necessary" parties to a complete settlement of the entire controversy or transaction, but are not "indispensable" to any valid judgment in the particular case. They should normally be joined, and the court, following the equity rule, will usually require them to be joined, in order to carry out the policy of complete determination and avoidance of multiplicity of suits. But, since the rule itself is one of equity, it is limited and qualified by considerations of fairness, convenience, and practicability. Where, for example, it is impossible to find these other persons or impracticable to bring them in, the action may proceed as to those parties who are present.

Thus, in Ambassador Petroleum Co. v. Superior Court, supra, a proceeding by the state against lessees operating oil wells, to prevent waste of natural gas, the lessors were held not to be indispensable parties; and in Morrow v. Superior Court, 9 Cal.App.2d 16, 26, 48 P.2d 188, 50 P.2d 66, the court refused to order another interested person brought in as a defendant where to do so might constitute an interference with the jurisdiction of the federal court over a different action to which he was a party. See, also, London, etc., Bank v. Smith, 101 Cal. 415, 421–423, 35 P. 1027; Rundell v. McDonald, 62 Cal.App. 721, 728, 217 P. 1082; Clark, Code Pleading, p. 246; 48 Harv.L.Rev. 995, 999. In Morrow v. Superior Court, supra [9 Cal.App.2d 16, 50 P.2d 67], where a writ of prohibition to restrain the trial pending the bringing in of the new party was refused, this court said, in denying a hearing: "The action is simply one to determine adverse claims as between the plaintiff and the named defendants. While in such an action additional parties ordinarily may be brought in so as to include a settlement of their adverse claims, it is not our view that the controversy now before the court between the original parties may not be determined without prejudice to the rights of the oil company. Certainly those rights might be determined and the decree so drawn that it will save the rights, if any, of the excluded party. On the facts appearing, the question is not one of jurisdiction, and the court has jurisdiction to proceed without bringing in such party if in its discretion it shall decide upon that as the proper course."

[10-12] With the foregoing distinctions in mind, the present action may be examined to determine whether the absent defendants are indispensable or only necessary parties. The nature of such an action has been frequently discussed by the courts. The probate court cannot, of course, take cognizance of the contract, and an equity court cannot compel the making of a will. Hence, there is no specific performance of the contract in the strict sense. But equity gives relief which is the equivalent of a specific performance. Though the estate may be probated and the property distributed accordingly, the court will, in an action by the promisee, impose a constructive trust upon any particular property in the hands of the individual distributee. This relief is sometimes called "quasi-specific performance", since it accomplishes the substantial result of enforcement of the contract. See Notten v. Mensing, 3 Cal.2d 469, 473, 45 P.2d 198, 200; Rundell v. McDonald, 62 Cal.App. 721, 728, 217 P. 1082; Atkinson on Wills, p. 172.

[13-15] The action in these cases is against the distributee personally, and not against the estate; and it is independent of the will and the probate proceeding. Each distributee is individually held as a constructive trustee solely of the property which came to him, and none is interested in the granting or denial of similar relief as to any other. Where there are a number of legatees and devisees, they would all appear to be "necessary" parties in the sense that the main issue, the validity of the testamentary disposition of the property of decedent, affects their property interests, and the entire matter, the disposition of all of the decedent's property, cannot be finally settled without a binding adjudication for or against every legatee or devisee. Hence, the court will usually order them served and brought in unless there is some good reason for not doing so. But the absent defendants in such a case are not indispensable parties. Unlike the situations discussed above, in which any judgment would necessarily affect the rights of the absent persons, the case here is one where plaintiff may litigate her claim against the appearing defendants alone and obtain a decree which binds them alone. The absent defendants, not being before the court, will not be bound by the judgment, whether favorable or unfavorable, and their property interests will not be affected.

This analysis finds complete support in the well-considered case of Rundell v. McDonald, supra, where all of the heirs of the intestate were named as defendants, but the action was dismissed as to some of them. The court said (62 Cal.App. at page 728, 217 P. at page 1085): "If, on the other hand, as appellant contends, an action such as this can be maintained only against the heirs, appellant nevertheless is in no position to complain of any defect of parties defendant, since the decree cannot injudiciously affect the other heirs. Though the heirs succeeded to the legal title as tenants in common, they held their respective undivided moieties by several and distinct titles. * * * The theory on which the courts proceed, therefore, is to fasten a trust on the property in favor of the promisee, and to enforce such trust against the heirs of the deceased. Under this theory each heir holds the title to which he has succeeded in trust for the promisee. In the instant case the effect of the judgment against appellant as the surviving husband was to fasten a trust on the title to which he succeeded and to compel a conveyance of that title to respondent. If, as appellant contends, an action such as this lies only against the heirs of the deceased promisor and not against his estate or personal representative, then the judgment cannot be pleaded against any of the heirs as to whom the action was dismissed. It follows, therefore, that the decree in no wise affects the rights of appellant's coheirs, and that they were not indispensable parties to the action." See, also, to the same effect, Oles v. Wilson, 57 Colo. 246, 141 P. 489, 498.

[16] If, in this kind of action, the court has jurisdiction to try the case, and may render a valid judgment where the plaintiff sues or maintains the suit against less than all of the distributees, it must be clear that they are not indispensable parties. So, in the present case, the absent defendants are not indispensable parties, and the court has jurisdiction to proceed without them, to determine the rights of the parties actually before it.

[17, 18] Much stress is laid by petitioners upon the fact that plaintiff prays for judgment against all the defendants, and has not dismissed as to the absent parties. It is also pointed out that the prayer seeks a decree quieting title to the property. Petitioners argue that the court cannot have jurisdiction over the action in the form in which plaintiff seeks to maintain it, without bringing in the absent parties. The answer to this contention is that the court cannot lose jurisdiction of a proceeding merely because the prayer of the complaint seeks relief beyond that to which the plaintiff is entitled. The court may try the matters within its jurisdiction and render a valid judgment. It is not bound to follow plaintiff's theory and certainly it will not be presumed that it will follow an erroneous theory and act beyond its jurisdiction.

[19] Only brief mention need be made of the contention that the prosecution of the action against less than all of the distributees will cause inconvenience and multiplicity of suits to the injury of the executor. These are all matters within the discretion of the court to consider in connection with its policy to settle the entire controversy in one proceeding, if possible. But the contention, as we have seen, does not go to the jurisdiction of the court.

[20] We have refrained from discussing the question whether the lower court's denial of the motion to bring in the absent defendants was, under the circumstances, an abuse of discretion. If they were readily available and could have been brought in without serious difficulty, it may well be that the motion should have been granted. On the other hand, if, as is asserted by respondents, many reside outside the state or the country, great difficulty might be encountered in any attempt to bring them in, and the trial might be indefinitely delayed, to the detriment of the present parties. The fact that the interests of the absent defendants are trivial as compared with that of the residuary legatee, which received over seventy-five percent of the estate, is perhaps some indication of the reason why plaintiff chose to go to trial against the latter alone. All these considerations, however, were for the trial court in the first instance, and its determination, though reviewable in the proper manner, cannot be attacked on an application for writ of prohibition.

The alternative writ, heretofore issued, is discharged, and the peremptory writ is denied.

We concur: EDMONDS, J.; CURTIS, J.; CARTER, J.; SHENK, J.; MOORE, J. pro tem.; YORK, J. pro tem.

16 Cal.2d 500

JUCHERT v. CALIFORNIA WATER SERVICE CO.

S. F. 16381.

Supreme Court of California.
Nov. 7, 1940.

Rehearing Denied Dec. 5, 1940.

1. Appeal and error 🔑930(1)

On appeal by one contending that jury's verdict was not supported by the evidence, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible.

2. Appeal and error 🔑989

When a verdict is attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

3. Appeal and error 🔑996

Where two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury or the trial court.

4. Evidence 🔑595, 597

Where there is no evidence or not even slight evidence of an essential fact to be proved by a plaintiff, a conclusion of a trial court or jury based thereon becomes a mere "conjecture", and does not rise to the dignity of an "inference", which is a deduction that the reason of the jury makes from the facts proved. Code Civ.Proc. § 1958.

See Words and Phrases, Permanent Edition, for all other definitions of "Conjecture" and "Inference".

5. Appeal and error 🔑996

The rule is not that for an inference to be established by circumstantial evidence it must be the only inference which can fairly or reasonably be drawn from the circumstances relied on, or that, if other inferences may reasonably be drawn from the facts in evidence, the evidence does not support the inference sought to be deduced from it, the principle being more applicable as a rule to guide a jury in its deliberations on the facts, than it is as a rule to guide the appellate court in passing on the sufficiency of the evidence.

6. Negligence 🔑134(1)

To authorize a recovery in an action based on negligence, there must be substantial proof of negligence.

7. Negligence 🔑134(1)

Where a plaintiff in an action based on negligence has failed to make out a case for the jury on either of two theories or establishes neither of two inconsistent inferences, no recovery can be had.

8. Evidence 🔑595

The jury is authorized to make any logical and reasonable deduction from evidence.

9. Trial 🔑139(1), 142

The jury is the exclusive judge of the weight and value of inference that may be drawn from evidence.

10. Appeal and error ⚷996

Any attempt on the part of an appellate court to draw an inference of fact from evidence constitutes a usurpation of the province of the trial court.

11. Appeal and error ⚷996

The fact that some inference, other than that which has been drawn by a jury, may appear to an appellate tribunal to be the more probable, affords no sufficient reason for disturbing the jury's inference.

12. Appeal and error ⚷996

An appellate court does not have power to draw an inference different from that which the jury has deduced, notwithstanding evidence on which inference is founded is undisputed or without conflict.

13. Appeal and error ⚷996

When an inference is supported by the evidence, and is not opposed to human experience and reason, it cannot be disturbed by an appellate court.

14. Waters and water courses ⚷195

In suit by motorcyclist to recover from water company for injuries sustained when motorcycle struck hole in highway, on theory that highway was caused to sink by water escaping from company's broken pipe into filled ground, verdict of jury for motorcyclist was sustained by the evidence.

15. Waters and water courses ⚷195

A water company which was alleged to have been guilty of negligence in permitting water to escape from broken pipe into filled ground, so as to cause a hole in highway, was not relieved from liability to motorcyclist for injuries sustained when motorcycle struck hole in road, on ground that city was under a duty to repair the hole, and, but that for lack of repair, injuries would not have been sustained, since, where the neglect of a defendant proximately causes an injury, such defendant is liable therefor despite the existence of another and concurring cause.

16. Waters and water courses ⚷195

A water company, which was a private and not a public corporation, was not relieved from liability for injuries allegedly resulting because of company's alleged negligence, on ground that it did not have notice of defect in its pipe and a reasonable opportunity to repair it, since a private corporation is liable for damages caused by the defective and dangerous condition of its property.

17. Trial ⚷191(7)

In suit by motorcyclist to recover from water company for injuries sustained when motorcycle struck hole in road, on theory that road was caused to sink by water escaping from company's broken pipe into filled ground, an instruction, that when a thing which causes injury is under management of a defendant, and accident is such as in ordinary course of things does not happen if those who have the management use ordinary care, it affords reasonable evidence, in absence of explanation by defendant, that accident arose from want of ordinary care, was not erroneous because there was no claim that road was under the management of defendant, since it could not be assumed that the state highway department would deny permission to the water company to repair the pipe.

18. Trial ⚷191(7)

In suit by motorcyclist to recover from water company for injuries sustained when motorcycle struck hole in road, on theory that road was caused to sink by water escaping from company's broken pipe into filled ground, instruction that, if water company had exclusive control and management of water pipe and water was permitted to escape therefrom, the escaping of the water from the pipe afforded evidence, in absence of explanation, that it arose from want of ordinary care on part of water company in management of the pipe, was not erroneous on ground that it assumed that water escaping from pipe caused motorcyclist's injuries.

19. Trial ⚷295(1)

Where instructions generally are read together as a whole, the component parts of the same instruction should be read together in order to ascertain if the whole correctly states the law.

20. Evidence ⚷20(1)

It is common knowledge that, in the ordinary course of things, water mains do not break if those having the management thereof use proper care.

21. Waters and water courses ⚷195

In suit by motorcyclist to recover from water company for injuries sustained when motorcycle struck hole in road, on theory that road was caused to sink by water escaping from company's broken pipe into

filled ground, doctrine of "res ipsa loquitur" was properly applied.

See **Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".**

In Bank.

Appeal from Superior Court, San Mateo County; Arthur Coats, Judge.

Action by Walter A. Juchert against the California Water Service Company and the City of San Mateo to recover for injuries sustained when motorcycle, on which the plaintiff was riding, struck a depression in the highway, on ground that the highway was caused to sink by water escaping from broken pipe of the Water Service Company. From a judgment in favor of the plaintiff, the California Water Service Company appeals.

Judgment affirmed.

For prior opinion, see 97 P.2d 259.

Rehearing denied; EDMONDS, J., dissenting.

J. E. McCurdy, of San Mateo, and T. M. Stuart, of San Francisco, for appellant.

Francis N. Foley, and Hugh F. Mullin, Jr., both of San Mateo, for respondent.

CARTER, Justice.

Defendant herein appeals from a judgment for plaintiff in an action for personal injuries brought against the California Water Service Company, a corporation, and the city of San Mateo. The injuries complained of allegedly were sustained when the motorcycle upon which plaintiff was riding struck a trough-like depression in the highway known as El Camino Real, north of its intersection with Second avenue in said city of San Mateo.

The first trial of the case before a jury resulted in a verdict in the sum of $10,000 for plaintiff and against both defendants. Their motions for a new trial were granted. A second trial of the action terminated in a mistrial due to the illness of one of the jurors. At the conclusion of the evidence in the third trial, the court directed a verdict in favor of the defendant city of San Mateo and submitted the case to the jury as against the defendant California Water Service Company. The jury returned a verdict against said defendant in the sum of $8,000. A motion for a new trial was denied, whereupon said defendant California Water Service Company appealed from the judgment entered against it.

The major contention of the defendant California Water Service Company, hereinafter referred to as the defendant, is that the verdict of the jury on which judgment was entered in the trial court is not supported by the evidence.

[1-3] As is always true on such appeals, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible. It is elementary that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. And when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury or trial court. Crawford v. Southern P. Co., 3 Cal.2d 427, 45 P.2d 183; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483.

Bearing these rules in mind we turn to the evidence.

El Camino Real, one of the main highways in the State of California, passes through the city of San Mateo in a general northerly and southerly direction. It is crossed by Second Avenue which runs from east to west. At a point about 100 feet north of the intersection of those streets, El Camino Real is crossed at right angles by San Mateo creek. The stream is bridged by a sunken culvert which is covered by a deep fill. On the morning of March 9, 1936, the time of the accident, a hole had sunk in the surface of the highway at a point immediately adjacent to the curb on the east side of the highway and 186 feet north of the intersection of Second avenue with the highway. According to the descriptions of the various witnesses, the hole was from four to eighteen inches deep near the curb on the eastern boundary of the highway, it was from fourteen to thirty-six inches wide and extended southwesterly six to forty feet out into the roadway, gradually diminishing in depth.

The plaintiff was a mail carrier engaged in traversing the streets of San Mateo daily but was not aware of the existence of said hole. In making his rounds on the morning of March 9, he was traveling at a speed of about twenty or twenty-two miles an hour in a northerly direction and did not see the hole in time to avoid hitting it. When his motorcycle hit the hole the plaintiff was thrown and suffered the injuries complained of.

Prior to 1936, El Camino Real, immediately south of the place of the accident, ascended toward the south in a steep grade over a substantial hill. At that time the highway, though paved, was but thirty-five feet wide between curbs. In 1935, the state highway department reduced the grade of El Camino Real at this point and extended the new highway to a width of seventy-six feet between curbs, and a width of one hundred and two feet over all.

The top of the original hill was at or near the intersection of Second avenue with El Camino Real, and in doing the reconstruction work the top of the hill was removed and a very large fill made at the bottom of the hill to the north where El Camino Real crossed San Mateo creek.

To support this heavy fill a retaining wall of concrete was constructed along the east side of El Camino Real. This wall extended from Second avenue to the Mills Memorial Hospital which adjoins the highway on the east. El Camino Real extends along the grounds of the Mills Memorial Hospital, which abut it on the east, a distance of over four hundred feet from Second avenue on the south northward to Baldwin avenue. The hospital itself is substantially in the center of the grounds north and south.

A concrete culvert in the form of an arch was constructed over San Mateo creek. The fill was twenty-two to twenty-seven feet deep in places and was placed over the culvert. The old road was not taken out but the fill was placed on top of it and the sides were filled in to bring the whole to a uniform grade and width.

After the work was completed a width of seventy-two feet was surfaced with asphaltic concrete. Along the side on the east a two foot gutter and a curb were installed. Immediately east of the curb and adjoining the same is a five foot concrete sidewalk. Then immediately east of the sidewalk and between it and the retaining wall which extends along the boundary of the Mills Hospital grounds is a gravel strip approximately seven feet wide. This gravel strip is entirely "new-made-ground", namely, a part of the fill that is entirely outside and to the east of the old paved roadway, and like the rest of the fill is made of loose dirt, red or white rock and other fill material.

When the culvert was being placed in position the public utilities were assigned positions in this strip where they could install their conduits and pipes. On the east end of the culvert the San Francisco Water Company was assigned a place on a plane four feet below the surface for the laying of its thirty-six inch water pipe. Slightly above and to the east, a space was assigned to the defendant to lay its twelve inch iron water pipe. A pipe of the Pacific Gas and Electric Company was already in place. The concrete retaining wall between the seven foot gravel strip of the highway and the Mills Hospital grounds was poured over and around it.

On Friday, March 6, 1936, inside the hospital grounds, water was seen percolating through the hole in which this pipe of the Pacific Gas and Electric Company pierced the eastern wall. The amount of water emanating therefrom was described as such quantity as might flow through a one-half inch pipe not under pressure. That water ran across the hospital grounds down into San Mateo creek.

Shortly thereafter the defendant company was notified of this condition and its agent made an examination to ascertain if its water pipe was broken, but he found no leak.

After the accident the San Francisco Water Company started an excavation for the purpose of ascertaining whether there was a possible leak in its line, but before it reached its deeper laid pipe, ascertained that the leak was in the defendant's water main. Thereupon defendant dug down and located a crack in the bottom of one section of its pipe. The cracked section of the main was taken out and a new one installed. The evidence does not disclose definitely whether the water then ceased to flow through the hole in the wall occupied by the pipe of the Pacific Gas and Electric Company, for the same witness at one time said he did not notice if the water stopped flowing outside the wall, then later said, whatever the source of the water it stopped after the pipe was repaired. The hole in the roadway was later filled by the city of San Mateo.

That the road sank and thereby created the hole on the surface is clearly shown.

What caused it was the real issue on the trial of this case. There was no direct evidence. The plaintiff contends there was an inference that the road was caused to sink by water which escaped from the defendant's broken pipe into the filled ground, or by drainage water increased by the water that so escaped from defendant's pipe.

The defendant contends that the road was caused to sink because it was built on filled ground or because the filled ground was saturated with drainage water.

According to plaintiff, defendant was negligent in the following particulars: (1) In laying its water main across the concrete arch of the culvert with only a two foot cushion of fill between the pipe and the arch while immediately adjacent thereto the pipe rested on twenty-five feet of fill, without taking proper precautions to prevent a break in its pipe which might result from the settlement of the fill; (2) in failing to test the pipe for leaks before covering it; and (3) in failing to shut off its water within a reasonable time after being notified of the leak in the main.

Whether from the facts proved it can be inferred that defendant was negligent in all or any one of these respects, and that the depression in the highway which caused plaintiff's injuries occurred as the result of such negligence is the question to be determined.

[4] Where there is no evidence or not even slight evidence of an essential fact to be proved by the plaintiff, a conclusion of a trial court or jury based thereon becomes a mere conjecture and does not rise to the dignity of an inference. Puckhaber v. Southern P. Co., 132 Cal. 363, 64 P. 480; Reese v. Smith, 9 Cal.2d 324, 328, 70 P.2d 933. An inference is a deduction which the reason of the jury makes from the facts proved. Sec. 1958, Code Civ.Proc.

[5] The rule is not, as is sometimes contended and occasionally stated by the courts, that in order for an inference to be established by circumstantial evidence it must be the only inference which can fairly or reasonably be drawn from the circumstances relied on, or that if other inferences may reasonably be drawn from the facts in evidence, the evidence does not support the inference sought to be deduced from it.

As stated in Robertson v. Weingart, 91 Cal.App. 715, 723, 267 P. 741, said principle is more applicable as a rule to guide a jury in its deliberations upon the facts, than it is a rule to guide the appellate court in passing upon the sufficiency of the evidence. Peters v. McKay & Co., 136 Cal. 73, 68 P. 478.

[6, 7] The correct rule has been stated in the recent case of Weiand v. Southern P. Co., 34 Cal.App.2d 500, 93 P.2d 1023, 1025, wherein it was held that there must be substantial proof of negligence in any case to authorize a recovery, and that where a plaintiff has failed to make out a case for the jury on *either* of two theories or establishes *neither* of two inconsistent inferences no recovery can be had. The court said, "If, however, plaintiff has proven sufficient facts to justify a verdict upon *one* theory, the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury." The court further quoted from the opinion of Judge Rudkin in the case of Hobbs, Wall & Co. v. Peterson, 9 Cir., 2 F.2d 594, to the following effect: "'But the court was not compelled to accept any of the theories advanced by the plaintiff in error. The mere suggestion of such theories did not necessarily throw the case into the realm of speculation and compel a finding in its favor. As said by the court in Wabash Screen Door Co. v. Black [6 Cir.], 126 F. 721, 725, 61 C.C.A. 639, 643: "While the evidence was circumstantial, it was ample in our opinion, to warrant the submission of the question to the jury under the instructions given. * * * Doubtless a jury ought not to be permitted to speculate, in the sense of guess, between causes, when no reasonable explanation of the injury can be found in the testimony. * * * But, in the absence of direct testimony, the simple suggestion of theories by the defense does not reduce the jury to mere speculation, and disqualify it from determining the cause of the injury complained of. The theories suggested may be forced and fanciful, finding no reasonable foundation in the facts proved. They may be explanations which do not explain; which the common sense of the jury, when applied to the testimony, would instantly reject."'"

[8-12] A recent pronouncement of this court in the case of Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 600, 602, 86

P.2d 829, 831, states the true position of an appellate court in cases where several inferences may be drawn from the evidence presented to a jury or trial court: "It may be confidently declared that founded upon the evidence, the jury not only is authorized to make any logical and reasonable deduction, but also that the jury is the exclusive judge of the weight and value of the inference that may be drawn by it; furthermore, as corollary thereto, that any attempt on the part of an appellate court to draw an inference of fact constitutes 'a usurpation of the province of the trial court'. The fact that some inference other than that which has been drawn by a jury may appear to an appellate tribunal to be the more reasonable, affords no sufficient reason for disturbing the inference in question. 10 Cal.Jur., p. 735 et seq. It also appears to be well-established law that notwithstanding the fact that the evidence upon which the inference is founded is undisputed or without conflict, an appellate court has not the power to draw an inference different from that which the jury has deduced." See, also, Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 67, 148 P. 212; Mah See v. North Am. Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; Crawford v. Southern P. Co., supra; Raggio v. Mallory, 10 Cal. 2d 723, 76 P. 660, 115 A.L.R. 836; Bellon v. Silver Gate Theatre, Inc., 4 Cal.2d 1, 47 P.2d 462; Knapp v. Bergman, 5 Cal.2d 368, 55 P.2d 218.

The evidence presented in this case is voluminous and, in some instances, highly conflicting.

An employee of the defendant was of the opinion that the crack in defendant's water main occurred as the result of the sagging of the pipe due to the natural settlement of the fill. The plaintiff, however, contends that defendant was negligent in laying its water main across the concrete arch of the culvert without sufficient cushion of fill. Although it does not appear anywhere in the record that the defendant's pipe actually touched the concrete, plaintiff urges that a pipe would naturally bend and break where but two feet of fill separated it from the concrete arch and where the pipe, immediately adjacent thereto, was laid over twenty-five feet of fill. It is plaintiff's position that had defendant taken proper precautions to prevent a break or maintained its pipe properly it would not have been cracked by the settlement of the fill. In support of this contention plaintiff points out that the water main of the San Francisco Water Company, laid in close proximity thereto, did not break.

No contention was made that the defendant did not use good quality pipe. That used was new, of cast-iron, and came in sections twelve feet long and twelve inches in diameter. One end was bell-shaped, the small end was inserted in the bell, and the joint was caulked. Redwood blocks about two feet long and four inches square on the end were laid at the bottom of the trench under the joints of the pipe. Defendant's witnesses testified that the pipe was laid under the supervision of the engineers of the state highway department; that the water was turned on while the pipe was still exposed; and that it was examined for leaks for a period of three weeks before the fill was tamped in around it and the pipe covered. A disinterested witness, however, presented by the plaintiff, testified that the pipe he saw laid close to the bridge was laid two or three sections at a time and covered immediately without allowing time for settlement of the fill or testing for leaks. Plaintiff points out that the testimony of the highway inspector was that he saw part, but not all of the pipe exposed to permit testing for leaks.

Defendant claims that it was not negligent in failing to shut off the water in its main on March 6, because there was no leak in its pipe on that date. The employee who reported no leak testified that he made his examination in a manner customarily used by water companies. This examination consisted of attempting to thrust a pointed three-eighths inch iron rod into the gravel strip above defendant's water pipe and near the Pacific Gas and Electric Company's pipe hole in the hospital grounds, and of attaching a mechanism known as a leak detector to the pipe to listen for the "sizzling" sounds which should indicate a break. The employee stated that he found no softness of the soil and no sound indicating a leak, but that on March 9, the date of the accident, the same instrument indicated a break. Plaintiff maintains that compliance with custom will not negative negligence, where it is not consistent with due care, and points out that the San Francisco Water Company did not rely on any such instrument as a leak detector, but immediately started excavating to determine if its pipe had broken and in the course thereof located the crack and leak in defendant's pipe.

Briefly, the facts upon which plaintiff relies as establishing the inference that the depression in the highway was caused by the cracks in defendant's pipe are that the depression was located almost directly opposite the break in defendant's pipe; that three days prior to the accident free water was seen flowing from around the Pacific Gas and Electric Company's pipe into the hospital grounds indicating a possible condition of saturation underneath the highway in the fill; that the sidewalk and street had been gradually subsiding for a period of a couple of months prior to the accident, and that the gravel strip adjoining the sidewalk seemed continuously damp; and that the abrupt trough-like character of the hole in the roadway indicated a washing away of the underlying fill or the presence of a localized saturated condition and not an area of general subsidence.

Defendant on the other hand contends that any depressions in the highway were the result of the natural settlement of a deep fill; that if any water could have caused or added to the amount of settlement, said water was the 15.09 inches of rain which had fallen in the previous sixty-eight days. Defendant points out that the deepest part of the depression was eight or ten feet south of the crack in its pipe—or slightly uphill and that though the Pacific Gas and Electric Company pipe hole was north or downhill from the break it was approximately forty-five to fifty feet away, and the hole was one foot five inches above the bottom of its pipe. Therefore, any water flowing through said hole would have had to be the result of a considerable area of saturation. To indicate that such was the case, plaintiff referred to the fact that two months prior to the accident the sidewalk had subsided two inches; that one month prior thereto the gravel strip appeared constantly damp; and that one week before March 9, a saucer-like depression appeared in the highway eight inches in width and two inches in depth. Witnesses for the plaintiff testified that the depression became so noticeable March 7 and 8 that from the service station across the street, where they worked, they could see and hear passing cars bounce over the trough-like crack. One of said attendants testified that he drove over it himself on March 8 and found the hole so deep that he called it to the attention of the San Mateo police.

Defendant stated that the depression discussed herein was only one of many occurring in this portion of the highway. Plaintiff contended, however, that, with the exception of the general subsidence which occurred on the westerly side of the highway when the retaining wall there gave way, all depressions occurred in the immediate vicinity of and included the hole with which we are here concerned. A witness for defendant stated that another subsidence took place south of the culvert arch in the spring of 1938. Plaintiff did not attempt to explain the cause thereof.

According to defendant, the inference which plaintiff seeks to establish as to the quantity of water which escaped from its pipe was rebutted by the direct testimony of its employee. The same employee who reported no break in the defendant's pipe on March 6, 1936, also testified as to the condition surrounding the break in the pipe when the same was uncovered. He testified that the ground was not saturated and that in making the excavation a shovel, bar and pick axe were used. He testified that the leak was in the form of a split seam, spoken of as a "hair-crack", two and one-half inches long. Through it flowed water to the amount of one-half cupful per minute. The witness testified that eighteen inches down, the ground was damp but not saturated; that there was a small circle of water at the bottom of the pipe; that a small spray of water came out of the pipe; but that there was no open space beneath the crack—no dirt had been washed away. The pressure of the water in the pipe was admittedly forty to fifty pounds per square inch.

Defendant introduced testimony to the effect that if there were water draining from its pipe there was no evidence that it was flowing underneath the highway surface, but that the fact that water flowed out of the Pacific Gas and Electric Company pipe would indicate that it was flowing in an easterly direction; and as long as it was there stopped by the presence of the wall it would then have a tendency to flow northward in the downhill direction. Defendant contended that had the water settled to the bottom of the fill it would have drained out of the "weep-holes", four inch pipes installed in the culvert six feet apart, and would not have resulted in saturation of the fill. Testimony introduced by plaintiff, however, was to the effect that the water would first seep to the bottom of the fill, and that, though it might have a tendency to flow north (downhill), it would also reach a plane under the surface where its tendency to flow in all directions would be equal and the fact that the wall stopped the flow to the east would increase its tendency to flow westward under the highway.

[13, 14] We are of the opinion that the evidence here disclosed is capable of supporting more than one inference. "When an inference is supported by the evidence, and is not opposed to human experience and reason it cannot be disturbed by an appellate court." 10 Cal.Jur. 738. Then resolving all conflicts in plaintiff's favor and indulging all reasonable inferences to uphold the verdict as we are required to do, we cannot but hold that the verdict of the jury is supported by sufficient evidence and therefore must be sustained.

[15] There is no question but that the depression in the highway caused plaintiff's injuries. Because defendant was charged as being concurrently liable with the city of San Mateo in whose favor the trial court directed a verdict, defendant seeks to avoid any liability by pointing out that the proximate cause of the accident was the hole in the road, that the city was under a duty of care to repair said hole, that but for said lack of repair the injury would not have occurred and that thus the chain of causation between any alleged negligence of defendant and the injury was broken. This defense is not available to the defendant, however, for it has been held in this state that where the neglect of a defendant proximately causes an injury, said defendant is liable therefor despite the existence of another and concurring cause. Bosqui v. City of San Bernardino, 2 Cal.2d 747, 764, 43 P.2d 547; Crabbe v. Rhoades, 101 Cal.App. 503, 510, 282 P. 10.

[16] Defendant also contends that it is not liable for any defect in its pipe, even though the same caused plaintiff's injury where it did not have notice, and a reasonable opportunity to repair. Defendant is a private not a public corporation and as such liable for the damages caused by the defective and dangerous condition of its property. The distinction between the liability of such private corporations and public corporations has been discussed and set forth in the case of Watson v. City of Alameda, 219 Cal. 331, at page 333 therein, 26 P.2d 286, at page 287, where the court said: "Where a properly constructed street, e. g., falls into disrepair, knowledge or notice of its defective condition is conceded to be essential to fix liability. But, it is argued, where the affirmative act of responsible officers is directly carried out, as in new construction or improvement, this fact itself gives rise to liability for any dangerous condition, notice being unnecessary. The effect of this distinction would be that the municipality would, in all governmental work on public streets, buildings, grounds, etc., be liable for the negligence of its employees, in the same manner as if the work were done in its proprietary capacity, that is to say, in the same manner in which a private corporation would be liable. But any such modification of the rule of nonliability for acts performed in a governmental capacity must come from the Legislature, and the Legislature has, in the act of 1923, set forth the extent of its departure from the former rule. The municipality is not under this statute, liable in the same manner as a private corporation, for negligence of its employees; nor is it enough to show a dangerous condition of property. The municipality must have had notice and have failed to exercise its opportunity to remedy the condition. The theory of the act seems to be that liability is imposed not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof."

As its final ground for this appeal, defendant urges that the doctrine of res ipsa loquitur had no application to the facts involved herein, and that the instruction given thereon constitutes reversible error.

The instruction complained of reads as follows: "I instruct you that when a thing which causes injury is under control and management of a defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use ordinary care, it affords reasonable evidence in the absence of explanation by the defendant, that the accident arose from want of ordinary care. Therefore if you find that the defendant water company had exclusive control and management of its water pipe, and that water was permitted to escape therefrom, then I instruct you that the escaping of said water from said pipe affords evidence in the absence of explanations, that it arose from a want of ordinary care on the part of said water company in the control and management of said pipe."

Immediately following was the instruction that: "As I have already instructed you, want of ordinary care or negligence on the part of the defendant must be a proximate cause of the accident before the defendant can be held liable."

Defendant contends that the thing that caused the accident was a hole in the road; that the first sentence of the instruction was inapplicable because there was not even a claim that the road or any part of it was "under the control and management of the defendant"; and that the second sentence assumed that the water escaping from defendant's pipe injured the plaintiff, a fact of which there was no evidence.

[17-19] We cannot agree with these contentions. When instructions generally are to be read together as a whole, certainly the component parts of the same instruction should be read together in order to ascertain if the whole correctly states the law. The first sentence of the instruction under consideration is only an abstract statement of the law. The second attempts to apply the principle of law to the present case. The instruction following informs the jury that unless the breaking of the pipe or the escaping water was the proximate cause of plaintiff's injuries, defendant is not liable.

Defendant admitted by its pleadings that it owned, maintained, controlled and operated the pipe in question. It maintains, however, that this control was not exclusive, since the pipes were laid in a public highway which was at all times under the control of the state. We see no merit in this argument. Certainly plaintiff owned and operated the pipe and was under a duty to maintain and control it. There is no showing that the state highway department ever exercised any control over the pipe other than in a supervisory capacity during its installation. The mere fact that permission would have to be requested from the highway department to open the gravel strip in which the pipe was laid would not take the pipe from plaintiff's exclusive control, especially where it was not shown that such permission was more than a mere formality or would ever be denied. In fact, it approaches absurdity to assume that said department would grant the initial right to install the pipe yet deny permission to operate it and keep it in repair.

Defendant asserts that since there was no evidence that a new pipe line installed such as this would not ordinarily spring a leak unless those in control of it were guilty of negligence, the instruction given was clearly erroneous. The courts in this state have often applied the doctrine of res ipsa loquitur in cases similar to, though not identical with this. For instance, they have stated that in the absence of negligence, oil storage tanks ordinarily do not explode (Phoenix Assur. Co. v. Texas Holding Co., 81 Cal.App. 61, 252 P. 1082); that pipe sections, bricks, and mechanics' tools do not fall (Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A.L.R. 480); steam boilers do not explode (Lippert v. Pacific Sugar Corp., 33 Cal.App. 198, 164 P. 810); and automobiles do not collide with standing wagons (Bauhofer v. Crawford, 16 Cal. App. 676, 117 P. 931).

[20] Certainly it would not extend the doctrine to say that it is a matter of common knowledge that in the ordinary course of things water mains do not break if those having the management thereof use proper care.

It may then be said of the instant case that, in the absence of other explanations, a new ⅝-inch cast iron pipe, laid for a period of approximately five or six months for the purpose of carrying water, would not have burst if those in charge of its installation and maintenance had been free from negligence. The doctrine has in fact been applied to bursting water mains in the cases of Buffums v. City of Long Beach, 111 Cal.App. 327, 295 P. 540; Rainier Heat & Power Co. v. City of Seattle, 113 Wash. 95, 193 P. 233, and Esberg-Gunst Cigar Co. v. City of Portland, 34 Or. 282, 55 P. 961, 43 L.R.A. 435, 75 Am.St.Rep. 651.

[21] We therefore hold that the instruction was proper.

The foregoing disposes of the contentions of the defendant on this appeal, and necessitates an affirmance of the judgment, and it is therefore affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; SHENK, J.; YORK, Justice pro tem.; MOORE, Justice pro tem.

16 Cal.2d 460

SHOWALTER v. WESTERN PAC. R. CO.

S. F. 16374.

Supreme Court of California.

Nov. 4, 1940.

Rehearing Denied Dec. 2, 1940.

1. Commerce 🔑8(6)
Master and servant 🔑250¼

In determining whether a matter in action in state court under the Federal Employers' Liability Act is a procedural matter governed by the law of the state, or is a substantive matter governed by the law of the federal courts, the fact that a particular piece of evidence is vital to a party's burden of proof will not alone transform it from a matter of procedure into a matter of substance. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

2. Evidence 🔑126(1)

In action against railroad under the Federal Employers' Liability Act for death of brakeman from injuries sustained during switching operations, testimony of another brakeman, that after the accident the deceased brakeman stated that he "got knocked off" railroad car, was admissible as "res gestæ". Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

3. Evidence 🔑121(1)

Declarations which are voluntary and spontaneous and made so near the time of the principal act as to preclude the idea of deliberate design, though not precisely concurrent in point of time therewith, are regarded as "contemporaneous" and admissible as "res gestæ."

See Words and Phrases, Permanent Edition, for all other definitions of "Contemporaneous".

4. Evidence 🔑118

The test in determining whether a statement is "res gestæ" is whether the statement is made under such circumstances of physical shock or nervous excitement as preclude the likelihood of reflection and fabrication.

5. Evidence 🔑118

Where a declaration is made under the immediate influence of the occurrence to which it relates, and so near the time of that occurrence as to negative any probability of fabrication, the declaration is admissible as "res gestæ."

6. Evidence 🔑118

To render statements admissible as "res gestæ" there must be some occurrence startling enough to produce nervous excitement and render the statements spontaneous and unreflecting, the statements must have been made before there was time to contrive and misrepresent, and the statements must relate to the circumstance of the occurrence preceding it.

7. Evidence 🔑118

The practice in California has been to allow the trial court no discretion in determining the admissibility of alleged res gestæ statements, but there is necessarily some element of discretion in the trial court.

8. Evidence 🔑118

In passing on admissibility of testimony claimed to constitute a part of the "res gestæ", trial court determines whether unsworn statements are so accredited that they may go to the jury and be weighed and valued by it, and, in determining that, the court considers whether the statements are spontaneous, whether there was opportunity of fabrication or a likelihood of it, lapse of time between act and declaration relating to it, attendant excitement, mental and physical condition of declarant, and other circumstances important in determining whether trustworthiness of statements was such that they might safely go to the jury.

9. Master and servant 🔑87, 265(2)

The liability of a carrier under the Federal Employers' Liability Act is predicated on negligence, and the burden of proving such negligence rests on the plaintiff. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

10. Courts 🔑97(5)

The sufficiency of the evidence to support a verdict in an action against a carrier under the Federal Employers' Liability Act is a question of "substantive law" as interpreted by the federal courts. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantive Law".

11. Master and servant 🔑276(1)

In an action against a carrier under the Federal Employers' Liability Act, no mere scintilla of evidence is sufficient to sustain a plaintiff's burden of proof, but substantial evidence must be produced by plaintiff. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

12. Master and servant ⚿276(2)

In an action against a carrier under the Federal Employers' Liability Act, the evidence produced to show that the negligence of the carrier was the proximate cause of the accident may be either direct or circumstantial, but it must be substantial, and evidence which leaves the determination of those essential facts in the realm of mere speculation and conjecture is insufficient. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

13. Evidence ⚿584(1)

Where the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof.

14. Evidence ⚿98, 597

A verdict resting on conjecture cannot stand, and, where proved facts equally support two inconsistent inferences, judgment must go against the party having the burden of proof.

15. Master and servant ⚿135

The violation of a railroad custom, such as the custom requiring that the whereabouts of a fellow employee must be known before cars on which he is riding are coupled, constitutes "negligence".

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

16. Trial ⚿139(1)

A jury should not be permitted to speculate, in the sense of guess, between causes, when no reasonable explanation of an injury can be found in the testimony, but, in absence of direct testimony, the simple suggestion of theories by the defense does not reduce the jury to mere speculation, and disqualify it from determining the cause of the injury complained of.

17. Appeal and error ⚿989

The Supreme Court should not indulge in mere speculation as to a possible defense unsupported by any proven facts.

18. Master and servant ⚿276(8), 278(18)

In action against railroad under the Federal Employers' Liability Act for death of brakeman from injuries sustained during switching operations when he fell beneath car wheels, evidence was sufficient to sustain verdict for plaintiff on issues whether railroad, or its employees, caused to collide or couple the cars on which brakeman had been riding, and whether that act constituted negligence which was the "proximate cause" of the brakeman's death. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

19. Trial ⚿140(2)

Generally, the credibility of a witness, who is interested in an action, is for the jury.

20. Trial ⚿140(2)

If the evidence is possible of contradiction in the circumstances, if its truthfulness or accuracy is open to a reasonable doubt on the face of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, the jury should pass on the truth of his statements.

21. Evidence ⚿590

In action against railroad under the Federal Employers' Liability Act for death of brakeman from injuries sustained during switching operations, jury could accept part of testimony of another brakeman and reject other portions of his testimony, where brakeman was an employee of railroad at time of action, and he gave a clear, definite, and exact account of happenings immediately preceding the accident, but testified that he could not remember whether engine on which he was riding collided or coupled with cars on which deceased brakeman was riding. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

22. Evidence ⚿588

Where jury's verdict indicated that jury believed a portion of witness' testimony to be contradicted by the facts, they were justified in disregarding it.

23. Evidence ⚿590

In an action under the Federal Employers' Liability Act, a jury may not arbitrarily disregard the uncontradicted testimony of an employee of a railroad company, but where such evidence is contradicted by proven facts as well as where it is contradicted by the testimony of other employees, jury may disregard the testimony. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Ruth Ann Showalter, administratrix of the estate of Joseph W. Showalter, deceased, against the Western Pacific Railroad Company to recover damages for the death of Joseph W. Showalter, deceased. From a judgment in favor of the plaintiff and from an order denying the defendant's motion for judgment notwithstanding the verdict, the defendant appeals.

Judgment affirmed.

Prior opinion, 96 P.2d 964.

Rehearing denied; EDMONDS and HOUSER, JJ., dissenting.

Edwin V. McKenzie, Ernest I. Spiegl, Arthur B. Dunne, Duncan Low, and Dunne & Dunne, all of San Francisco, for appellant.

Clifton Hildebrand, of Oakland, and Goodman & Brownstone, of San Francisco, for respondent.

CARTER, Justice.

Plaintiff, as administratrix of the estate of Joseph W. Showalter, deceased, brought this action to recover damages for the death of said deceased. Upon trial by jury, plaintiff had judgment in the sum of $18,000. Defendant appeals from said judgment and from the order denying its motion for judgment notwithstanding the verdict.

Plaintiff's complaint contained two counts. The first was predicated on negligence under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., and the second charged violation of the Safety Appliance Act, 45 U.S.C.A. § 1 et seq. It was alleged in the complaint and admitted by the answer that deceased was a brakeman in the employ of the defendant; that both deceased and the defendant were engaged in interstate commerce at the time of the accident; that it was the duty of deceased at about 9 o'clock p. m. on the night in question to ride upon two freight cars in a switching operation at defendant's yard at Keddie, California, in which switching operation said cars were being dropped by the engine onto a track known as lower four in said yard; and that in said switching operation, deceased received the injuries which resulted in his death. It was alleged in the first count and denied by the answer that defendant "carelessly and negligently operated and controlled said cars" thereby causing said injuries and death. During the course of the trial plaintiff was permitted to amend by adding the words "and engine". It was alleged in the second count and denied by the answer that the handbrake on one of said cars was defective and that as a result of its defective condition said handbrake "suddenly and unexpectedly released and let go" thereby throwing deceased upon the tracks and causing said injuries and death. Defendant's answer affirmatively alleged that negligence of the deceased was the sole proximate cause of his death; that deceased was guilty of contributory negligence; that deceased assumed the risk.

At the close of plaintiff's case, defendant made a motion for nonsuit as to the second count. Said motion was granted, as plaintiff presented no evidence of any violation of the Safety Appliance Act. Defendant then rested, without offering any evidence, and moved for a directed verdict on the first cause of action. The motion was denied and the cause was submitted to the jury upon the evidence introduced by the plaintiff. The jury returned a verdict in favor of the plaintiff and judgment was entered thereon. Thereafter, defendant made a motion for judgment notwithstanding the verdict. Said motion was denied and this appeal followed.

The questions presented on this appeal are whether the evidence introduced by the plaintiff was sufficient to support a verdict in her favor; whether certain portions of said evidence were admissible; and whether the court erred in its instructions to the jury.

Before reviewing all the evidence with a view to determining its sufficiency, the question of whether certain portions thereof were properly received as evidence must be considered.

Over the objection of the defendant, there was admitted into evidence a statement made by the deceased to Parrott, a fellow brakeman. Parrott did not see the accident, but ran to the side of the deceased where he heard him "holler". He found the deceased lying across the tracks under the car which had run over him, cutting off his legs. Upon being asked if he then had any conversation with the deceased, Parrott answered, "I did—as I remember, I asked him, 'How in the world did it happen, Joe?' "—"He said, 'I got knocked off.' " Being asked if that were all the conversation, Parrott replied, "Well, he said, 'I am all done, both legs cut off.' "

It is plaintiff's position that these statements of the deceased were properly admissible as part of the res gestae.

Defendant contends that in actions under the Federal Employers' Liability Act substantive rights of the parties are governed by the act as interpreted by the federal courts; but that where an action is brought in a state court the law of such state may be applied to matters of practice and procedure. Asserting that rules as to the admissibility of evidence are matters of procedure, defendant concludes that under the law of the state of California the statements here in question are not part of the res gestae and that such has been the rule ever since the decision in the case of People v. Ah Lee, 60 Cal. 85.

Plaintiff concedes that an action brought in a state court under the Federal Employers' Liability Act is governed as to substantive rights by the law as interpreted by the federal courts, and as to matters of practice and procedure by the state courts; but urges that the admissibility of the res gestae declaration was not purely a procedural matter to be governed by state law.

Plaintiff points to the statement in the case of Chicago, M. & St. P. R. Co. v. Coogan, 271 U.S. 472, 46 S.Ct. 564, 565, 70 L.Ed. 1041, that "proof of such negligence is essential to recovery. The *kind* or *amount of evidence* required to establish it is *not subject* to the *control of the several* states". (Italics ours.)

Citing numerous authorities, plaintiff reasons that the "kind of evidence" goes to substance and not to procedure; that where a matter of substance is involved, a substantial right cannot be taken away under the guise of a rule of procedure; that the res gestae declaration is clearly admissible under the federal rules; that the res gestae statement here was the keystone of plaintiff's proof necessary to sustain her burden of proof; that any decision permitting or excluding it had to do "with the kind of evidence", hence no state court could take away plaintiff's right to produce it; that to permit its rejection would deprive plaintiff of a substantial right under the flimsy guise of procedure.

[1] We are not convinced by this argument. As a practical matter every ruling as to evidence affects to a greater or lesser degree the ultimate result of an action. Therefore, the fact that a particular piece of evidence is vital to a party's burden of proof will not alone transform it from a matter of procedure into a matter of substance. In cases brought under the Federal Employers' Liability Act it has been held that rules of evidence are governed by the law of the state in which the suit is brought. Central Vermont R. R. Co. v. White, 238 U.S. 507, 511, 35 S.Ct. 865, 59 L.Ed. 1433, Ann.Cas.1916B, 252; New Orleans, etc., Co. v. Jackson, 145 Miss. 702, 710, 110 So. 586; Fleming v. Norfolk S. R. Co., 160 N.C. 196, 76 S.E. 212, 215; Kansas City So. Ry. Co. v. Leslie, 112 Ark. 305, 167 S.W. 83, 91, Ann.Cas.1915B, 834.

[2] We are, however, of the opinion that the statement in question should be admissible under the rule of res gestae as applied in this state.

[3] Courts in general have been in considerable confusion as to the rule of res gestae. In this respect the courts of this state are not different. The rule which we deem to be correct was enunciated in the early case of People v. Vernon, 35 Cal. 49, 95 Am.Dec. 49—namely, that declarations which are voluntary and spontaneous and made so near the time of the principal act as to preclude the idea of deliberate design, though not precisely concurrent in point of time therewith, are regarded as contemporaneous and admissible.

Numerous cases decided subsequently, however, failed to follow this decision and have erroneously held that the test of whether a statement is res gestae is not its proximity to the principal act in point of time, but its utterance before the principal act itself has been completed. Of the cases adhering to this later rule, the following are representative: People v. Ah Lee, 60 Cal. 85; Durkee v. Cent. Pac. R. R. Co., 69 Cal. 533, 11 P. 130, 58 Am.Rep. 562; Murphy v. Board of Police, etc., Commissioners, 2 Cal.App. 468, 83 P. 577; People v. Murphy, 28 Cal.App. 708, 153 P. 732; Salvo v. Market St. Ry. Co., 116 Cal.App. 339, 2 P.2d 585; Zohner v. Sierra Nevada Life & Casualty Co., 114 Cal.App. 85, 299 P. 749; Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 P. 286; People v. Wong Ark, 96 Cal. 125, 30 P. 1115.

The rule which they have applied is perhaps expressed most clearly in Williams v. S. P. Co., 133 Cal. 550, at page 554, 65 P. 1100, at page 1102, where the court said, "Expressions of persons who are actors, made during the occurrence, may generally, but not always, be proved. If spontaneous and caused by the event, they may nearly always be shown. But if afterwards, no matter how shortly afterwards, there is an attempt to explain what has happened, or to account for it, or to defend one's self, or the like, it is incompetent and inadmissible as res gestæ." The court in said case stated also that "A narrative, even if given during the occurrence, is inadmissible" for the reason that it is not a spontaneous outgrowth of the occurrence. As its authority for this statement the court cited Heckle v. S. P. Co., 123 Cal. 441, 56 P. 56.

[4] A few cases in this jurisdiction have properly refused to apply the rule as thus stated and have negatived both time and completion of the principal occurrence as tests for determining admissibility. The test so laid down is whether or not the statement is made under such circumstances of physical shock or nervous excitement as preclude the likelihood of reflection and fabrication. This better view is set forth in the case of Lloyd v. Boulevard Express, 79 Cal.App. 406, at page 411, 249 P. 837, and quoted with approval in the case of Coryell v. Clifford F. Reid, Inc., 117 Cal.App. 534, at page 536, 4 P.2d 295, is as follows: " 'His statements, if true, indicate that they were made before the excitement attending the accident had subsided. Questions as to the admissibility of such questions as part of the res gestæ depend upon whether such statements are the emanations of the acts done, before the excitement usually incident to an accident causing great injury has subsided, or are the statements made after the excitement has subsided, and the witness has time to calculate a policy to be pursued. Here the statements were made at the scene of the accident, and in the presence of those suffering from its results, and in the presence of the wreckage the accident created. Again we hold that the trial judge before whom the witness appeared is better prepared to pass upon the evidence upon which the admissibility of such statements depends than is an appellate court, and his ruling should not be disturbed, unless he has abused his discretion. We cannot say, from the evidence appearing in the record, that the declarations of Mitchell were inadmissible. If the statement of the employee is spontaneous, that is, made at the time of the accident and during the excitement attending it, before the employee has time to reflect upon the consequences of his statement, or to fabricate evidence against his employer, it is admissible against the employer.' Also, see 10 R.C.L. 978, and 4 R.C.L., Perm.Suppl., p. 2801."

Plaintiff has argued in the instant case that the statement in question was made before the completion of the occurrence and therefore admissible. As authority she points to the case of Heckle v. S. P. Co., supra, wherein this court held that it was error for the trial court to have refused to admit a statement of the decedent made while he was still under the wheel of the car which had run over him. It did not appear with any certainty exactly how long the statement was made after the deceased had been first caught by the wheel, but it did appear that the time was short. The court pointed out, however, that the time may have been so long that the statements of the deceased took on the character of narrative rather than spontaneity, and said that if that appeared to be the case it would be the duty of the trial court to strike them out.

Under the authority of this case it might be possible to regard the deceased's statement herein as having been made prior to the completion of the occurrence, nevertheless the character of the utterance would still remain in question.

[5] We do not propose to place our decision on this basis, for in our opinion the rule to be followed is that where a declaration is made under the immediate influence of the occurrence to which it relates and so near the time of that occurrence as to negative any probability of fabrication, said declaration is admissible. Measured by this standard we conclude that the ruling of the trial court admitting the statement of the deceased herein was correct.

The cases cited hereinabove to the contrary, holding the view that the admissibility of such statements is dependent on proximity of time to the principal event or on the continuation of the occurrence to which they relate, are as a consequence hereby overruled.

The position of the courts as a whole with regard to declarations allegedly a part of a transaction is set forth briefly in 35 H.L.R., at p. 447, in the following manner: "There are two theories on the admissibility of various declarations which are alleged to be part of the res gestae, or as James Bradley Thayer preferred to say, res gestae (transaction). Thayer's view is that the declarations must be substantially contemporaneous with the action of a material transaction, and must explain the acts. He bases their admission on the need of telling a complete story of the event. Wigmore's view goes farther and does not require contemporaneousness with an event. He favors the admission of statements or exclamations by an injured person, or by any other person present at any exciting occasion, immediately after the event, describing the circumstances as observed by him. In the cases the word 'immediately' undergoes a considerable stretching. The confusion in the decisions is illustrated by the position of the United States Supreme Court, which supported Wigmore's view in Insurance Company v. Moseley, and Thayer's view in Vicksburg, etc., R. R. v. O'Brien. Recent discussion in the cases and law reviews inclines toward Wigmore's view. * * * On either view, the declarations are excluded if the event has terminated and the nervous excitement has been succeeded by reflective powers."

Professor Wigmore points out that to be admissible it is not necessary that such declarations be made precisely at the same time as the occurrence to which they relate, as is the case under the "Verbal Act" doctrine. These declarations are admissible not because they fall without the hearsay rule, as is the case with "verbal acts", but because they fall within an exception to that rule. The foundation for this exception is that if the declarations are made under the immediate influence of the occurrence to which they relate, they are deemed sufficiently trustworthy to be presented to the jury. Wigmore on Ev., 2d Ed., sec. 1747 et seq., and cases cited.

[6] The basis for this circumstantial probability of trustworthiness is "that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief". To render them admissible it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it. Wigmore on Ev., 2d Ed., sec. 1750.

[7] The practice in this state heretofore has been to allow the trial court no discretion in determining the admissibility of alleged res gestae statements; however, under the view taken herein there is necessarily some element of discretion in the trial court.

[8] As stated by the court in Roach v. Great Northern Ry. Co., 133 Minn. 257, 260, 158 N.W. 232, 234, "In passing upon the admissibility of testimony claimed to constitute a part of the res gestæ the trial court determines whether unsworn statements are so accredited that they may go to the jury and be weighed and valued by it, and in determining this it considers whether the statements are spontaneous, whether there was an opportunity of fabrication or a likelihood of it, the lapse of time between the act and the declaration relating to it, the attendant excitement, the mental and physical condition of the declarant, and other circumstances, important in determining whether the trustworthiness of the unsworn statements is such that they may safely go to the jury."

The circumstances surrounding the declarations of the decedent herein are such that we cannot say that the court erred in admitting them. The deceased had suffered a severe physical and mental shock; although the exact time between his receiving the injury and the utterance does not appear, it is apparent that the time was short; the statement was made while he was still lying midway between the trucks of the car which had run over him; the words were spoken almost in the same breath in which he said he "was done for"; the statement related to the circumstances causing the shock; it is therefore most reasonable to suppose that the utterance was spontaneous, unreflected, and dominated by the occurrence which had just preceded it.

A case so closely paralleling the case at bar that it requires comment is that of Chesapeake and Ohio R. Co. v. Mears, 4 Cir., 64 F.2d 291, 293, certiorari denied 293 U.S. 557, 55 S.Ct. 69, 79 L.Ed. 659. In said case, it was alleged that Mears was knocked from the top of a car, on which he was walking, by another car placed too close on an adjoining track. No one saw the accident. He was last seen by witness Mills, and when the latter returned about ten minutes later, he found the deceased lying near track three with both legs cut off above the knees and rapidly bleeding to death. Mills asked what had happened, and deceased pointed to the car on track three, replied, "That car knocked me off."

The court therein held the statement admissible and said: "While a logical basis is not always given for the decisions, the cases almost uniformly hold that a statement made by an injured person as to the cause of his injury is admissible if the time which has elapsed since the injury is so short that he is still under the influence of the happening and his statement presumptively a spontaneous expression growing out of it and not the result of reason and reflection."

Said court also cited with approval the early case of Travellers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L.Ed. 437.

We think the following statement made by Mr. Justice Swayne, at page 408 of 8 Wall., 19 L.Ed. 437, in the latter case, worthy of repetition here. Said he: "Here the principal fact is the bodily injury. The res gestæ are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The res gestæ are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below. In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason. The want of this concurrence in the law is often deeply to be regretted. The weight of this reflection, in reference to the case under consideration, is increased by the fact, that what was said could not be received as 'dying declarations,' although the person who made them was dead, and hence, could not be called as a witness."

Defendant complains of certain rulings made by the trial court with regard to the admission of certain expert testimony. We have examined these rulings and find them to be without prejudicial error.

We come now to the question of sufficiency of the evidence.

[9, 10] It is well settled and the parties do not dispute the facts that the liability of a carrier under the Federal Employers' Liability Act 45 U.S.C.A., § 51, is predicated on negligence; that the burden of proving such negligence rests on the plaintiff in any action brought under said act; and that the sufficiency of the evidence to support a verdict is a question of substantive law as interpreted by the federal courts. Chicago, M. & St. P. R. Co. v. Coogan, supra.

[11, 12] Likewise, it is clear under the federal decisions as under the decisions of this state that no mere scintilla of evidence but substantial evidence must be produced by the plaintiff in order to sustain the burden of proof. Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 53 S.Ct. 391, 77 L.Ed. 819; Small Co. v. Lamborn & Co., 267 U.S. 248; Gunning v. Cooley, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720; Southern Ry. Co. v. Walters, 284 U.S. 190, 52 S.Ct. 58, 76 L.Ed. 239; Chicago G. W. R. Co. v. Rambo, 298 U.S. 99, 56 S.Ct. 693, 80 L.Ed. 1066. The evidence produced to show that negligence on the part of the carrier was the proximate cause of the accident may be either direct or circumstantial, but it must be *substantial*. Evidence which leaves the determination of these essential facts in the realm of mere speculation and conjecture is insufficient. Pennsylvania R. Co. v. Chamberlain, supra; Chicago, M. & St. P. R. Co. v. Coogan, supra; Atchison, T. & S. F. R Co. v. Toops, 281 U.S. 351, 50 S.Ct. 281, 74 L.Ed. 896; Northern R. Co. v. Page, 274 U.S. 65, 47 S.Ct. 491, 71 L.Ed. 929; St. Louis-S. F. R. Co. v. Mills, 271 U.S. 344, 46 S.Ct. 520, 70 L.Ed. 979; Kansas City So. Ry. Co. v. Jones, 276 U.S. 303, 48 S.Ct. 308, 72 L.Ed. 583; Patton v. Texas & P. R. Co., 179 U.S. 658, 21 S.Ct. 275, 45 L.Ed. 361.

So far as the record discloses there were no eye-witnesses to the accident in question. Necessarily, therefore, proof of the facts must be based on circumstantial evidence alone. Three other employees of defendant were engaged in the switching operation in question. The defendant called no witnesses, and the plaintiff called only the brakeman, Parrott. There is no conflict in the evidence as the cause was submitted at the close of plaintiff's case. The following facts are either admitted facts or facts to which the witness Parrott testified:

The accident in question took place in the Keddie yard of defendant. The yard consists of four tracks, numbered one to four, from south to north, which run in an easterly and westerly direction parallel to the main track. The yard is on a one per cent grade extending from east to west. A series of tracks and switches known as the "snake-lead" connect the tracks. This "snake-lead" perhaps derives its name from the continuation of figure "S" curves it makes as it curves away from each track and straightens out again to cross the next one. By means of these "cross-overs" it is possible to run trains from the main line onto any one of the four tracks, or from any one of said tracks to another. The portion of each track to the east of the snake lead is designated "upper", while the portion to the west is designated "lower".

The particular switching operation in which the crew—consisting of the deceased, a brakeman; Parrott, a brakeman; the engineer and fireman—was engaged involved three cars and the engine. At the beginning of the operation the engine and three cars were on lower track one. The order of the cars and engine from east to west was as follows: a water car, a gondola car, a refrigerator car and the engine. The pilot of the engine was headed east. In railroad parlance a gondola car is referred to as a "gon" and a refrigerator car is referred to as a "reefer". The object of the switching operation was to place the gon and the reefer on lower four coupled to a cut of twelve cars which were then located on lower four; and to place the water car on upper four. The method to be pursued in accomplishing this object was as follows:

The engine was first to push the three cars to upper one so that the entire unit would be clear of the switch located on track one; the water car was then to be uncoupled, left standing on upper one; the engine was then to give the reefer and gon a slight start and then uncouple and run back onto lower one; the switch to the snake-lead was to be thrown as soon as the engine crossed said switch and the reefer and gon were to be permitted to roll down across the snake-lead to a coupling with the twelve cars located on lower four; the switch on track one was then to be lined so that the engine could proceed from lower one to upper one and couple onto the water car; the switch on track one was to be then thrown again so that the engine and water car could proceed down the snake-lead to lower four from which point the engine was to push the water car into upper four. The cars were all approximately forty feet in length. It was apparently known to all members of the crew that the easterly end of the cut of twelve cars, standing on lower four, was approximately one hundred feet west of the switch on track four at the end of the snake-lead. With the reefer and the gon added thereto, there would remain only approximately twenty feet between the easterly end of the gon and said switch, which would obviously leave insufficient space for the engine and water car to enter lower four before entering upper four without first coupling onto the fourteen cars, including the original twelve and the reefer and gon, and pushing them a short distance down lower four.

The deceased was the senior man of the crew and was in charge of this switching operation. He assigned Parrott to handle the switch on track one and to remain with the engine and water car during the balance of their movement. Deceased was to uncouple the engine from the reefer and gon after the engine had given them a rolling start on upper one and was then to ride said cars across the snake-lead and to a coupling with the twelve cars on lower four. The night was dark and it appears that the movement was intended to be and was carried out at a slow rate of speed. The deceased when last seen was rolling down with the two cars at a speed of perhaps two miles per hour. Parrott followed with the engine and water car, the pilot of the engine and its headlight being pointed away from the direction of the movement down the snake-lead to track four.

The first part of the movement was carried out without any unexpected happening. The deceased uncoupled the reefer and the gon from the engine on track one and climbed to the top of the reefer, which was the first of the two cars, as said two cars rolled slowly by the switch on track one and onto the snake-lead for the purpose of rolling over the snake-lead and coupling with the cars on lower four. The duty of deceased was to control said cars by means of the handbrake and to bring them to a normal coupling. He was last seen before the accident on top of the reefer at the west end thereof as the two cars passed Parrott who was standing at the switch on track one. Said cars rolled by and the balance of the crew proceeded with their duties in completing the switching operation.

Parrott then lined the switch on track one so that the engine could again proceed from lower one to upper one. The engine did so proceed and he rode the engine pilot to the place the water car was standing on upper one and coupled the water car to the pilot of the engine. He then went back to the switch on track one and threw said switch so as to permit the engine to proceed from upper one across the snake-lead to lower four. After throwing the switch, Parrott got on the footboard at the end of the tender, which was in front of the engine, at the left side or engineer's side, which was his proper position. The engine then proceeded to back over the snake-lead. Parrott did not see the lighted lantern of the deceased and there was nothing to prevent him from seeing it if it had been on the top of the cars.

While the engine was still backing and when the front of the tender upon which Parrott was riding had arrived at or just west of the switch on lower four track, Parrott first heard the deceased holler. It was a holler as if "someone were in pain or distress in some way". If deceased had been hollering before that time, Parrott did not believe he could have heard him "because the engine was rolling, and because of the distance I was from him". When he heard the holler Parrott testified they were near the gondola, but whether they had made a coupling or not he couldn't remember. Parrott ran across the track to the north side and found deceased lying across the north rail of track four underneath the gon, about halfway between the trucks of the gon, possibly a little closer to the east end. He was about forty or fifty feet from the cross-over switch on track four.

The two cars had rolled down to a coupling with the cars on lower four. Deceased's head was toward the north and his feet were toward the inside of the track. He had been run over and while he was still conscious spoke to Parrott when Parrott arrived. He died shortly thereafter as the result of his injuries.

The remaining testimony throws but little light on the manner of the happening of the accident. Parrott was qualified as an expert and gave certain testimony regarding the proper and customary manner of riding cars under the circumstances which deceased rode the two cars. He testified that the proper place for a man to ride under the circumstances was on top of the reefer, the leading car, near the brake which was at the west end of said reefer. It is assumed by the parties, however, from other evidence that deceased fell to the ground between the east end of the reefer and the west end of the gon. This assumption seems to be made because apparently only the westerly trucks of the gon ran over the deceased; his lantern was found between the rails near his feet; there were certain marks found along the east end of the reefer; and on the following morning deceased's brake club was found by Parrott in the grab-iron at the west end of the gon.

It appears that the movement of the cars could have been controlled from the brake platform of the gon and, of the deceased, Parrott said, "If he found that the movement could be made properly, it was in his discretion to take any position on the cars that he deemed consistent with the safe movement of the cars. That would be entirely up to him, as he was riding the cars. If he wanted to control the movement of the cars from the handbrake on the gondola car, that would be also up to him." This statement was corroborated by other expert testimony. Parrott further testified, however, that "a man could not see very easily where he was going on the brake platform of a gondola"; and "I do not know of anything that would make it advisable to do so. I do not know of any reason at all why he should have done so."

[13, 14] It is the contention of the defendant that where the only evidence of negligence is circumstantial, an inference of liability can be drawn only where this is the only reasonable inference to be drawn. A reading of the cases cited by the defendant as its authorities, reveals that they support the correct rule that it is where the evidence tends *equally* to sustain either of *two* inconsistent propositions that *neither* of them can be said to have been established by legitimate proof. Wheelock v. Freiwald, 8 Cir., 66 F.2d 694-698;

Pennsylvania R. Co. v. Chamberlain, supra; United States Fidelity & Guaranty Co. v. Des Moines Natl. Bank, 8 Cir., 145 F. 273, 279. The rule by which a verdict is measured in order to determine its ability to stand is laid down in Wheelock v. Freiwald, supra [66 F.2d 698]: "A verdict cannot be permitted to stand, which rests upon conjecture, surmise, or speculation, but plaintiff must produce substantial affirmative proof that the negligence of the carrier caused the injury, and 'where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover.'"

Although the defendant in this case offered no evidence it contends that that produced by the plaintiff showed no negligence on the part of the defendant, but, on the contrary, indicated that plaintiff fell from the cars while engaged in a normal switching operation.

A contention much the same was made in the recent similar case of Weiand v. S. P. Co., 34 Cal.App.2d 500, 93 P.2d 1023. The court at page 1025 of 93 P.2d therein stated that the rule in the Wheelock case quoted above is predicated upon the theory that neither of two inconsistent inferences has been established; that "If plaintiff has failed to make out a case for the jury on either of two theories, no recovery can be had. If, however, plaintiff has proven sufficient facts to justify a verdict upon one theory, the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury."

The test, as laid down in another recent decision, Sherman v. S. P. Co., 34 Cal.App.2d 490, 93 P.2d 812, at page 818, is "whether or not the inferences which may be drawn from the evidence to sustain the verdict are reasonable".

[15] It is admitted that the deceased was acting within the scope of his employment when the accident occurred. The evidence is undisputed that Parrott did not see deceased's lantern, and that to couple onto cars upon which a fellow employee is riding without knowing his whereabouts is a violation of railroad custom. Violation of a known custom admittedly constitutes negligence. St. Louis & S. F. Ry. Co. v. Jeffries, 8 Cir., 276 F. 73, p. 75 and cases cited.

The sole question then is whether or not plaintiff proved sufficient facts so that the jury might reasonably infer that the injury to the deceased was proximately caused by the negligence of the defendant and that the facts proved do not equally support another theory as to the cause of the death of the deceased.

It is plaintiff's theory of the case that the deceased was riding the reefer and gon slowly down to a coupling on track four; that since he was found approximately half way between the trucks of the gon and only its westerly set had run over him, he was evidently operating the brake on the westerly end of the gon when he fell; the facts that his lantern was found at his feet and his brake club in the grab-iron of the gon at its west end support this premise. From the fact that he was found approximately forty feet from the switch on track four, and the car was forty feet long, it is evident that the end of said car was at or near the switch when deceased fell; the train crew intended to make a coupling with the cars on which deceased was riding; Parrott testified only that he did not remember whether the rear of the engine coupled (plaintiff asserts that in railroad parlance this term includes any contact and the briefs of both parties seem to use it in this manner) or collided with the westerly end of the gon although he was riding on the side of said engine; Parrott heard the deceased holler when the engine was still moving; he heard said holler when the engine was at or just west of the switch on track four. Plaintiff contends that these facts considered together with deceased's statement that "I got knocked off", and Parrott's testimony that he could not see deceased's lantern, clearly demonstrate that the cause of the death of the deceased was that the crew of the engine, contrary to admitted custom and practice, coupled with the gon at a time when the crew of the engine was not aware of the exact whereabouts of their fellow employee, the deceased.

In our opinion the facts presented reasonably support the theory of the plaintiff. Correspondingly, we are unable to find that said facts equally support the theory of the defendant that the deceased fell from the train through unavoidable accident for which neither he nor defendant were at fault or through his own negligence. The facts presented show that deceased was "knocked off" at a time when the end of the gondola car was at the cross-over switch on track four. Defendant suggests that the jostling of the car as it rolled over the switch might have caused deceased to fall; that deceased may have tripped or lost his balance for any number of reasons. No evidence appears to substantiate any of these theories. Furthermore, deceased was an experienced brakeman and it is unlikely that the normal movement of the cars alone would cause him to fall.

[16] As was said by the court in Wabash Screen Door Co. v. Black, 6 Cir., 126 F. 721, 725: "Doubtless a jury ought not to be permitted to speculate, in the sense of guess, between causes, when no reasonable explanation of the injury can be found in the testimony. * * * But, *in the absence of direct testimony, the simple suggestion of theories by the defense does not reduce the jury to mere speculation, and disqualify it from determining the cause of the injury complained of.* The theories suggested may be forced and fanciful, finding no reasonable foundation in the facts proved. They may be explanations which do not explain; which the common sense of the jury, when applied to the testimony, would instantly reject." (Italics ours.)

[17, 18] The jury may not base a verdict on mere speculation, but neither should this court indulge in mere speculation as to a possible defense unsupported by any proven facts. Sears, Roebuck & Co. v. Peterson, 8 Cir., 76 F.2d 243, 247. The trial court submitted to the jury the question as to whether defendant, or its employees, collided or coupled with the cars on which deceased was riding, and whether this constituted negligence proximately causing the death of the deceased. We are of the view that it cannot be said that there is no substantial evidence to sustain the verdict on these issues.

[19-22] Plaintiff contends that the jury could properly accept and properly reject portions of the testimony of the witness Parrott. Parrott, although not a party to this action, is an employee of the defendant. Furthermore, expert testimony was given at the trial to the effect that the brakeman who signals the engineer to move the train or a portion of it is responsible for the movements thereof. If, therefore, the deceased's death were caused by defendant's negligence, Parrott would be the employee at fault. Consequently, although not a party to the action, he could be deemed interested in the result. Generally, the credibility of a witness who is interested in an action is for the jury. If the evidence is possible of contradiction in the circumstances if its truthfulness, or accuracy, is open to a reasonable doubt upon the face of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it. Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209, 218, 51 S.Ct. 453, 75 L.Ed. 983. Certainly the same rule should apply here where the witness gave a clear, definite and exact account of the happenings immediately preceding the accident, but could not remember whether the rear of the engine on the side of which he was riding collided or coupled with the cars on which the deceased was riding, and said that nothing "unusual" happened. It has been held in this state that where the testimony of a witness is itself contradictory and inconsistent, the jury may believe certain portions thereof and reject others. Firth v. S. P. Co., 44 Cal.App. 511, 186 P. 815. The verdict of the jury in this case indicates that the jury believed a portion of the witness's testimony to be contradicted by the facts and hence were justified in disregarding it.

[23] It has been held in other cases brought under the Federal Employers' Liability Act that the jury is authorized to accept part of the testimony of certain witnesses and reject other portions thereof. Mobile & O. Ry. Co. v. Hedgecoth, 215 Ala. 291, 110 So. 44; Southern Ry. v. Newman, 187 Ga. 132, 199 S.E. 753. The jury is not permitted arbitrarily to disregard the uncontradicted testimony of an employee of a railroad company, but where such evidence is contradicted by proven facts as well as where it is contradicted by the testimony of other employees, as in the cases above cited, the same rule should apply.

The instructions given to the jury taken together as a whole properly advised the jury as to the law and we do not find that the defendant was in any way prejudiced thereby.

A careful review of the record convinces us that the evidence is sufficient to justify the verdict, and the judgment is therefore affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; MARKS, Justice pro tem.; MOORE, Justice pro tem.

EDMONDS, Justice (dissenting).

As I read the record in this case, the evidence, even with the statement of Showalter, which I agree was part of the res gestae, does not support the verdict. My reasons are based upon these facts, which stand undisputed:

Showalter, the deceased, was the senior man of the train crew and in the absence of the conductor was directing their movements. As the two cars started down the snake lead, Showalter boarded the refrigerator car, the leading one of the two, at its forward end and went to the top. He had his light and his brake club with him. His purpose was to control the movement of those cars by using the brake. When last seen, he was on top of the refrigerator car with his light. Neither he nor his light was seen again until he was found lying underneath the gondola car, half way between the two rails, and run over by the leading truck of that car.

As the two cars moved along the snake lead Parrott, another member of the crew, got on the footboard of the tender and the engine backed slowly down the track following the cars. There is no claim that this was an improper movement. Parrott had his light, and was at the position where the tender would collide with anything which was on the track ahead of it. Concerning a coupling of the engine and the gondola, he said that he could not remember whether one was made.

When Parrott found Showalter under the car he went up to him and said, "How in the world did it happen, Joe?" Showalter replied: "I got knocked off. I am all done, both legs cut off." There was nothing else said. It is significant that this question was asked by the man who was responsible for the movements of the engine and was controlling it by his signals. He was the first one to see Showalter. The spontaneous exclamation made by the man who would know most about the car movements indicates that Parrott did not know what had happened. The only reply by Showalter to his question was, "I got knocked off."

The respondent construes this reply to mean that the locomotive knocked him off. However, Showalter knew that Parrott was a member of the crew, but there was not one word of accusation. He did not say that the engine had bumped the cars and knocked him off or that the accident was the fault of any member of the crew.

Unquestionably, Showalter left his position on the moving refrigerator car, walked along the top of that car and climbed down or fell down between the refrigerator car and the gondola car. Did he move from the forward end of the refrigerator for the purpose of going to the brake stand on the gondola car, or did he walk across the car for some other reason? Whatever his purpose, he fell between the two cars being controlled by him. How he fell is entirely a matter of speculation.

Parrott's testimony concerning his first knowledge that an accident had occurred is most significant. He said that he heard Showalter shout; it was not a shout of surprise, but that of a man who had been already injured, and was in pain. Moreover, his testimony is that he heard the shout while the locomotive was backing. He also said that only one pair of trucks had passed over him.

Respondent contends that certain measurements prove that the engine following the two cars collided violently with them, knocking Showalter off. She argues that although Parrott was unwilling to testify that he violated his duty so as to permit the engine to contact the cars ahead, he was not unwilling to testify to facts which conclusively demonstrate that there must have been such a collision. But an examination of the record does not indicate that the only reasonable conclusion to be drawn from Parrott's testimony points to a contact. He testified: "We were near the gondola, but whether we had made a coupling into the gondola or not, I cannot remember at this time, the step I was standing on did not get much beyond the cross-over switch; assuming that the gondola and refrigerator cars had made a coupling with the cars, the east end of the gondola would not be as far as 40 to 50 feet from the switch. It would possibly be 8 or 10 feet from the switch; I said I found Showalter under the center of the car. * * * With relation to the cross-over and lower 4 track at the time I heard that holler I was near the switch, or just west of the switch of lower 4 track." This is substantially all the evidence as to the position of the cars at the time Showalter was injured.

Respondent argues that because Showalter must have gotten under the car 20 feet before it came to rest, that the east end of the gondola car must necessarily have been in front of or a few feet to the east of the switch, and because Parrott testified that when he heard the cry of pain, the west end of the tender was near or just west of the switch, it follows that there must have been a collision. However the measurements were approximate and there is no assurance that Parrott heard the first cry of pain or that if he did, whether Showalter had called as he was falling or after he had been run over.

The burden of proof is on the plaintiff to show negligence, but there is no substantial evidence that the engine and tender were anywhere near the two cars. The words used by Showalter do not prove that he was knocked off by the engine. Indeed the evidence shows other facts which make his explanation entirely consistent with the happening of the accident in other ways. For example, it was the practice in the yard to use clubs in working the brakes. It is entirely possible that the spinning of a brake wheel or a lurching of the cars as they passed over the frogs and switches, may have knocked Showalter off the car. Certainly it is just as consistent with the evidence that Showalter was knocked off by the brake or a movement of the cars as it is that he was knocked off by the contact of the engine and under the Federal Employers' Liability Act, where the evidence is wholly circumstantial, to support a verdict it must exclude all other reasonable inferences. If there are other equally reasonable inferences, no one of them can be said to preponderate over the others.

This rule was succinctly stated by the Supreme Court of the United States in Patton v. Texas & Pacific Railway Co., 179 U.S. 658, 663, 21 S.Ct. 275, 277, 45 L.Ed. 361, where it was said: "* * * it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." The rule was also stated in Tucker Stevedoring Co. v. W. H. Gahagan, Inc., D. C., 6 F.2d 407, at page 410, as follows: "Yet sound reason, as well as settled law, demands that a conclusion shall not be based upon circumstantial evidence alone, unless the facts relied upon are of such a nature and are so related to each other as to exclude every other fair and reasonable hypothesis. If the facts are consistent with either of two opposing theories, they prove neither." See, also, Atchison, T. & S. F. R. Co. v. Saxon, 284 U.S. 458, 52 S.Ct. 229, 76 L. Ed. 397; United States F. & G. Co. v. Des Moines Nat. Bank, 8 Cir., 145 F. 273.

In my opinion, the decision of the District Court of Appeal was correct and the judgment should be reversed.

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16 Cal.2d 449

In re ROTHROCK.

Bar Misc. No. 1609.

Supreme Court of California.

Nov. 4, 1940.

Rehearing Denied Dec. 2, 1940.

1. Attorney and client ⟹39

Generally, the conviction of a felony or other infamous crime is cause for disbarment, since the commission of an intentional and willful criminal act is indicative of an unfitness to be intrusted with the administration of the law, but attorney's name will not be stricken from the rolls where the nature of the particular crime does not reflect a bad moral character with respect to duties of attorney's profession. St.1939, p. 357, §§ 6101, 6102.

2. Attorney and client ⟹39

Under statute providing that conviction of a felony involving moral turpitude constitutes cause for disbarment or suspension, whether an offense involves moral turpitude is a matter for court. St.1939, p. 357, §§ 6101, 6102.

3. Attorney and client ⚷49

The purpose of a disbarment proceeding is not to punish the attorney but to afford protection to the public and to the profession by an investigation respecting the moral fitness of the attorney to continue in the practice of the law.

4. Attorney and client ⚷39

If the nature of the offense of which an attorney has been convicted considered alone or in connection with the record of conviction and statute defining particular offense does not disclose that commission of crime would or would not cast discredit upon attorney's moral fitness to practice law, court, in disbarment proceeding, may consider nature of offense as it bears upon attorney's moral fitness to practice law. St. 1939, p. 357, §§ 6101, 6102.

5. Attorney and client ⚷39

Under statute authorizing disbarment or suspension of attorney convicted of a felony or misdemeanor involving moral turpitude, "moral turpitude" will not be imputed to lesser infractions of penal law which carry no reflection upon the attorney's moral fitness to practice law. St.1939, p. 357, §§ 6101, 6102.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude".

6. Attorney and client ⚷39

Under statute authorizing disbarment or suspension of an attorney convicted of felony or misdemeanor involving moral turpitude, an attorney convicted on a plea of guilty of assault with a deadly weapon, for which a mild penalty was assessed, was not convicted of an "offense involving moral turpitude", and proceedings for disbarment were dismissed. St.1939, p. 357, §§ 6101, 6102; Pen.Code, §§ 245, 1207.

See Words and Phrases, Permanent Edition, for all other definitions of "Offense Involving Moral Turpitude."

In Bank.

Proceeding in the matter of the disbarment of Donald A. Rothrock, an attorney at law.

Proceeding dismissed.

Rehearing denied; GIBSON, C. J., and HOUSER, J., dissenting.

Donald A. Rothrock, in pro. per. (William L. Southwell, of San Francisco, and J. M. Frame, of Reno, Nev., of counsel), for petitioner.

Claude Minard, of San Francisco, for respondent.

PER CURIAM.

On November 22, 1939, a certified copy of the record of the conviction of Donald A. Rothrock, an attorney at law, on a charge of assault with a deadly weapon, Pen.Code, sec. 245, was filed in this court. It was filed pursuant to sections 6101 and 6102 of the Business and Professions Code (added by Stats.1939, p. 357, formerly section 288, Code Civ.Proc). The record shows that on October 30, 1939, in the action of the People of the State of California v. Donald A. Rothrock, No. 61939, pending in the superior court, in and for the county of Los Angeles, the defendant therein pleaded "guilty" to count three of an information filed October 7, 1935, charging assault with a deadly weapon, committed in the county of Los Angeles on September 12, 1935. The court sentenced the defendant to serve two months in the county jail. The judgment of conviction has become final and the sentence imposed upon the defendant has been served.

Section 6101 of the Business and Professions Code provides:

"Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension as provided in section 6102.

"The record of conviction shall be conclusive evidence and the clerk of the court in which the conviction is had shall, within thirty days thereafter, transmit a certified copy of the record of conviction to the Supreme Court. The proceedings to disbar or suspend an attorney shall be undertaken by the court upon the receipt of the certified copy of the record of conviction.

"A plea or verdict of guilty is deemed to be a conviction within the meaning of this section."

Section 6102 provides:

"Upon the receipt of the certified copy of the record of conviction of an attorney of a crime involving moral turpitude, the court shall suspend the attorney until judgment in the case becomes final. When a judgment of conviction becomes final, the court shall order the attorney disbarred.

"The other provisions of this article providing a procedure for the disbarment and suspension of an attorney do not apply to an attorney convicted of a crime involving moral turpitude, unless expressly made applicable."

On January 5, 1940, the attorney, referred to herein as the "petitioner", or as the "defendant", moved to dismiss the proceeding herein on the ground that the crime of which he was convicted did not involve moral turpitude. After several postponements of the hearing granted at the request of the petitioner, the matter was submitted on the argument of counsel for the petitioner and counsel for The State Bar and on the briefs filed by the petitioner.

A short résumé of the proceedings which took place before the entry of the judgment of conviction will serve to indicate the reason for the lapse of time between the filing of the information and the entry of the plea of guilty to the third count thereof.

Count 1 of the information charged that on September 12, 1935, the defendant attempted to murder one Golda Draper, and that at the time of the commission of the offense he was armed with a revolver. Count 2 charged a similar attack upon one John H. Ganzenbuher. Count 3 charged assault with a deadly weapon, a revolver, upon George Zaris. On October 16, 1935, the defendant entered a plea of "not guilty". On January 22, 1936, after trial by the court sitting without a jury, the defendant was adjudged guilty on all counts and was found to have been armed as charged in the information. On the same day the defendant made an oral motion for a new trial, which was continued to January 31, 1936, for argument.

The proceedings from this point are reflected in the decisions in People v. Rothrock, Dec. 17, 1936, 8 Cal.2d 21, 63 P.2d 807; People v. Rothrock, May 20, 1937, 21 Cal.App.2d 116, 68 P.2d 364; In re Rothrock, July 12, 1939, 14 Cal.2d 34, 92 P.2d 634; and in the minutes of this court in the Matter of the Disbarment of Donald A. Rothrock, Misc. 1497, published in 98 Cal. Dec., following page 206. By the decision first cited this court denied a motion to dismiss an appeal taken by the People from an order of the trial court setting aside its findings of guilty on each of the three counts and continuing the case for arraignment and plea. The order was reversed with directions to enter judgment in accordance with the finding of the court. The disposition of the appeal was based upon the supposed showing in the record that there was no motion for a new trial pending before the court at the time the order was entered. Upon the going down of the remittitur the trial court on February 3, 1937, entered its judgment of conviction on all three counts and sentenced the defendant to imprisonment in the state prison at San Quentin for the term prescribed by law, the sentences on all counts to run concurrently. The defendant was thereupon committed in accordance with the judgment.

The decision by the District Court of Appeal (People v. Rothrock, 21 Cal.App.2d 116, 68 P.2d 364) disposed of the merits of the appeal from the judgment of conviction by affirming the judgment. On June 21, 1937, this court entered an order based on the purported final judgment of conviction, removing Donald A. Rothrock from his office as an attorney at law.

On August 12, 1939, pursuant to order of this court, the remittitur theretofore issued on the determination of the appeal (People v. Rothrock, 8 Cal.2d 21, 63 P.2d 807) from the order setting aside the findings of the trial court was recalled. In re Rothrock, 14 Cal.2d 34, 92 P.2d 634. The recall was ordered because of the mistake of fact made by this court in assuming that the defendant had not made a motion for a new trial, whereas such a motion had been made and was disposed of. The remittitur was corrected to accord the defendant a new trial.

On August 23, 1939, this court set aside its former order of disbarment and declared the status of Rothrock to have been unaffected by said order of disbarment.

The further proceedings in the trial court, as hereinabove noted, resulted in the judgment of conviction entered on the plea of guilty to the third count of the information, charging assault with a deadly weapon upon George Zaris.

The petitioner contends that the offense of assault with a deadly weapon does not involve moral turpitude within the meaning of the foregoing sections of the Business and Professions Code.

This court has heretofore adopted definitions of moral turpitude as applied to an attorney's conduct. Those definitions have been held applicable either in relation to professional misconduct or the commission by an attorney of a crime. Matter of Humphrey, 174 Cal. 290, 163 P. 60; In re O'Connell, 184 Cal. 584, 194 P. 1010; Lantz v. State Bar, 212 Cal.

213, 298 P. 497; Jacobs v. State Bar, 219 Cal. 59, 25 P.2d 401; In re Hatch, 10 Cal.2d 147, 73 P.2d 885; In re Craig, 12 Cal.2d 93, 82 P.2d 442.

[1] It has been stated that the commission of an intentional and willful criminal act is indicative of an unfitness to be intrusted with the administration of the law, and that generally the conviction of a felony or other infamous crime is cause for disbarment. It is also stated, however, that where the courts have the power to investigate into the nature of the act, the attorney's name will not be stricken from the rolls where the nature of the particular crime does not reflect a bad moral character with respect to the duties of the attorney's profession. See notes, 45 Am.St.Rep. pp. 76, 77, and cases cited; 5 Am.Jur. pp. 428–429, and cases cited.

[2] The legislature of this state by the adoption of the foregoing Code sections has recognized that a violation of the law, without more, does not necessarily brand the attorney committing the same as a person unfit to practice law. It has thus added the further requirement that in the commission of the crime moral turpitude must be involved. The legislature has made the record of conviction conclusive, but it has left to the courts the duty of deciding whether the particular crime involves moral turpitude. In cases such as those involving convictions of murder, forgery, extortion, bribery, perjury, robbery, embezzlement and other forms of theft, no difficulty would attend the determination of the question of moral turpitude from a consideration of the record of conviction alone.

[3, 4] The courts do not appear to have decided the question whether the conviction of an attorney on the charge of assault with a deadly weapon will require his disbarment on the ground that the offense involves moral turpitude. In Re Hatch, supra, this court stated that a conviction of simple assault and battery might indicate that moral turpitude was not involved. In the final analysis the purpose of any disbarment proceeding is not to punish the attorney—in the case of a criminal act he is amenable to punishment under the penal statutes—but is to afford protection to the public and to the profession by an investigation respecting the moral fitness of the attorney to continue in the practice of the law. In re Vaughan, 189 Cal. 491, 209 P. 353, 24 A.L.R. 858; Ex parte Wall, 107 U.S. 265, 288, 2 S.Ct. 569, 27 L.Ed. 552. The author of the note cited supra (45 Am. St.Rep. at p. 77; see, also, 2 R.C.L., p. 1100) cites decisions recognizing that it is not every criminal act which will justify a disbarment, and to the effect that "acts merely discreditable, but not infamous and not connected with an attorney's duties, did not justify the striking his name from the rolls". The author comments: "To this, however, we cannot assent without adding the qualification that the discreditable acts must be such that it may fairly be inferred that, though the attorney is guilty of them, his moral character is not such as will probably lead him into an abuse of the privileges of his profession, or a disregard of his duties either to the court or to his clients." Such a test appears proper to be applied in the case of any conviction where it cannot be said that the attorney is thereby stamped with infamy to such an extent that to retain his name on the rolls would reflect discredit upon the bar and the courts and lower the prestige of the profession. Thus this court, in In re Jacobsen, 202 Cal. 289, 260 P. 294, indicated that the moral turpitude involved in the commission of a crime by an attorney should be such as would be "calculated to injure his reputation for the performance of the important duties which the law enjoins". Therefore, in convictions presenting doubtful cases on the question of moral turpitude, where the perpetrator of the offense is an attorney, the question whether the act involves moral turpitude properly may be resolved by a consideration of the nature of the offense as it bears upon his moral fitness to continue in the practice of the law. A consideration alone of the nature of the offense, therefore, may disclose that conviction thereof would not result in loss of the respect and confidence of his fellow-men, if his name be continued on the roll of attorneys. If that be the result of the consideration of the record of conviction alone, the conclusion may well be determinative of the question of moral turpitude, and the offense of which the attorney was convicted will be held not to involve moral turpitude. If, however, the nature of the offense, considered alone or in connection with the record of conviction and the statutes defin-

ing the particular offense, does not disclose that the commission thereof would or would not cast discredit upon the attorney's moral fitness to practice law, then an investigation into the circumstances will be permitted. In re Hatch, supra, and In re Richardson, Cal.Sup., 102 P.2d 1076, were such cases.

The question whether under particular statutes the crime of assault with a deadly weapon involves moral turpitude does not appear to have been decided in this state, but has had some consideration in other jurisdictions.

In Ex parte George, D.C., 180 F. 785, 786 (deportation under the immigration laws) the alien was convicted "of a felonious assault and sentenced to four months' imprisonment". The "assault consisted of his act in striking in a quarrel another Greek with a large piece of firewood. At the same time the brother of petitioner stabbed the same person with a knife." The court said: "It [the assault] certainly does not constitute a misdemeanor involving moral turpitude."

In Weedin v. Yamada, 9 Cir., 4 F.2d 455, 457, the court upheld an order of deportation in a case where a Japanese subject had pleaded guilty to a charge of "assault with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show a willful, malignant, and abandoned heart", under a statute which so defined the crime. The court said: "Such a crime, in our opinion, involves moral turpitude beyond any question."

In United States ex rel. Morlacci v. Smith, D.C.N.Y., 8 F.2d 663, 664, the court, in deciding that the crime of "second degree assault" involved moral turpitude, observed that mere assault and battery concededly did not involve such a degree of depravity (see, also, to the same effect Gillman v. State, 165 Ala. 135, 51 So. 722, and Pollok v. State, Tex.Cr. App., 101 S.W. 231, involving conviction of assault and battery as affecting credibility of witnesses), "but an assault with a dangerous weapon, in this case a revolver, and shooting the person, is simply an act which includes something done by the assailant contrary to good morals and proper conduct. Society is entitled to protection from willful acts of that description which frequently result in more serious injury and consequences than that following the commission of the offense in question. * * * it is doubtful whether this court has the power to examine the circumstances upon which the conviction and sentence were based."

In United States ex rel. Ciccerelli v. Curran, 2 Cir., 12 F.2d 394, 395, a subject of Italy was ordered deported on the ground of conviction of a "criminal assault with a gun". The court merely observed: "It seems to be admitted that the crime of assault in the second degree is one involving moral turpitude."

In Ciambelli ex rel. Maranci v. Johnson, D.C., 12 F.2d 465, 466, also a deportation case, the question was whether a conviction of assault and battery upon a police officer involved moral turpitude. The court observed that the indictment charged that Maranci was armed with a dangerous weapon, a razor, but that it was not charged nor claimed "that the assault was made with the weapon". The court said: "It has been held that simple assault and battery is not a crime involving moral turpitude [citing cases]. But an assault is one of those offenses which may, or may not, involve moral turpitude, depending upon the circumstances of the particular case. If one ordinarily law-abiding, in the heat of anger, strikes another, that act would not reveal such inherent baseness or depravity as to suggest the idea of moral turpitude. If, on the other hand, one deliberately assaulted an officer of the law with a dangerous weapon and with felonious intent, or for the purpose of interfering with the officer in the performance of his duty, the attendant circumstances showing an inclination toward lawlessness, the act might well be considered as one involving moral turpitude. Between the two lies the line of demarcation which I do not undertake to define accurately. I only determine which side of the line the facts of this case fall." On the facts in that case the court concluded that the assault did not involve moral turpitude.

In a similar case, United States ex rel. Mazzillo v. Day, D.C.N.Y., 15 F.2d 391, 392, involving a conviction of "assault in the second degree", the court also looked into the circumstances of the offense and concluded that an assault on the driver of a cab, inflicting on him a cut on the neck and forcing him to abandon his vehicle, was an offense involving moral turpitude.

However, in United States ex rel. Griffo v. McCandless, D.C.Pa., 28 F.2d 287, where the alien had been convicted and sentenced for the offense of "aggravated assault and battery", the court concluded that moral turpitude must be inherent in the charge, that it could not go beyond the record, which was conclusive, and that it was not conclusively implied in the charge of aggravated assault and battery. Likewise in United States ex rel. Mongiovi v. Karnuth, D.C.N.Y., 30 F.2d 825 (conviction of an alien on a plea of guilty to a charge of manslaughter in the second degree), it was held that where the offense as defined by statute did not include an evil intent, or commission of the act wilfully or designedly, the court would not look beyond the charge and statutory definition of the crime for the purpose of deciding whether the offense involved moral turpitude. The court distinguished Weedin v. Yamada and United States ex rel. Morlacci v. Smith, supra, wherein assault with a deadly weapon was held to involve moral turpitude, on the ground that in those cases the crime of assault with a deadly weapon, as defined in the respective state statutes, was committed with an intent to do bodily harm.

The case of State v. Metcalfe, 204 Iowa 123, 214 N.W. 874, 876, involved a proceeding to disbar an attorney on charges of assault with intent to commit murder and shooting and wounding one person with a revolver, and an assault with a shotgun and shooting and wounding another person. The attorney had been convicted on both charges, but the convictions in each case had been reversed. The court, citing authorities, held that affirmative action could be taken in the proceeding, although there were no convictions, if the facts warranted such action. It concluded, however, on the facts—the shooting by the attorney occurring in one case during an altercation with his tenants and in the other while protecting his property from chicken thieves—that the circumstances of neither case involved any misconduct within the sphere of duty as an attorney, or any lack of the qualifications of integrity, honesty and fidelity essential to that relation; that "these acts do not of themselves necessarily evince a lack of moral character in respect to the qualities required for the proper discharge of the duties of an attorney, nor, in the absence of a conviction therefor, require his disbarment. A quarrelsome disposition, a hasty and ungoverned temper, and even an unwarranted assertion, under provocation, of a claimed right of defense of self or property, are not necessarily incompatible with truthfulness, faithfulness, and integrity."

From the foregoing discussion and review of cases dealing with the question whether the offense of assault with a deadly weapon involves moral turpitude, we arrive at the following conclusions:

[5, 6] In the absence of a statutory definition indicating that evil intent is inherent in the commission of the crime, the courts generally are reluctant to classify the crime of assault with a deadly weapon as one involving moral turpitude as a matter of law. Where the question has arisen in disbarment proceedings, such conduct has been deemed not to call for disbarment as a matter of course. A high degree of moral standards is required of an attorney, but the courts have not been inclined to impute moral turpitude in the commission of the lesser infractions of the penal laws which carry no reflection upon the attorney's moral fitness to practice law. The commission of such lesser offenses by an attorney in the heat of anger or as the result of physical or mental infirmities does not, without more, cast discredit upon the prestige of the legal profession or interfere with the efficient administration of the law and should not be deemed to involve moral turpitude. Our statute, sec. 245, Pen.Code, does not define assault with a deadly weapon so as to indicate that it is an offense which by these tests involves moral turpitude as a matter of law. That it did not involve moral turpitude in the particular case may be reflected by the record of conviction, which is all that is before the court in this proceeding. That record consists of the charge of the offense to which the defendant pleaded guilty; the plea; and the judgment of conviction. See sec. 1207, Pen.Code; 8 Cal.Jur., p. 474. The light sentence imposed on the attorney indicates that the trial court was of the opinion that the offense to which a plea of guilty was entered did not involve moral turpitude. Our consideration of the record leads us to the same conclusion.

The motion is granted and the proceeding is dismissed.

41 Cal.App.2d 397

BOWMAN v. UNION TRUST CO. OF SAN DIEGO et al.

Civ. 2711.

District Court of Appeal, Fourth District, California.

Nov. 6, 1940.

1. Exceptions, bill of ⚷6, 51

Where proposed bill of exceptions which omitted many material matters contained some 800 pages and, while the real issues were few and simple, no attempt was made to eliminate immaterial matter and to prepare a bill of exceptions with reasonably concise summarization of issues and proceedings, the trial judge was not required to accept and settle such bill, nor to himself undertake task of preparing a proper record, and was justified in terminating proceedings for settlement of bill of exceptions when after several extensions appellant was still asking court to accept and settle the original bill of exceptions. Code Civ.Proc. §§ 473, 1054.

2. Property ⚷4

Ordinarily, such structure as a house becomes part of realty upon which it stands, but it may be treated as personalty as between persons who deal with it as such.

3. Evidence ⚷419(13)

In action to rescind sale of realty and buildings for $30,000 on ground of vendors' failure to credit a payment of $1,000, parol evidence that the $1,000 was paid to one of vendors who was sole owner of a house and that such payment was not part of sale was not inadmissible on ground that such evidence varied terms of written instrument, where, by bringing action for rescission, purchaser opened up question of consideration, whereupon vendors were entitled to meet the question by evidence that total purchase price including the house was $31,000 and not $30,000. Code Civ.Proc. § 1962, subd. 2.

4. Evidence ⚷419(11)

The question of consideration may always be inquired into, and actual consideration of a contract may be shown by parol evidence even though a different consideration appears in the writing. Code Civ.Proc. § 1962, subd. 2.

◆

Appeal from Superior Court, San Diego County; Frank Macomber, Judge.

Action by Lamont William Bowman against the Union Trust Company of San Diego and others, to rescind a contract of sale of property. From a judgment for defendants, and from an order terminating proceedings for settlement of a bill of exceptions plaintiff appeals.

Judgment and order affirmed.

Charles Peckham and J. Earl Haskins, both of Los Angeles, for appellant.

Noon & Noon and Sloane & Steiner, all of San Diego, for respondents.

BARNARD, Justice.

On April 24, 1925, the plaintiff purchased from three members of the Loperena family two lots in the city of San Diego with certain improvements thereon, including a store building and a house. In addition to the cash consideration he gave back a note secured by a trust deed on the property, in which the defendant trust company was named as trustee. On January 15, 1938, after steps had been taken to foreclose this trust deed, the plaintiff brought this action for a rescission. He alleged that within three years last passed he had discovered that the defendants had breached the contract by failing to credit some of the payments he had made upon the purchase price, offered to reconvey the property upon the repayment to him of the amount he had paid on account of the purchase price, and asked judgment for the total amount he claimed to have paid, with interest from the respective dates of payment.

The main controversy was over a payment of $1,000 made by plaintiff to one of the three owners of the property. This person claimed to be the exclusive owner of an old house situated on the lots and the plaintiff had agreed in writing to give him $1,000 for this house, and $15,000 for his one-half interest in the remainder of the property, contingent upon his being able to purchase the interests of the other two coowners. He left this $1,000 with a bank on this condition, and later agreed to give the other two owners $15,000 for their half interest. Through another agreement and another escrow title to the property was passed to the plaintiff, the named consideration being $30,000, of which $5,000 was paid in cash and a note for $25,000 was given secured by a trust deed. After the latter deal was closed the bank delivered the $1,000 to the one of the three owners who owned the house. In this action the plaintiff claimed that this payment of $1,000 should have been credited upon the trust deed and that he had made certain other payments on the trust deed which had not been credited thereon by the defendants.

The court found in all respects in favor of the defendants, finding, among other things, that the three members of the Loperena family owned this property, with the exception of the house thereon which was owned exclusively by one of them, Martin Loperena; that the plaintiff agreed to purchase the house from Martin for $1,000, and by separate agreement agreed to purchase the remaining interests of the three owners of the property for $30,000; that the trust deed was given as a part of that purchase price; that the $1,000 paid for the house was not a part of the $30,000 to be paid for the remainder of the property, was not to be credited thereon and was not to be credited upon the note and trust deed; that the defendants had not breached the contract by failing to credit any payments which had actually been made; and that a certain amount was still due on the purchase price of the lots and on the note and trust deed. Judgment was entered in favor of the defendants on October 5, 1938, a motion for a new trial was denied on November 23, 1938, a request for a transcript under section 953a, Code of Civil Procedure, was filed on December 3, 1938, and a notice of appeal was filed on December 20, 1938.

While a clerk's transcript was filed in the trial court and has been brought here, no reporter's transcript was ever certified or filed and the appellant at some time elected to proceed to prepare a bill of exceptions. By successive orders the court extended the time in which to prepare and file such a bill of exceptions to December 30, 1938, to January 28, 1939, to February 27, 1939, to March 29, 1939, and to April 26, 1939. On the next day, April 27, 1939, a proposed bill of exceptions was served and filed. Thereafter the respondents moved to strike the proposed bill of exceptions and to terminate the proceedings for a settlement thereof on the ground that the proposed bill was improper and sham, and that it failed to show any attempt to prepare a proper bill of exceptions. The appellant moved for relief under section 473 of the Code of Civil Procedure. The court granted the motion for relief and on May 23, 1939, gave the appellant until June 9 to amend and to file a proper bill of exceptions. This was not done and on June 20, 1939, the trial judge notified the appellant that the order of May 23 had not been complied with, that he would give him until June 27, 1939, within which to prepare a proper bill of exceptions and that upon his failure so to do his proceedings for the preparation of a record would be terminated. No further bill of exceptions was filed and on June 26, 1939, the appellant filed notice of a motion for an order settling the bill of exceptions which had already been proposed. This motion was argued by counsel for both sides on June 28, 1939, and was denied. On June 29, 1939, the court entered a formal order terminating proceedings for the settlement of a bill of exceptions. From this order the plaintiff has also appealed.

In support of this second appeal the appellant has filed a clerk's transcript covering the period from December 2, 1938, to the date of the filing of notice of appeal from the order terminating proceedings for the preparation of a record. There is no certification by the trial judge who made the order and there is no bill of exceptions or other authenticated record in support of the appeal from the order terminating proceedings, or showing what papers or matters were brought to the attention of the court or considered by it in connection with the hearing which resulted in the order thus appealed from.

Attached to this second clerk's transcript, however, is a typewritten copy of the proposed bill of exceptions and proposed amendments in connection with the appeal from the judgment. This proposed bill of exceptions is in two volumes. The first volume, containing 374 pages, includes, among other things, full copies of a great many purported exhibits, the major portions of which have no bearing on this appeal; a deposition containing 75 pages copied word for word; excerpts from the testimony of certain witnesses; and 94 exceptions, many of them trivial in nature and most of which are not so connected with the matters to which they relate that it can be told what error is claimed. It also contains frequent references for further particulars to volume II which is a partial reporter's transcript containing 437 pages which the court reporter certifies to be a true copy of the testimony of certain named witnesses. No other record is before us. The appellant has submitted both appeals upon this record.

[1] In connection with the appeal from the order terminating proceedings no attempt has been made to present a bill of exceptions or any record of what was presented to or considered by the judge who made that order. It does appear from the clerk's transcript that extensions of time in which to prepare a bill of exceptions were given to the appellant over a period of four months, several of which were forbidden by statute. Sec. 1054, Code Civ.Proc. After the time thus granted had expired the proposed bill of exceptions, which is now presented here, was filed. While this document omits many things, as pointed out in the amendments offered, it is some 800 pages long and contains hundreds of pages of matter which a casual inspection discloses should not be in a bill of exceptions. While the real issues which the appellant has presented in his opening brief, which incidentally contains more than 400 pages, are few and simple no attempt was apparently made to eliminate immaterial matter and prepare and present a bill of exceptions with a reasonably concise summarization of the issues and proceedings in connection with which error is claimed and the evidence relied on. It can neither be held that it was the duty of the trial judge to accept and settle this bill of exceptions as presented nor to himself undertake the task of preparing a proper record. Four weeks after the trial judge instructed the appellant to do this nothing had been done and the court then notified the appellant that if it was not done within another week the proceedings would be terminated. Nothing was then done and on the final hearing, June 28, the appellant was still asking the court to accept and settle this same bill of exceptions. Under the circumstances, the trial judge was justified in terminating the proceedings. Poe v. Donley, 61 Cal.App. 550, 215 P. 399.

Turning to the appeal from the judgment, the appellant is in no better position if we accept the proposed bill of exceptions as a proper record and consider this appeal on its merits. Unsatisfactory and voluminous as the purported record is, a casual inspection thereof discloses that the court's findings are supported by evidence which was received. While this is admitted by the appellant in his opening brief he contends that a part of this evidence was inadmissible because it was parol evidence which was received and accepted as varying the terms of a written instrument. In this connection it is contended that the house which the appellant separately agreed to buy for $1,000 from one of the owners was, in law, a part of the real estate; that it could not, therefore, have been the exclusive property of one of the three owners; that the $1,000 paid for this house was necessarily a part of the consideration in the second transaction whereby he purchased the remaining interests of all three owners; that the escrow instructions superseded all previous negotiations; that these escrow instructions did not mention the house in question; and that it follows that it was error for the court to admit parol evidence "to show a different consideration than that set forth in the final escrow instructions".

[2-4] Ordinarily, such a structure as a house becomes a part of the realty upon which it stands, but there can be no question that it may be treated as personal property as between persons who deal with it as such. The appellant so dealt with it and got what he bargained for. In fact he tore the house down and no one ever objected. Having been told of the situation he bought the house from one of the owners and bought the remainder of the property from all three owners in separate deals under two written agreements. The $1,000 was put into a separate deposit before the other deal was closed and before the appellant executed a note and trust deed for the balance of the purchase price on the remainder of the property. In fact he is himself attempting to vary the terms of the note and trust deed by introducing parol evidence to the effect that he did not owe the amount of the note at the time it was executed, and that he had already paid $1,000 which should have been applied upon that indebtedness. Not only were there two deals and two written contracts, separately handled through separate escrows, but the appellant in bringing this action for a rescission upon these grounds opened up the question of consideration for the purchase and sale of these lots and for the trust deed given in part payment therefor, and the respondents were entitled to meet the question of consideration thus raised. This they did by evidence that the total purchase price for all of the property, including the house, was $31,000, and not $30,000 as claimed by the appellant. It is well settled that the question of consideration may always be inquired into and that the actual consideration of a contract may be shown by parol evidence even though a different consideration appears in the writ-

ing. Sec. 1962, subd. 2, Code Civ.Proc.; Sandrini v. Branch, 32 Cal.App.2d 707, 90 P.2d 593.

Since the evidence to which the appellant objects was properly admitted, the contention that the court's findings are unsupported by the evidence is without merit. With this issue of law decided against the appellant, the other questions raised become immaterial and require no consideration.

For the reasons given, the judgment and order appealed from are each affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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41 Cal.App.2d 275

PEOPLE v. ALEXANDER.

Cr. 1730.

District Court of Appeal, Third District, California.

Nov. 9, 1940.

Hearing Denied Nov. 25, 1940.

1. Criminal law ⚷1144

On appeal from judgment of conviction, all intendments favor upholding the judgment.

2. Criminal law ⚷1144(13)

On appeal from judgment of conviction, evidence must be viewed in light most favorable to the prosecution, and jury, having found accused guilty, must be assumed to have believed such testimony as pointed towards his guilt.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

On petition for rehearing.

Rehearing denied.

For prior opinion, see 106 P.2d 450.

A. M. Mull, Jr., and Lawrence G. Dorety, both of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

[1, 2] Appellant, in his petition for a rehearing, suggests that this court in its recital of the facts has failed to indicate the conflict in the evidence. Upon appeal, as pointed out in People v. Dukes, 90 Cal.App. 657, 266 P. 558, all intendments favor upholding the judgment, and the evidence is to be viewed in the light most favorable to the prosecution, and the jury, having found appellant guilty, it must be assumed the jury believed such testimony as pointed toward his guilt.

In the case at bar the testimony of appellant was that he went to the home of his wife to shoot himself in her presence, and in his attempt to get the revolver from his pocket or on account of his poor aim, the gun was discharged, missed appellant, and the bullet passed over the head of his wife. This theory was disbelieved by the jury. It should be kept in mind, therefore, that our narrative of what took place was gathered from what the jury must have believed the facts to have been, and not the construction placed thereon by appellant.

The words "meaning the shooting at his wife" in the paragraph beginning "when asked by the police why he did it" may be stricken from the opinion.

Rehearing denied.

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41 Cal.App.2d 369

CARPENTER et al. v. LOS ANGELES GAS & ELECTRIC CORPORATION.

Civ. 12085.

District Court of Appeal, Second District, Division 1, California.

Nov. 6, 1940.

Rehearing Denied Dec. 2, 1940.

Hearing Denied Jan. 2, 1941.

1. Electricity ⚷11

Where, after prolonged controversy as to the accuracy of charges made by an electrical company for services rendered to plaintiffs and refusal by plaintiffs on due notice to remove their meter to a point accessible to meter readers, the company in accordance with its regulations on file with the State Railroad Commission discontinued service to plaintiffs' house, plaintiffs could not recover against the company for wrongful discontinuance of service.

2. Electricity 🔑11

The reasonableness of rules for the regulation of its service adopted by a corporation distributing electricity is a question for the determination of the state railroad commission. St.1915, p. 159, § 63(b) et seq.

3. Electricity 🔑11

In action for wrongful discontinuance of electric service, where the regulations under which the defendant electricity distributing company acted in discontinuing service to plaintiffs had been on file with the railroad commission, the reasonableness of such regulations as determined by the railroad commission, either directly or by implication, was conclusive on the trial court. St.1915, p. 159, § 63(b) et seq.

4. Trial 🔑142

Where there was no substantial evidence to support a verdict for plaintiff, when every reasonable and legitimate inference which might be drawn from that evidence, whether conflicting or not, was indulged, trial court properly granted a motion for an instructed verdict in favor of defendant.

5. Appeal and error 🔑110

No appeal lies from an order denying a new trial.

◆

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by LeRoy E. Carpenter and Margaret Carpenter against the Los Angeles Gas & Electric Corporation for general and punitive damages for discontinuance of electrical service. From judgment for defendant and an order denying a motion for new trial, plaintiffs appeal.

Judgment affirmed and appeal from order denying new trial dismissed.

Hearing denied; CARTER, J., dissenting.

Robert R. Ashton, of Los Angeles, for appellants.

LeRoy M. Edwards, T. J. Reynolds, and Neil G. Locke, all of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from a judgment for defendant upon a verdict of the jury directed by the court, and an attempted appeal from an order denying a motion for a new trial.

The action is one in which plaintiffs seek damages, both general and punitive, for the alleged wrongful, unlawful and malicious discontinuance of electrical service at plaintiffs' home which theretofore had been supplied by defendant.

From the evidence adduced at the trial, which consumed four days, it appears that early in 1934 plaintiffs questioned the truth of defendant's monthly statement on account of electricity shown by the meter to have been used. A letter from plaintiffs to defendant in that regard, under date of February 5, 1934, is as follows: "Dear Sirs: Received your sheet showing the electric readings requested. Now, please advise how you obtained these. There is no way to secure them except by admittance to the house, and no one has asked to be allowed to enter for that purpose. During six weeks of the time shown, the house was unoccupied, and we were out of the city. Yours very truly, L. E. Carpenter." A second letter under date of February 19, 1934, is as follows: "Dear Sirs: Enclosed is check for gas as per your bills of Jan. 6.89—Feb. 6.13, 1302. Under date of Feb. 5, I wrote you concerning the electricity, asking an explanation—You have not answered that letter. I am withholding payment until you straighten this matter out as it should be. Yours truly, L. E. Carpenter."

In reply to the above letters defendant informed plaintiff in a letter dated March 6, 1934, that its assistant chief meter reader reported that the meter could be read through the window. Thereafter it appears that other meter readers reported to the contrary. In any event, the dispute over the meter readings continued for over a year.

Briefly, the record reveals evidence of the following pertinent facts: That the meter was located on the screen porch; that the screen door was covered with a canvas on the inside; that the door was always locked; that time and again the defendant's meter readers were required to return by special appointment or otherwise to gain access to the meter; that the board of public utilities and transportation investigated the matter at the request of defendant; that plaintiff protested the investigation and questioned the board's authority; that considerable correspondence regarding the accounts and the payment thereof and to the controversy generally went on between plaintiffs and defendant; that defendant endeavored to get the meter moved outside or to an accessible spot; that plaintiffs had withheld the payment of their account repeatedly; and finally, that defendant, after due notice and although all accounts were paid, shut off the electricity on February 28, 1935.

Plaintiffs' complaint contains the allegation that "the only reason given by said defendant corporation for disconnecting said electrical service after the same had been cut off, was that plaintiffs' account was too small and too *troublesome* to bother with". (Italics added.)

The defense was based on the claim by defendant that its rules adopted in accordance with law, had been followed at all times in connection with its action in discontinuing electric service to plaintiffs.

The trial court, following the motion by defendant for an instructed verdict, summed up the law and facts in part as follows: "In a sense there was a dispute about something, running over a period of years; and I assume that there would be a dispute about something as long as the service was continued, in this case. When Mr. Carpenter questioned the amount of the bills, the company, as I understand the evidence, wrote off the amount that was in dispute. He questioned the accuracy of readings made through the screen. For a time it appears that someone connected with the defendant corporation contended that an accurate reading could be made through the screen, and thereafter, however, persons in authority conceded that the meter could not be properly read through the screen. Then Mr. Carpenter, as I understand his position, which has been very difficult for me to comprehend, when the representatives of the corporation finally definitely agreed, both verbally and in writing, that the meter could not be read through the screen, took the position, 'Well, you said it could, now you read it through the screen.' There was no dispute as to the amount of the bill that was pending. * * * We have definitely now in evidence the rules and regulations of the company. It appears from the evidence that those rules were on file with the railroad commission approximately 15 years or thereabouts prior to this controversy. The mere long-continued period without question would appear to be at least a tacit holding by the railroad commission that they were reasonable. * * * There is no issue of fact to be presented to the jury. It is undisputed that the rule was adopted. It was on file. * * * Notice was given in accordance with the rules. The basis for the application of the rule was the inability to read the meter under the conditions that existed and for which plaintiff contended for a year and still contends in his evidence. So that the case, as to the application of the rule, is made out by the plaintiff, himself."

[1] In connection with its instructions to the jury the court commented further, as follows: "There is no dispute as to the inability to read or properly read the meter. That is a point that plaintiff contended for. That was his first contention, that the meter had not been properly read. Therefore, it is undisputed that at times the curtain was drawn in such way that no reading at all could be had. There is, as I indicated, no issue upon that point. The plaintiffs contend that the meter could not be properly read. The representatives of the defendant corporation concede that the meter could not be properly read and at times read at all. Therefore, notice was given, either that the meter be placed in some accessible place or the service would be discontinued, which is without dispute; and it is without dispute that no change in the location of the meter was thereafter made. So, as a matter of law, the court is compelled to hold, on the undisputed testimony, that the defendant corporation had a legal right to discontinue the service; and when one acts legally, there is no cause of action." The foregoing comments by the trial judge are in accord with the record.

[2, 3] That the rules and regulations as proved at the trial, under and by virtue of which defendant acted in the premises, were controlling and constituted a complete defense, there can be no question. No constitutional issue is involved with relation to such rules and regulations and the operation thereof as affecting the rights of the plaintiff. The reasonableness of such rules and regulations, as correctly pointed out by respondent, is a question addressed to the judgment of the governmental agency charged with the determination thereof—in this instance, the railroad commission of the state of California. That commission having acted with regard thereto, either directly or by implication, as the evidence shows without contradiction, the rules became and were binding on defendant company. The reasonableness of such rules and regulations, in the circumstances, was conclusive on the trial court. Public Utilities Act, sec. 63(b), et seq. St.1915, p. 159; Live Oak Water Users' Ass'n v. Railroad Comm., 192 Cal. 132, at page 139, 219 P. 65; and to the

same effect see, also, Truck Owners & Shippers, Inc. v. Superior Court, 194 Cal. 146, 228 P. 19.

[4] A review of the record discloses that in no event would the evidence have supported a verdict in favor of plaintiff as a matter of fact and as a matter of law. When, indulging in every reasonable and legitimate inference which may be drawn from the evidence and disregarding the fact, if it is a fact, that the evidence is conflicting, and when in such circumstances the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff, it is then the trial court's plain duty to grant a motion for an instructed verdict. Thomsen v. Burgeson, 26 Cal.App.2d 235, 79 P.2d 136; Collins v. Nelson, 16 Cal.App.2d 535, 61 P.2d 479.

For the foregoing reasons the judgment is affirmed.

[5] No appeal lies from the order denying the motion for a new trial and the same is therefore dismissed.

41 Cal.App.2d 409

WHITNEY et al. v. REDFERN.

Civ. 2471.

District Court of Appeal, Fourth District, California.

Nov. 6, 1940.

1. Appeal and error 🔑544(2)

On an appeal on the judgment roll alone, an appellate court is limited to the consideration of the questions whether the complaint states a cause of action, whether the findings are within the issues, whether the judgment is supported by the findings, and whether reversible error concerning a matter of law appears on the face of the record.

2. Appeal and error 🔑907(3)

Where there is no bill of exceptions or duly authenticated record affirmatively showing alleged error, the District Court of Appeal on appeal on judgment roll alone must indulge in presumption in favor of regularity of findings and judgment, and if trial court commits error therein, that error or facts necessary to establish it must be shown affirmatively by the appellant, and where a finding is made on the subject matter, it will be presumed that there was received into the record evidence sufficient to justify and support it.

3. Appeal and error 🔑544(2)

On appeal on the judgment roll alone, only ultimate facts found by the court and not probative facts which have no proper place in the findings can be considered, and only in cases where it clearly appears that the ultimate fact found is based upon and adduced from findings of probative facts, and it is plain that the latter do not justify nor support the ultimate fact found, will the findings of probative facts control that of the ultimate fact, and so deprive the judgment of support.

4. Mortgages 🔑578

Where original foreclosure action was brought on mortgage without any reference in the pleadings to any previous proceedings or renewal of trust deed, and defendant answered and alleged that mortgage was given as part of purchase price of realty, the District Court of Appeal on appeal on the judgment roll alone was required to presume that trial court's finding that mortgage was given as part of purchase price was based on competent evidence, in absence of any contrary showing. Code Civ.Proc. § 580b.

5. Mortgages 🔑559(2)

Where obligation of mortgage, found by the trial court to have been given to secure payment of balance of purchase price of realty, was contracted and dated after enactment of statute providing that no deficiency judgment shall lie after sale of realty under mortgage given to secure payment of balance of purchase price, that statute was applicable and precluded the giving of deficiency judgment after sale of realty under mortgage. Code Civ.Proc. § 580b.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Hattie E. Whitney and another against Arvilla M. Redfern, a widow, to foreclose a mortgage, and for a deficiency judgment. From that portion of a judgment denying them the right to a deficiency judgment, plaintiffs appeal.

Affirmed.

Fred A. Wilbur, of Santa Ana, for appellants.

W. W. Kaye, of Los Angeles, for respondent.

GRIFFIN, Justice.

This is an action to foreclose a mortgage dated October 1, 1934, in the sum of $9,750, on certain real property in Orange county given to secure the payment of a promissory note in that sum made by respondent Arvilla M. Redfern to appellants Hattie E. Whitney and Ruth E. Woodhead.

At the time the foreclosure proceedings were instituted the sum of $7,250, exclusive of interest, was due thereon. Appellants, in addition to the prayer for a sale of the property to satisfy the lien, also sought a deficiency judgment for any amount not satisfied by the sale. Respondent, in an amendment to her answer, alleged that the mortgage herein described was "given by this defendant to the plaintiffs to secure payment of the balance of the purchase price of the real property described in said mortgage", and prayed judgment of the court "that in the event the court grants the plaintiffs a decree of foreclosure of the real property described in the said mortgage said decree shall provide that no deficiency judgment be entered against this defendant". The court, after hearing evidence thereon, found in favor of appellants that the mortgage should be foreclosed, but denied the right of a deficiency judgment against respondent and specifically found in that respect that in June, 1930, the defendant and respondent executed and delivered to C. H. Whitney, a trust deed to secure a note for $18,500, which was given as part payment of the purchase price of the property involved; that the note for $18,500 was reduced to $9,750 by sundry payments; that respondent could not pay the note and that C. H. Whitney thereafter requested of the trustee a full conveyance of the property to respondent and that the property was so conveyed; that upon the reconveyance of the property said defendant and respondent immediately made, executed and delivered the promissory note and mortgage above-mentioned which was made payable to the appellants, the two daughters of C. H. Whitney; that the said note and mortgage was given to secure payment of the balance of the purchase price of the real property involved; and that no deficiency judgment should lie in any event after the sale of the mortgaged property. Appellants now base their appeal entirely on the judgment roll alone and from that portion of the judgment denying them the right to a deficiency judgment.

The only question presented to this court is whether or not the promissory note and the mortgage given under the conditions as herein set out, come within the purview of section 580b of the Code of Civil Procedure, which provides that no deficiency judgment shall lie in any event after the sale of any real property under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property. It is the contention of appellants that where one sells real estate and takes in part payment therefor a promissory note secured by a mortgage or trust deed, and in the event the seller or his assigns files suit to recover thereon, no deficiency judgment shall be rendered against the maker; but if the note is paid or canceled and a new note is made to parties other than the original seller, then section 580b of the Code of Civil Procedure does not apply. It is further argued that the fact that the appellants are the daughters of C. H. Whitney should not be considered in the transaction because they were complete strangers to the transaction and that the court erred in holding that the note and mortgage were given to secure the payment of the balance of the purchase price of the real property.

Appellants further contend that respondent must take one of two courses. Either she must say that the note and mortgage sued on in this action are a note and mortgage disconnected with the original note and trust deed so as to bring it within section 580b of the Code of Civil Procedure, or she must say that the note and mortgage and the note and trust deed are part of one transaction, and that if the note and mortgage are a part of the original transaction then section 580b does not apply because that section cannot be retroacted, citing Hales v. Snowden, 19 Cal.App.2d 366, 65 P.2d 847, and Birkhofer v. Krumm, 27 Cal.App.2d 513, 81 P.2d 609. It is then argued that if the note and mortgage were a separate transaction then section 580b of the Code of Civil Procedure does not apply because the note was given to someone other than the original seller and was not given as a part of the purchase price of the real property.

Respondent in reply argues, among other things, that the court having made a finding that the mortgage was given to secure the balance of the purchase price, such finding is conclusive against the appellants for the reason that they have not brought up the evidence to show that the finding is not supported.

As to the remaining point, respondent contends that since the mortgage was given subsequent to the adoption of section 580b of the Code of Civil Procedure, the law as established in that section became a part of the contract and controls the rights of the parties, and that by accepting the mortgage after that section had become the law of the land, the appellants waived the right to a deficiency judgment to which they were entitled under the law prior to the enactment of that section, citing Hales v. Snowden, supra; Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712; Welsh v. Cross, 146 Cal. 621, 81 P. 229, 106 Am. St.Rep. 63, 2 Ann.Cas. 796; Loeb v. Christie Hotel Corp., 16 Cal.App.2d 299, 60 P.2d 529; Mulcahy v. Baldwin, 216 Cal. 517, 15 P.2d 738; County of Los Angeles v. Jones, 6 Cal.2d 695, 59 P.2d 489; and sec. 3513, Civil Code.

[1-3] The rule by which appellate courts are limited in their review of questions arising in cases appealed upon the judgment roll alone is clearly stated in Macowsky v. Irvine, 71 Cal.App. 77, 234 P. 839, 840, namely, "Do the findings support the judgment; or, stated in its parts: (1) Does the complaint state a cause of action; (2) are the findings within the issues; (3) is the judgment supported by the findings; and (4) does reversible error concerning a matter of law appear on the face of the record?" See, also, Norton v. Newerf, 45 Cal.App. 10, 187 P. 57; Carter v. Sill, 63 Cal.App. 95, 218 P. 81; Johnston v. Callahan, 146 Cal. 212, 79 P. 870; Kahn v. Matthai, 115 Cal. 689, 47 P. 698. Where there is no bill of exceptions or duly authenticated record affirmatively showing alleged error, this court, on appeal from the judgment roll alone, must indulge in the presumption in favor of the regularity of the findings and the judgment, and if the trial court commits error therein, that error, or the facts necessary to establish it, must be shown affirmatively by the appellant (Herriter v. Porter, 23 Cal. 385), and where a finding is made on the subject matter it will be presumed that there was received into the record evidence sufficient to justify and support it. Breeze v. International Banking Corp., 25 Cal.App. 437, 143 P. 1066. Upon an appeal on the judgment roll alone, only the ultimate facts found by the court, not the probative facts which have no proper place in the findings, can be considered, and it is only in those cases where it clearly appears that the ultimate fact found is based upon and adduced from the findings of probative facts, and it is plain that the latter do not justify nor support the ultimate fact found, that the findings of probative facts will control that of the ultimate fact, and so deprive the judgment of support. Breeze v. International Banking Corp., supra.

[4, 5] In the light of these rules, we will then consider this case as presented on appeal from the judgment roll alone. Appellants brought the original action upon the mortgage without any reference in the pleadings to any previous proceedings or renewal of the trust deed. Respondent answered and alleged that the mortgage was given as a part of the purchase price, and the court so found. We must presume that such finding was based upon competent evidence in the absence of any contrary showing. The mortgage obligation being contracted and dated subsequent to the enactment of section 580b of the Code of Civil Procedure (1933), the section would therefore be applicable and preclude a deficiency judgment being given thereon when such mortgage was given, as found by the court, to secure the payment of the balance of the purchase price. Under the record before us we might reasonably assume, in support of the judgment, that the two daughters, appellants herein, were merely acting as trustees for C. H. Whitney under a new and independent transaction to secure the payment of the balance of the purchase price of the real property. Wright v. Bank of Lassen County, 132 Cal.App. 336, 22 P.2d 748.

In view of the state of the record and the presumptions attaching, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

41 Cal.App.2d 428

PEOPLE v. CHAVEZ.

Cr. 3393.

District Court of Appeal, Second District, Division 1, California.

Nov. 7, 1940.

Robbery 🔑24(1)

Evidence of possession of the stolen property by accused and his sister and identification of accused by victim of robbery *held* sufficient to support conviction of robbery.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Albert Chavez was convicted of robbery, after a prior felony conviction, and he appeals.

Affirmed.

Jesse Bach Porter, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment and order denying a motion for new trial.

Accused of robbery, after a prior felony conviction, which prior conviction was admitted, a jury found the defendant guilty as charged.

The record reveals that the offense was committed about 7:30 P. M. on March the 10th in front of the victim's home, at which time and place defendant, after a struggle, succeeded in wresting her purse and its contents from the victim, Mrs. Tsutsui, a Japanese woman. The purse contained some Japanese bonds and Japanese money. The next morning defendant displayed one of the bonds to a Japanese storekeeper about a block and a half from the scene of the robbery. Another bond was found about a block from defendant's sister's residence, while still another had been deposited by defendant's sister in a bank.

The defendant, who was later arrested at the Mexican border after having been located in Mexico, was returned by the officers to Los Angeles. He was identified by Mrs. Tsutsui at the preliminary hearing on April the 15th.

The defendant's story briefly and in substance was that he had found the bonds.

Appellant's brief specifies seventeen alleged errors described as "points raised by appellant", which it is asserted "will be considered below in this brief". Only three, however, are given consideration, none of which has merit. It is urged that error resulted from the failure of the court to give certain instructions with regard to identification and also with regard to certain alleged misstatements of the district attorney. In addition to the foregoing, the sufficiency of the evidence is questioned. As above noted, there is no merit to any of these contentions. An examination of the record reveals the evidence to be abundantly sufficient to support the judgment and there are no errors in the record.

For the foregoing reasons the judgment and the order appealed from are, and each of them is, hereby affirmed.

We concur: YORK, P. J.; WHITE, J.

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41 Cal.App.2d 404

PHILLIPS v. BRUCE et al.

SAME v. SCHAAF et al.

Civ. 2494.

District Court of Appeal, Fourth District, California.

Nov. 6, 1940.

Hearing Denied Jan. 2, 1941.

1. Mines and minerals 🔑79(1)

Where a lessee in an oil lease for a term of years and as long thereafter as oil or gas may be produced therefrom in paying quantities, assigns an overriding royalty to another, the assignee acquires an interest in the real property leased which is a "profit a prendre in gross," which interest is limited in duration to life of lease, and which cannot be voluntarily conveyed by lessee to lessor without consent of assignee.

See Words and Phrases, Permanent Edition, for all other definitions of "Profit a Prendre in Gross".

2. Mines and minerals 🔑79(1)

Where lessee under oil leases for a term of years and as long thereafter as oil or gas may be produced therefrom in paying quantities, as owner of a "profit a prendre in gross", assigned overriding royalties for the indefinite terms of leases, and subsequent to assignment leasehold interests in properties terminated by reason of failure of lessee to drill within 10 months from respective dates of leases as required by terms thereof, assignee's interest ended with legal termination of leases.

◆

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Cecil H. Phillips, as trustee for Painted Hills Mines, Limited, against Sara B. Bruce and another, consolidated with action by the same plaintiff against Karoline Schaaf and others, to quiet plaintiff's title to 5 per cent. of the oil and gas produced and saved from two parcels of land. From judgment for defendants, the plaintiff appeals.

Affirmed.

C. Douglass Smith, of Long Beach, for appellant.

Rutan, Mize & Kroese, of Santa Ana (Harold H. Coyle, of Placentia, of counsel), for respondents.

MARKS, Justice.

Plaintiff brought two actions to quiet his title to five per cent of the oil and gas produced and saved from two parcels of land in the Huntington Beach oil field in Orange county. The cases were consolidated for trial. Defendants had judgment and this appeal followed. Three oil leases are involved.

Defendant Karoline Schaaf owned ten acres and the defendant Sara B. Bruce owned five acres of land, parts of which are here involved. The Bruce property adjoined the north half of the Schaaf property on the east. William Schaaf, as trustee, holds an interest in the oil produced from the Schaaf property.

The first lease we must notice, although the property is not directly involved, covers the north one hundred fifty feet of the east fifty feet of the Schaaf property and the north one hundred fifty feet of the west fifty feet of the Bruce property. It is called the "Community Lease". It is admitted that a well was drilled on this property, was placed on production, and is still producing; that plaintiff has received his five per cent overriding royalty from that well. It is admitted that he is entitled to continue to receive that royalty as long as oil, gas or other hydrocarbons are produced in paying quantities from the well drilled on this particular property. The property described in the community lease was expressly excepted from each of the two leases we will next mention.

Under date of October 12, 1935, Sara B. Bruce, as owner, executed an oil lease with the Pacific Southwest Oil Company, as lessee, whereby she leased her property (except the portion in the Community Lease) to the lessee for the term of twenty years and as long thereafter as oil, gas or other hydrocarbons may be produced therefrom in paying quantities.

The lease referred to the Community Lease and stated that the Community Lease provided for actual drilling on the property there described within forty-five days. The lease involved here then provided:

"In the event drilling is commenced upon said Community Lease within the said time therein provided, then this lease shall terminate as to all rights and obligations unless the Lessee herein shall on or before ninety (90) days after the discovery of oil in paying quantities from said Community Lease, or on or before ninety (90) days after the abandonment of drilling upon said Community Lease, the earlier date to control, commence the actual physical operation of drilling in the ground for oil on the land hereby leased. It is agreed that cessation of drilling in good faith on said Community Lease for any period of twenty (20) days, shall constitute an abandonment of drilling.

"In the event drilling is commenced upon said Community Lease within the said time therein provided, then, unless required under the above provisions to commence drilling sooner, this lease shall terminate as to all rights and obligations, unless the Lessee herein shall, on or before ten (10) months from date hereof, commence the actual physical operation of drilling in the ground for oil on the land hereby leased, it being the intention that the period of time taken to discover oil or to abandon said Community Lease well, shall not extend the time to commence drilling under this lease more than ten (10) months from date hereof * * *.

"Notwithstanding the provisions hereinabove contained in Paragraph 16, it is hereby agreed that this lease is made upon the condition that in the event Lessee shall not commence the actual drilling of the first well on the leased premises in the manner and within the time provided in Paragraph 4 (just quoted), then this lease shall ipso facto terminate and become null and void without any notice whatever."

On the same day Karoline Schaaf leased her property, except that portion described as the Community Lease, to the same lessee. Except as to the lessors and the descriptions, the two leases are identical in form.

Both leases were duly recorded on December 17, 1935.

Under date of December 3, 1935, both leases were assigned by the lessees to the Twentieth Century Oil Company. The assignments were recorded on January 14, 1936.

Under date of December 9 or 19, 1935, the Twentieth Century Oil Company assigned an overriding royalty of five per cent of the production from both leased properties and other properties to the plaintiff. This assignment was recorded on December 27, 1935.

It is admitted that no drilling operations were ever started and that no well was ever drilled by the Pacific Southwest Oil Company nor the Twentieth Century Oil Company on either parcel of property.

On November 30, 1936, Gottfried Schaaf and Karoline Schaaf brought an action to quiet title to their property against Pacific Southwest Oil Company and Twentieth Century Oil Company. On January 18, 1937, a judgment was entered quieting their title to the property against the two named defendants.

On December 11, 1936, Sara B. Bruce brought a similar action against the same defendants. Judgment was entered in her favor on January 18, 1937.

Plaintiff was not made a defendant in either action. He argues that these judgments are not binding on him, which is probably true.

Under date of February 18, 1938, the landowners leased their respective properties, excepting that described in the Community Lease, to the J. E. F. Oil Company, which drilled wells on the leased property and is now producing oil therefrom.

[1] Since the judgment in this case was rendered the case of Payne v. Callahan, 37 Cal.App.2d 503, 99 P.2d 1050, 1056, was decided. That case holds that when a lessee in an oil lease such as we have here, assigns an overriding royalty to another, the assignee acquires an interest in the real property leased which is a profit a prendre in gross, which interest is "limited in duration to the life of the lease", and which could not be voluntarily conveyed by the lessee to the lessor without the consent of the assignee. See, also, Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871.

[2] Defendants contend that under the rule of the Payne case the original leases under which plaintiff claims were terminated and brought to an end by the failure of the lessees to commence the actual physical operation of drilling for oil on the leased premises within ten months from the dates of the leases.

This contention must be sustained. The leases did not require the landowners to do anything to terminate them in the event that the lessees failed to drill within ten months from their respective dates. By the clear terms of the leases such failure to drill terminated them. It is admitted that there were no drilling operations under those leases. Therefore the leasehold interests in the properties ended by the very terms of the leases on August 12, 1936.

Plaintiff claims under these leases. He took his interest with notice of their terms. His interest ended with the legal termination of the leases on August 12, 1936. Payne v. Callahan, supra.

Plaintiff seeks to escape from these conclusions under the following provisions which appeared in both leases:

"This lease is made on condition that the Lessee shall not sell any interest in the leasehold created hereby, or any rights to or interest in the oil and gas in place, without the prior written consent of Lessor, and upon breach of said condition, this lease shall terminate, at Lessor's option. Lessee shall have the right to sell percentages and interests in and to the oil, gas and other hydrocarbon substances to be produced and saved under this lease."

Plaintiff argues that the lessors expressly authorized the execution of assignments by the lessees; that the assignments by the lessees to him were under this authority; that they had the same effect as though made by the landowners.

It is rather clear from the quoted paragraph that the landowners intended to prohibit the lessees, without their consent, from assigning any interest in the oil that would constitute an interest in the freeholds or in the leaseholds; that they only authorized assignments of such interests in the oil produced as would not infringe on these estates. However that may be, the assignments were by the lessees and were subject to all the terms of the leases. The lessees could only convey a part of the estates which they then owned. They could not convey a greater estate. Nothing in the leases made the lessees the agents of the landowners in making such assignments. The lessees could convey no part of the landowners' titles. As the assignment here in question was made by the lessees out of their leasehold estates, the interests created by the assignment could not survive the leases. As the leases were lawfully terminated on August 12, 1936, plaintiff's interest ended on that date.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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41 Cal.App.2d 435

WALSH v. PARKER.

Civ. 12050.

District Court of Appeal, Second District, Division 1, California.

Nov. 8, 1940.

Rehearing Denied Dec. 4, 1940.

Hearing Denied Jan. 2, 1941.

1. Executors and administrators 🔑451(2)

In action against administrator based on memorandum allegedly executed by deceased stating that plaintiff had worked for deceased for six years, that deceased had agreed to pay plaintiff $2,000 a year, and that the amount was to be paid from estate of deceased after her death, conflicting evidence regarding whether plaintiff rendered services for deceased which constituted valuable consideration for her promise to pay was for jury. Civ.Code, § 1606; Code Civ. Proc. § 1963, subd. 39.

2. Appeal and error 🔑996

Verdict representing the jury's choice between conflicting inferences which were capable of being drawn from evidence was conclusive on District Court of Appeal.

3. Executors and administrators 🔑448

Where second amended complaint against administrator was based upon rejected claim against deceased's estate which was set up in original complaint, permission to file second amended complaint was matter within discretion of trial judge, since the basic cause of action was not changed.

4. Appeal and error 🔑959(1)

In absence of a showing that discretion of trial judge was abused, ruling of trial judge in permitting the filing of a second amended complaint, which was based upon rejected claim against deceased's estate which had been set up in original complaint, could not be disturbed by District Court of Appeal.

5. Appeal and error 🔑1050(1)

In action against administrator based on memorandum whereby deceased directed payment out of her estate to plaintiff for services rendered, no prejudicial error was committed in admission of deceased's partial holographic will as an exemplar of deceased's handwriting, and for no other purpose, where jury was instructed regarding purpose of admission of evidence.

6. Appeal and error 🔑882(10)

Appellant could not complain of exclusion of evidence where trial court reversed its ruling excluding evidence, but appellant failed to take advantage of such reversal.

7. Executors and administrators 🔑205(2)

In action against administrator based on memorandum whereby deceased directed payment out of her estate of $2,000 a year to plaintiff for services rendered, verdict allowing $2,000 per year for period of six years was not so excessive as to shock sense of justice and raise presumption that it was result of passion and prejudice.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by James H. Walsh against Harvey M. Parker, administrator with the will annexed of the estate of Mary Ann Tarbell, deceased (substituted in the place and stead of Charles J. Ramsey, executor of the estate of Mary Ann Tarbell, deceased), to recover for services alleged to have been rendered by plaintiff during the life of the deceased. From an adverse judgment, the defendant appeals.

Affirmed.

Merriam, Rinehart & Merriam, of Pasadena, for appellant.

Ticknor & Maxwell, of Pasadena, for respondent.

YORK, Presiding Justice.

Respondent brought the instant action against appellant administrator upon a rejected claim against the estate of Mary Ann Tarbell, deceased, for services alleged to have been rendered by him during the life of said decedent, his claim being based upon the following memorandum:

"Sep. 8, 1933

"James H. Walsh has worked for me for the past six years staying in with nights and attending to me. Driving me evenings where I wanted to go, also most every Sunday. I agreed to pay him $2000 Two Thousand a year plus interest at the rate of 5%. This to be paid from my estate after my death.

"This I fully understand and order that James H. Walsh be paid $2000 a year for his services for the past six years and at the same rate as long as he shall continue in my service.

"this is my wishes.

"Mary A. Tarbell"

This is the second appeal taken by administrator in this cause. In the first trial, the court adopted respondent's theory that the instrument sued upon was an account stated, and accordingly refused to admit evidence offered by administrator as to the nature of the services rendered during the period prior to the execution of the document, and rejected administrator's offer to prove by such evidence a total failure of consideration. A judgment against administrator for $12,000 and interest was reversed upon the first appeal, this court holding that the document sued upon did not constitute an account stated, but was merely a promise to pay for past services after decedent's death, and that "the trial court erred in rejecting evidence of the true value of plaintiff's services rendered before the execution of the document sued upon, not only as affecting the probability of decedent's having executed the same, but also as affecting the amount which plaintiff was entitled to recover". Walsh v. Parker, 24 Cal.App.2d 224, 231, 74 P.2d 531, 535.

At the opening of the second trial, the respondent was permitted over the objection of appellant to file a second amended complaint setting forth three distinct causes of action:

The first alleged "that during the period of six years prior to September 8, 1933, plaintiff worked for the said Mary Ann Tarbell, staying in with her at nights, attending to her, driving her during evenings and when otherwise requested, as well as on Sundays; that said services were rendered by plaintiff for the said Mary Ann Tarbell at her request and upon oral agreement that the services rendered by plaintiff to said deceased as such personal attendant, for her comfort and welfare, should be compensated for in such a manner as would be mutually agreed upon by the parties at some future date; that said services continued during said entire period of six years at such times and places as were requested of plaintiff by said deceased; that on or about the 8th day of September, 1933, pursuant to said agreement and in fulfillment thereof, the deceased made, executed and delivered to plaintiff" the instrument hereinbefore quoted in full, and "that plaintiff then and there accepted said written instrument in fulfillment of said agreement and in full compensation for any and all services theretofore rendered for her by plaintiff, and that said parties then and there mutually agreed to the amount and manner of such payment, as set forth in said writing".

The second cause of action re-alleged the foregoing by reference and in addition alleged that the deceased for a valuable consideration made, executed and delivered to plaintiff the instrument of September 8, 1933.

The third cause of action re-cast the allegations of the first but in slightly different form, and in addition alleged that on or about the 8th day of September, 1933, plaintiff and decedent determined and agreed upon the amount of said compensation and stated an account between themselves by the execution and delivery of the instrument of September 8, 1933.

The answer to the amended complaint which by stipulation was deemed to be the answer to the second amended complaint, denied the execution of the instrument for want of information and belief, and set up separate defenses that it was obtained through undue influence that the decedent on the date of the execution of the alleged instrument was unable to understand its nature, purpose or effect, and that it was not supported by a sufficient consideration.

At the conclusion of the instant trial, the jury brought in a verdict in favor of respondent for the sum of $12,000 with interest. From the judgment which was thereafter entered, administrator prosecutes this appeal, contending (1) that the evidence as a matter of law is not sufficient to support the judgment; (2) that under the law of the case as laid down in the decision of this court upon the former appeal, the trial judge should have granted appellant's motion for a directed verdict as to each cause of action set forth in the complaint; (3) that the trial court erred in permitting the filing of the second amended complaint and in the exclusion and admission of evidence; (4) that the trial court gave erroneous and conflicting instructions to the jury; (5) that the verdict of the jury was excessive.

In connection with his first point appellant points out that "the instrument of September 8, 1933, was by its terms intended to fix plaintiff's compensation for his services already rendered. Therefore, the provisions of section 1606 of the Civil Code are applicable, whether the obligation to pay for the past services was either a moral or a legal obligation. That section provides:

"'An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, *to an extent corresponding with the extent of the obligation, but no further or otherwise.*' (Italics supplied.)

"At the time the instrument was executed, the 'extent of the obligation' existing against the decedent, legally or morally, was to pay for the reasonable value of the services rendered. The only consideration that can support the instrument was this prior obligation, and it can support the instrument only to the 'extent of the obligation, but no further or otherwise'. Herbert v. Lankershim, 9 Cal.2d 409, 477 [71 P.2d 220]."

In answer, respondent urges that "since the basis for this suit is a written agreement 'a good and sufficient consideration' is presumed, Code Civ.Proc. sec. 1963, subd. 39. The authenticity of the written document is established without conflict. * * * This fact places the present case on an entirely different footing from the case of Herbert v. Lankershim."

We summarize briefly the evidence offered upon the issue of consideration in support of the instrument here involved, as well as upon the question of the services rendered by respondent:

From the testimony of relatives, friends and employees of Mrs. Tarbell produced on behalf of appellant administrator, it appeared that on September 8, 1933, the day the instrument in question was executed, Mrs. Tarbell was about eighty-five years old and subject to the infirmities of age.

The respondent, a man about forty years old, had lived in Mrs. Tarbell's home for a period of six years, or from 1927, and although he worked as a gardener at a neighboring estate and was customarily away during the working hours of the day, he was usually at home in the evening at which time he did little or no work around the house, read to Mrs. Tarbell and occasionally took her for an automobile ride; when she felt ill he attended to her wants, and on Sundays he took her riding. In Mrs. Tarbell's home also lived her nephew, aged twenty-seven years, and until his death in October, 1930, her son Charles Sawdey, then aged fifty-seven years. Her son had no occupation outside the home, suffered from asthma, but devoted himself to the care of the home, his mother and their property interests.

After her son's death, a half-brother, Charles J. Ramsey, came to see Mrs. Tarbell twice daily and looked after her business for her. It was also shown on behalf of appellant that decedent's attitude toward respondent varied from anger and abuse to fond affection. She would chase him from the house threatening him with a hammer or a cane, nail up the windows and hide the bedclothes, but in a day or two she would relent and readmit him.

It was also shown by the evidence produced by appellant that Mrs. Tarbell was giving respondent his room and board "to read to her and stay in the evening"; that "she paid him room and board to read to her"; that Mrs. Tarbell stated "that he owed her money, never paid her a nickel for room and board * * * Mr. Walsh is working at Bender's and rooming here".

In April of 1933, Mrs. Tarbell made a holographic will using a form which was partly printed, in which she left her entire estate to respondent; a month later she made another will omitting any mention of him, which latter will was admitted to probate. After her death (which occurred in January, 1935), a number of promissory notes made payable to her and signed by respondent were found among her personal effects.

Respondent, on the other hand, offered testimony tending to prove that at the time he took up his residence with Mrs. Tarbell in 1927, her son Charles Sawdey was not well; that he suffered from asthma; that Mrs. Tarbell was ailing and required attention from some one other than her son, who died in 1930. Two nephews resided on the premises but their living quarters were in a room attached to the garage, and it is indicated that Mrs. Tarbell did not get along well with them and was afraid to stay alone. While she was able to care for her own needs a portion of the time, she was frequently ill and required assistance which was given by respondent.

During the period of six years from 1927 to 1933, respondent stayed with Mrs. Tarbell at night, attending her in various ways, reading to her and performing services about the house, including cooking, sawing wood, attending to the fires, laundry work, watering the lawn, cleaning up the yard and also the house. In addition, during this period, respondent drove Mrs. Tarbell about in her car evenings and on Sundays. She handled her own business and until June, 1934, had exclusive access to her bank account, and from August, 1932, to June, 1934, she issued checks on her checking account and in September, 1933, she handled entirely by herself an insurance transaction with Mr. Ernest Green, who testified as a witness for appellant administrator, and who also prepared and witnessed the will executed by Mrs. Tarbell on May 18, 1933, which was admitted to probate.

The witness Ralph T. Merriam testified that during the years 1933 and 1934, Mrs. Tarbell personally transacted business with him and was in frequent communication with him.

Mrs. Mabel Aijain in whose home respondent was a roomer and boarder for several months prior to 1927, testified that she had known Mrs. Tarbell since 1928 or 1929, and that around Christmas, 1929, Mrs. Tarbell told her she had plenty of cash, whereupon the witness suggested that she do something for respondent, who had had a couple of years of medical training, to which Mrs. Tarbell replied: "I have plans made for Pat (Walsh). He knows what they are. He won't lose anything by me. He won't lose anything by staying with me, what I want to do for him. He knows he will be taken care of. You don't need to worry." In a later conversation, this witness testified that Mrs. Tarbell told her "that there was a pretty penny put by for him that he could have to use; that she had plans made to know where the money was going, where it would do the best work; she didn't want it to be gambled or squandered; hard earned money. She thought Walsh was a capable man and would use it in the right way; she had provided for him. She said he knew about it." This witness further testified that in 1930, presumably in July, she and her husband wanted respondent Walsh to take a "trip to Fresno on the bus," but Mrs. Tarbell would not permit him to go, saying, "Mr. Walsh's time belonged to her, to keep my hands off, she needed him and she would not let him go"; that around January of 1934, the witness' husband wanted respondent to accompany him on a trip at which time Mrs. Tarbell told her in the presence of her husband and respondent: "that Mr. Walsh was necessary, she must have him there; that she couldn't be alone; she had a crowd she had to fight; she needed Mr. Walsh for protection. I said, 'Why don't you have a good woman come in and do your work, take care of you?' She said, 'No woman can put up with the things that Mr. Walsh has to put up with. No woman is capable of handling this crowd.' She told me that she was afraid to be alone without Mr. Walsh there; she needed him for the protection he could give her. She also told me that she was weak and he waited on her, carried her up and down stairs, he especially read to her when she was buffeted, was the expression she used; that her nerves were unstrung; that Mr. Walsh read to her by the hour to quiet her, took care of her as her own son had done, and as he had promised Charlie he would do; he looked after her better than anyone else whom she could find; she was satisfied with him, and he was satisfied with the arrangement she had made with him. * * * many times, on almost any occasion I was there, averaging once a month during a period of two or three years, she spoke of Mr. Walsh, her dependence on him, the comfort he was, and the protection that he was in the crowd that she was in; her need for him; she expected to make it all right with him. She said she was leaving him sufficient to cover all that would be required; that he was satisfied with her arrangement."

Mrs. Sides, at whose home in Arcadia the respondent and Mrs. Tarbell often stopped to buy eggs, testified that she saw Mrs. Tarbell occasionally during 1931, 1932 and 1933, and Mrs. Tarbell told her "that Mr. Walsh drove her around a good deal, and that she depended upon him to look after her, because she was afraid to stay alone, she said; and that she expected to see that he was recompensed. She said 'He is not going to lose by taking care of me.' * * * At one time, about this time, she told me Mr. Walsh took care that the boys did not bother her. She said she had two adopted boys that sometimes would come home and disturb her, and that he looked after her."

[1, 2] From the foregoing résumé, it appears that the evidence produced in the instant trial was in direct conflict and presented questions of fact for the jury which were determined by it in favor of respondent. Such determination representing as it did the jury's choice between the conflicting inferences which were capable of being drawn from the evidence is conclusive upon this court, for the reason that there is evidence in the record upon which it was possible for the jury to base a finding that respondent rendered services on behalf of Mrs. Tarbell, and that they constituted a valuable consideration for her promise to pay, as expressed in the document of September 8, 1933.

Upon the former appeal it was held by this court that the document was merely a promise to pay for past services and was not an account stated; and that the trial court erred in rejecting evidence of the true value of respondent's services rendered before the execution of the document sued upon. Following that ruling, the trial court in the instant action allowed both sides extremely wide latitude in their presentation of evidence upon all issues joined by the second amended complaint and answer, the second amended complaint being somewhat broader in scope than the complaint upon which the first trial proceeded. There was no error by the trial court in its denial of appellant's motion for a directed verdict, because under the evidence presented at the second trial it had no alternative except to submit the case to the jury for its determination.

[3, 4] Appellant urges that the trial court erred in permitting respondent to file his second amended complaint at the beginning of the second trial. This second amended complaint was based upon the rejected claim which was set up in the original complaint; consequently, the basic cause of action was not changed, and permission to file it was a matter within the discretion of the trial judge. In the absence of a showing that this discretion was abused, such ruling cannot be disturbed by this court.

[5, 6] Since the partial holographic will (plaintiff's exhibit No. 2) was admitted into evidence as an exemplar of Mrs. Tarbell's handwriting and for no other purpose, and the jury instructed to that effect, no prejudicial error resulted therefrom. Likewise, there is no merit in appellant's point to the effect that the exclusion of the testimony of Dr. Eastman, a physician who attended Mrs. Tarbell during a period subsequent to the execution of the agreement sued upon, constituted prejudicial error. As a matter of fact, the trial court reversed its ruling as to this evidence when it permitted Dr. Ohlhoffer to testify, but appellant failed to take advantage of such reversal and, therefore, has no ground for complaint upon that score.

Appellant contends that the trial court gave erroneous and conflicting instructions to the jury. A review of all of the instructions given reveals that the jury was fully and correctly instructed on the law applicable to the facts presented at the trial herein, and that there were no errors sufficiently prejudicial in character to warrant a reversal of the judgment.

[7] The jury in the instant case found there was no undue influence and that Mrs. Tarbell was of sound mind when she executed the document which forms the basis of this action; the document itself fixed respondent's compensation at $2,000 per year, and the verdict which was returned by the jury allowing this amount for a period of six years cannot be said to be so excessive as to shock the sense of justice and raise the presumption that it was the result of passion and prejudice.

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

41 Cal.App.2d 445

PEOPLE v. ROSE.

Cr. 3408.

District Court of Appeal, Second District, Division 1, California.

Nov. 8, 1940.

1. Criminal law ⚿1023(12)

A so-called "order" wherein court recommended that one who pleaded guilty to violation of statute making it a misdemeanor for any person, while under the influence of intoxicating liquor, to drive an automobile on any public highway within the state, be permitted, while serving his sentence, to work in one of the county road camps, and that his earnings from such work be used in the support of his family, was no part of the judgment, and was not an "appealable order" within purview of the Penal Code. Vehicle Code, § 502, St.1935, p. 174; Pen. Code, § 1237.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Criminal law ⚿1216(1)

The time spent by a defendant in jail awaiting trial or sentence cannot be considered as part of any judgment subsequently pronounced, and is not embraced within any penalty imposed.

3. Criminal law ⚿995(4), 1213

Five months' imprisonment imposed on one who pleaded guilty to a violation of statute making it a misdemeanor for any person, while under the influence of intoxicating liquor, to drive an automobile on any public highway within state, and who prior to sentence had been confined in jail 81 days, was neither uncertain nor "cruel and unusual punishment" inhibited by the State Constitution. Vehicle Code, § 502, St.1935, p. 174; Const. art. 1, § 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Cruel and Unusual Punishment".

* * *

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Holley Edward Rose pleaded guilty to a charge of violating the statute making it a misdemeanor for any person, while under the influence of intoxicating liquor, to drive an automobile on any public highway within the state, and he appeals.

Appeal dismissed, and judgment affirmed.

John J. Hamilton, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

[1] By information defendant was charged with a violation of section 501 of the Vehicle Code, St.1935, p. 174, which provides that "any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person, is guilty of a felony". After entry of a plea of not guilty, defendant was permitted to withdraw that plea and to enter a plea of guilty to a charge of violating section 502 of the same Code, which makes it a misdemeanor for any person, while under the influence of intoxicating liquor, to drive an automobile upon any public highway within this state. Following denial of an application for probation, defendant was sentenced to serve a term of five months in the county jail. At the time of pronouncing judgment, in response to a request from the defendant himself through his counsel, the court recommended that defendant be permitted to work in the county road camp and that his earnings from such work be used for the support of his family. This appeal is from the judgment and "order of the above entitled court made on August 28th, 1940". This so-called "order", wherein the court recommended that defendant be permitted, while serving his sentence, to work in one of the county road camps, is no part of the judgment, nor is it an appealable order within the purview of section 1237 of the Penal Code.

[2, 3] Appellant first contends that the judgment as pronounced constitutes cruel and unusual punishment, which is inhibited by section 6, article I, of our State Constitution. This claim is based upon the fact that at the time judgment was pronounced the court stated that it had taken into consideration the fact that prior to sentence the accused had been confined in jail 81 days, which time, added to the sentence

of five months' imprisonment, aggregated more than six months, which is the maximum straight jail term of imprisonment provided for in section 502 of the Vehicle Code. It is elementary that the time spent in jail awaiting trial or sentence cannot be considered as part of any judgment subsequently pronounced and is not embraced within any penalty imposed. That the court did, however, take into consideration the time spent in jail by appellant prior to pronouncement of sentence is evidenced by the fact that a judgment of five months' imprisonment only was imposed when six months and a fine of $500 could have been meted out. There is nothing "uncertain" about the judgment pronounced in this case, as claimed by appellant. The judgment, in direct and unequivocal terms, commits the appellant to serve five months in the county jail, and having in mind the nature of the offense to which appellant pleaded guilty and the maximum sentence which might have been imposed pursuant to the pertinent Vehicle Code section, there is nothing cruel or unusual about it. The appeal is without merit.

The attempted appeal from the "order of August 28th, 1940", is dismissed, and the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

41 Cal.App.2d 379

STUP et ux. v. HIGGINS.

Civ. 2470.

District Court of Appeal, Fourth District, California.

Nov. 6, 1940.

Rehearing Denied Nov. 26, 1940.

Hearing Denied Jan. 2, 1941.

1. Appeal and error 🔑1010(1)

On plaintiffs' appeal from judgment for defendant in automobile accident case, District Court of Appeal was bound to affirm judgment if finding that plaintiff driver was guilty of contributory negligence was sustained by substantial evidence.

2. Automobiles 🔑171(9), 208

The driver of an automobile is bound to be vigilant and watch for vehicles that might cross his path, and a failure to perform such duty may constitute "negligence".

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

3. Automobiles 🔑244(43)

In action to recover damages resulting from collision of automobiles at street intersection, evidence warranted finding that plaintiff driver, who was traveling on street protected by "stop" signs, failed to perform duty of watching for automobiles that might cross his path, and that such failure was "contributory negligence" and warranted judgment for defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

4. Appeal and error 🔑1010(1)

Where evidence and reasonable inferences to be drawn therefrom supported trial court's findings, judgment could not be disturbed.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Joe G. Stup and wife against Benjamin Howard Higgins to recover damages resulting from a collision of automobiles. From a judgment for defendant, plaintiffs appeal.

Affirmed.

W. Frank Shelley and George D. Higgins, both of Los Angeles, for appellants.

Elbert E. Hensley, of Los Angeles, for respondent.

MARKS, Justice.

This is an action to recover damages resulting from a collision of automobiles which occurred on April 8, 1938, in the intersection of Tustin avenue and McFadden street in Orange county. The case was tried by the court without a jury. The trial court found plaintiff Joe G. Stup, driver of the plaintiff car, guilty of contributory negligence and rendered judgment for defendant. Plaintiffs, who are husband and wife, have appealed.

Plaintiffs devote practically their entire brief to the question of the negligence of Benjamin Howard Higgins, the driver of the defendant car. They argue such questions as: which automobile had the right of way at the intersection; whether defendant entered the intersection lawfully; whether the Stup automobile constituted an immediate hazard to the automobile driven by Higgins when the latter entered the intersection.

[1] We are more concerned with the question of Mr. Stup's contributory negligence than with the negligence of Higgins. We may assume the soundness of every argument pointing to the negligence of Higgins and still will have to affirm the judgment if the finding that Stup was guilty of contributory negligence is sustained by substantial evidence. This is too elemental to require the citation of authorities. We will, therefore, briefly review the evidence bearing on contributory negligence and will assume without holding that there is evidence showing Higgins' negligence.

Tustin avenue runs north and south and McFadden street intersects it at right angles. There are stop signs on McFadden street east and west of Tustin avenue. The intersection is obstructed.

Stup was approaching the intersection on Tustin avenue from the south at a speed of thirty or thirty-five miles an hour. Higgins approached the intersection on McFadden street from the west. He stopped his car at the stop sign on McFadden street which was set back twenty-seven feet from the intersection. At that point his vision to his right was limited to one hundred fifty feet. He looked to his right and saw no vehicle approaching the intersection from the south. He proceeded into the intersection at a speed of twelve or fifteen miles an hour looking to the north for approaching vehicles on Tustin avenue. He saw none. When the front of his car had reached the center line of Tustin avenue he again looked to the south and saw the Stup car about thirty feet south of the intersection approaching at about the speed we have already mentioned, which speed was not changed until just before the two cars came together. Higgins tried to increase the speed of his car to clear the intersection and about half of it was east of the east line of Tustin avenue when the right front of the Stup car crashed into its right rear. The trial court on this substantial evidence found these facts in detail to be true. It also found that plaintiffs failed to keep a proper lookout and found contributory negligence in general terms.

It is clear that if Higgins had an unobstructed view of Tustin avenue to a point one hundred fifty feet south of the intersection when he stopped at the stop sign, if Stup had looked he could have had a clear view of the Higgins car entering the intersection from the time he (Stup) passed a point on Tustin avenue one hundred fifty feet south of the intersection. The view of Tustin avenue south from McFadden street was not obstructed between the stop sign and the intersection.

[2-4] It is the duty of the driver of a motor vehicle to be vigilant and watch for vehicles that might cross his path. A failure to perform that duty may constitute negligence. The trial court having found that Stup failed to perform that duty and that such failure was contributory negligence, and there being evidence and reasonable inferences to be drawn from such evidence supporting such findings, we cannot disturb the judgment here.

Judgment affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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41 Cal.App.2d 423

FORGNONE v. SALVADORE UNION ELEMENTARY SCHOOL DIST.

Civ. 6369.

District Court of Appeal, Third District, California.

Nov. 6, 1940.

Rehearing Denied Dec. 6, 1940.

Hearing Denied Jan. 2, 1941.

1. Negligence 🔑111(1)

Negligence may be pleaded generally, that is, after what was done has been stated, it is sufficient to allege that it was negligently done, without stating the particular omission which rendered the act negligent.

2. Schools and school districts 🔑120

A complaint, seeking to recover from school district for injuries sustained by pupil when fellow student twisted her arm, which alleged district was negligent in failing to provide for supervision of students while they were eating their lunch in a school room on school premises during an intermission of school, as required by School Code, was sufficient to state a cause of action, without reciting details of just how accident would have been avoided if supervisor had been present. School Code, §§ 2.801, 5.543.

3. Schools and school districts ⚷89

The purpose of school law requiring supervision of pupils on playgrounds and on school property during school hours is to regulate their conduct so as to prevent disorderly and dangerous practices which are likely to result in physical injury to immature scholars. School Code, § 5.543.

◆

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Cecelia Forgnone, by her guardian ad litem, C. A. Forgnone, and C. A. Forgnone, against the Salvador Union Elementary School District for injuries sustained by Cecelia Forgnone when a fellow student twisted her arm during an intermission of school, while students were eating their luncheons in a school room. From a judgment for defendant, the plaintiffs appeal.

Reversed with directions.

Caulfield & Keil, of San Francisco, for appellants.

Mervin C. Lernhart, of Napa, for respondent.

PER CURIAM.

The plaintiff has appealed from a judgment which was rendered against her pursuant to an order sustaining a demurrer to an amended complaint. The complaint seeks to recover damages for negligence of the Salvador Union Elementary School District for failing to provide supervision of its pupils during an intermission of school while they were eating their luncheons in a school room, during which time a fellow student in scuffling with Cecelia Forgnone twisted and broke her arm. It is alleged that no teacher or supervisor was present in the school room when the accident occurred.

The amended complaint alleged that Cecelia Forgnone, a minor student at the Salvador Union Elementary School, while "eating her lunch * * * in the classroom", was engaged by a fellow student in a scuffle which resulted in the twisting and breaking of her arm. It is further alleged that the fractured arm was the direct result of the negligence of the officers and agents of the school district by their failure to "take proper precautions to exercise proper care for the safeguarding of the pupils of the said school; * * * that at the said time and place * * * no supervision whatever was exercised over the said children * * * and no teacher or other employee of the defendant was present in the said classroom during the time of said accident or at any of the times between the hour of 12 o'clock noon * * * until after the occurrence of the accident."

[1] We are of the opinion that is a sufficient allegation of negligence. In the case of Taylor v. Oakland Scavenger Co., 12 Cal.2d 310, 316, 83 P.2d 948, 951, it is said with respect to the sufficiency of pleadings which attempt to allege negligence, that: "It is elementary that negligence may be pleaded generally. This means that after what was done has been stated, it is sufficient to allege that it was negligently done, without stating the particular omission which rendered the act negligent."

[2] Numerous cases are cited in support of that statement of the law. In the present case the negligence is alleged to have consisted of an omission to supply the supervisor of students during an intermission of school which is required by law. Since the accident occurred in a school room during the luncheon hour, it requires no speculation to assume that if the supervisor had been present in that room she would have observed the unusual scuffling and rough conduct of the students and she would naturally have commanded them to desist. Indeed, we may assume that if the teacher had been present the scuffling would not have occurred. Under those circumstances, with the supervision required by law, the injuries would not have resulted. It was unnecessary for the pleader to specifically recite the details of just how the accident would have been avoided if the supervisor had been present, under the circumstances of this case.

The amended complaint stated a good cause of action against the school district based on alleged negligence consisting of a failure to provide for the supervision of school children while they were eating their lunch in a school room on the school premises during an intermission of the school. Section 2.801 of the School Code provides that: "Boards of school trustees, high school boards, junior college boards and boards of education are liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers or employees."

Section 5.543 of the School Code provides that: "Every teacher in the public schools must hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds *or during recess.*"

The complaint alleges the adoption of a uniform rule by the state board of education with respect to the supervision of pupils, which provides in part that: "Where special playground supervision is not provided, *teachers shall supervise the conduct* . . . of the pupils of their classes in the school, or *on the school grounds during intermissions* and before and after school."

[3] We assume that the purpose of the law requiring supervision of pupils on the playgrounds and on the school property during school hours is to regulate their conduct so as to prevent disorderly and dangerous practices which are likely to result in physical injury to immature scholars under their custody. It is true that the mere lack of supervision, or inadequate supervision may not necessarily create liability on the part of a school district to compensate for injuries sustained by a pupil. If it appears that a supervisor could not have reasonably anticipated or prevented the conduct of fellow students which resulted in injuries, it might not be material whether they were present at the time of the act complained of, or not. But when the omission to perform a duty, like that of being present to supervise the conduct of pupils during an intermission while they are eating their lunches in a school room, may reasonably be expected to result in rough and dangerous practices of wrestling and scuffling among the students, the wrongful absence of a supervisor may constitute negligence creating a liability on the part of the school district. The question as to whether the absence of the supervisor from her post of duty in the present case contributed to the cause of the injury received by Cecelia Forgnone, will depend upon the particular circumstances to be established at the trial. It is the province of the trial judge or the jury to determine whether the facts may show that her absence actually did contribute to the injury received. The complaint alleges that while the children were eating their luncheons in the class-room a fellow-student engaged in scuffling with Cecelia during which encounter her arm was twisted and broken. It was further alleged that no teacher or employee was present in the class-room and that the negligence of the school district consisted of failing and neglecting to provide a supervisor to regulate the conduct of the students.

It has been held that improper supervision of pupils on the school grounds may create a liability on the part of the school district for injuries received by one pupil on account of the recklessness of a fellow student while they were engaged in recreation on the premises during an intermission. Buzzard v. East Lake School District, 34 Cal.App.2d 316, 93 P.2d 233.

The two cases relied upon by the respondent may be readily distinguished from the facts of this case. In the case of Weldy v. Oakland High School District, 19 Cal.App.2d 429, 65 P.2d 851, a judgment rendered pursuant to an order sustaining a demurrer to the complaint for failure to state facts sufficient to constitute a cause of action was sustained. But in that case it was alleged that a supervisor of a foot-ball game which was sponsored by the school was in attendance. It was further alleged that the accident complained of occurred in the course of the game when some of the students engaged in rowdyism during which one of the students threw a bottle which struck the plaintiff and injured him. It is apparent that even though the supervisor was present he could not be expected to be all over the field at once or to anticipate that some lawless student would recklessly throw a bottle into the crowd of spectators. But in the present case, if the supervisor had been present in the school room where the students were eating their luncheons, it would be expected that she would prevent the students from engaging in rough and dangerous scuffling which was likely to result in personal injuries to the students. The liability of the school district depends on the particular circumstances of each case.

In the case of Underhill v. Alameda Elementary School District, 133 Cal.App. 733, 24 P.2d 849, 851, upon which the respondent also relies, a judgment sustaining a demurrer was likewise upheld. In that case there was a supervisor present on the school grounds during the playing of a baseball game. It appears that one of the pupils was struck by a bat and injured in the course of the game. It was claimed that the negligence of the district consisted of failing to segregate "larger pupils" from "smaller pupils" and in permitting all of them to play ball in "one small single enclosed yard", and that it permitted the existence on the field of a certain wire at "an insufficient height" above the ground. Clearly the complaint failed to state how the size of the pupils, or the size of the field or the location of the wire contributed in any manner to the negligence which caused the accident. It was a mere conclusion to allege that the pupils were too large or too small; that the field was not of adequate size, or that the wire was too close to the ground. From the facts recited in that case it is impossible to determine how the negligence of the district contributed in any manner to the accident. In that case the supervisor was present. In this case no supervisor was present. That case furnishes no criterion for the determination of this action.

The judgment is reversed and the court is directed to overrule the demurrer and permit the defendant to answer the amended complaint.

41 Cal.App.2d 382

PARSELL et al. v. SAN DIEGO CONSOL. GAS & ELECTRIC CO.

Civ. 2702.

District Court of Appeal, Fourth District, California.

Nov. 6, 1940.

Rehearing Denied Dec. 5, 1940.
Hearing Denied Jan. 3, 1941.

1. Gas 🔑14½

Evidence presented question for jury as to whether alleged negligence of defendant gas company in leaving in alley a quantity of stones and broken concrete after completing the filling in of an excavation was "proximate cause" of injury to pedestrian who stepped on small piece of stone or broken concrete and fell to pavement in alley, notwithstanding that there was evidence from which it could have been found that stones and broken concrete were placed in alley by some one other than defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

2. Gas 🔑14½

Evidence presented question for jury as to whether pedestrian, who was injured when she stepped on a small piece of stone or broken concrete and fell to pavement, had seen piles of small stones and broken concrete allegedly left by defendant gas company on edge of pavement in alley after completing the filling in of an excavation prior to her injury, and knew that stones and rocks were being moved over the pavement by passing vehicles, so as to be guilty of contributory negligence barring recovery.

3. Gas 🔑14½

Fact that pedestrian, who was injured when she stepped on a small piece of stone or broken concrete allegedly left by defendant gas company in filling in an excavation and fell to pavement in alley, could have proceeded over sidewalks which were safe in going from her home to a store, did not render pedestrian guilty of contributory negligence as a matter of law.

4. Limitation of actions 🔑127(5)

Where it appeared that original complaint filed within one year after alleged injury alleged that plaintiff was injured because of defendant's negligent act in leaving an excavation in a dangerous and unprotected condition, and leaving certain material on pavement after excavation had been filled, third amended complaint on which trial was had which went more into detail but which still made substantially the same allegations, was not barred by limitations though filed more than one year after injury.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Ellen Parsell and Charles R. Parsell against San Diego Consolidated Gas & Electric Company for personal injuries sustained by Ellen Parsell. From a judgment for defendant notwithstanding verdict, the plaintiffs appeal.

Reversed with directions.

Y. A. Jacques and Charles E. Burch, Jr., both of San Diego, for appellants.

Sanders & La Motte, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for personal injuries. A jury having brought in a verdict in favor of the plaintiff, the defendant moved for a judgment notwithstanding the verdict, the motion being in the alternative form permitted by section 629, Code of Civil Procedure, and the right to ask for a new trial in the event of the denial of the motion being reserved. The motion was granted and the plaintiffs have appealed from the judgment then entered.

The accident happened in a paved alley in the city of San Diego, the northern end of which runs into University avenue. In installing certain gas service for a barber shop which stood at the southwest corner of the intersection of this alley with University avenue, the respondent, in the spring of 1938, dug a trench in the concrete pavement of the alley some 16 or 18 feet south of its intersection with University avenue. The trench was later filled in and the pavement repaired, but there is evidence that after that was done several piles of "stones, broken pieces of concrete, rocks and dirt" were left along the easterly edge of the alley pavement and near a retaining wall along the lot on which the building stood which housed the barber shop. These piles of dirt, stones and broken concrete remained there for several weeks after the excavation was filled, and there is evidence that from time to time passing vehicles knocked small rocks and pieces of concrete out onto the pavement as far as a manhole which stood in the center of the pavement and about 18 feet south of the property line.

On May 24, 1938, at about six o'clock in the evening, Ellen Parsell, one of the appellants, while on her way from her home to a store, entered this alley at the southern end of that block and proceeded through the alley toward University avenue. As she reached the vicinity of the manhole above mentioned she walked around it and had taken two or three steps when she suddenly stepped on a small piece of stone or broken concrete and fell to the pavement, receiving the injuries complained of. She testified that prior to her injury she had passed through this alley at least once a day for many years, that for "quite some time" she had seen these piles of debris near this retaining wall, and that on prior occasions there had never been any stones or broken concrete in her pathway as she walked along the alley.

[1] The first question presented is whether the evidence is sufficient to show any negligence on the part of the respondent which was a proximate cause of this accident. No contention is here made that the evidence does not sufficiently disclose that a quantity of stones and broken concrete was left on this pavement by the respondent after it completed the filling in of its excavation. The respondent does contend, however, that the appellants failed to sustain the burden of proving that the injury in question was proximately caused by the acts of the respondent rather than by the acts of other parties. In this connection, in granting the motion for a judgment notwithstanding the verdict, the trial judge said that he felt "that the uncontradicted evidence showed that there was an equal opportunity for the rocks to be there either by virtue of some act of the gas and electric company or an independent agency, along the side, from some other source."

There is considerable evidence given by several witnesses to the effect that the rocks and pieces of broken concrete which were piled upon the pavement of this alley along its easterly edge and near the retaining wall, about opposite the point where the excavation had been made, came from that excavation and the cutting of the pavement in connection therewith. On the other hand, the respondent relies upon other evidence which it contends indicates that the rocks or small pieces of broken concrete which were out on the pavement in the vicinity of the manhole, and upon one of which Mrs. Parsell claimed to have stepped, might have come from either of two operations which had previously been conducted on the lot where the barber shop stood. One of these was the building of the retaining wall which we have mentioned and the other was the erection of a lean-to in the rear of the barber shop. They also rely on evidence that some distance south of the barber shop and at about the middle of this block, a number of rather large and jagged pieces of broken concrete had for a long time lain along the edge of the pavement of this alley, having been placed there for the purpose of protecting a fence from automobiles which were backed out of garages on the opposite side of the alley. One witness testified that in backing his automobile out of one of these garages he sometimes hit these larger pieces of concrete and broke off small pieces therefrom, and that at times he had seen boys throw these small pieces around on the alley pavement.

The record does not sustain the court's statement that the uncontradicted evidence was to the effect that there was an equal opportunity for the "rocks" which caused the injury to have been where they were either because of acts of the defendant or because of acts of someone else. While there is some evidence to that effect, there is also evidence that all debris was removed after the preceding operations, and direct evidence that these "rocks" came from the respondent's operations and were left on the pavement by the respondent. The most that can be said in this regard is that there is a conflict in the evidence. The entire question of negligence on the part of the respondent and whether any such negligence was a proximate cause of this injury was one of fact for the jury. While it may be conceded that the evidence of negligence on the part of the respondent which was a proximate cause of this injury was somewhat weak and, further, that a new trial could properly have been granted by the court, the evidence in this connection did not warrant and will not sustain a judgment notwithstanding the verdict, under the familiar rules governing the entry of such a judgment.

[2, 3] The next question is whether contributory negligence on the part of the injured appellant appears as a matter of law. The respondent contends that this appellant had seen these piles of rock and broken concrete on the easterly edge of the pavement of this alley, that any danger therein was as obvious to her as it was to the respondent, that it must be presumed that she knew that these small rocks or pieces of concrete were daily being moved about over the pavement by passing vehicles, and that it must be held as a matter of law that she was guilty of contributory negligence. A number of cases are cited involving an invitee upon private premises, and obvious dangers, wherein it has been held that contributory negligence appeared as a matter of law. Cases are also cited where the plaintiff knew of an obviously dangerous situation on a sidewalk or a street, which danger he forgot or disregarded at the time in question. Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801, is also cited, where the plaintiff, without looking, stepped into an open stairway on private property in broad daylight. Without analyzing these cases it is sufficient to say that they are not controlling here. There is a clear distinction between the facts of this case and those involved in cases where a person is an invitee upon private property, as well as in some of the rules applicable to the two situations. There is an equal distinction between the facts of this case and those of certain cases where fixed defects which were inherently dangerous existed in streets and sidewalks and were not only obvious but known to the injured party.

The respondent also contends that since there was evidence that this injured appellant could have proceeded over sidewalks which were safe in going from her home to the store, by going around the block either to the right or left, and that these respective distances were just as short or practically so, she must be held guilty of contributory negligence as a matter of law. Reliance is placed upon the case of Buckingham v. Commary-Peterson Co., 39 Cal.App. 154, 178 P. 318, where the plaintiff was injured while attempting to pass over a highway which was being reconstructed and which was not open to public travel. The respondent also relies on Mora v. Favilla, 186 Cal. 199, 199 P. 17, where another safe way existed and the plaintiff was warned that the sidewalk was in a dangerous condition. Also, the case of Eldridge v. Clark & Henery Const. Co., 75 Cal.App. 516, 243 P. 43, where it is stated that when a person uses a street or sidewalk which his observation would inform him is dangerous he takes the risk of such injuries as may result from open and apparent defects which he ought to have seen and avoided. Again the facts of the instant case distinguish it from the cases relied on. This alley was open to public travel and it appears from the evidence that it was being regularly used both by vehicles and pedestrians. No warning was given and there was no obvious defect which was known to the injured appellant which affected that part of the pavement upon which she was accustomed to travel. While there was some evidence that certain witnesses knew that some of these stones or broken concrete were daily moved about over the easterly half of this portion of the alley pavement by passing vehicles, we can find no evidence to the effect that this was known to this appellant or that the moving of such stones extended to the portion of the alley which she ordinarily traveled, and the question whether she should have seen so small a stone as the one which caused her injury is one of fact rather than one of law. While the question of contributory negligence may have been a close one at best, under all of the circumstances here appearing we think it was a question of fact for the jury and that the judgment may not be sustained on the theory that this appellant was, as a matter of law, guilty of contributory negligence.

[4] The respondent makes the final contention that the judgment, as entered, should be affirmed because it appears that the cause of action upon which the appellants' recovery and judgment was based is barred by the statute of limitations. The contention is that, while the original complaint was filed within one year after the date of the accident, the action was tried upon a complaint which included a third amendment which was filed more than a year after the accident occurred; that this amendment set up an entirely new and different cause of action; that the gist of the original cause of action was that the respondent had left an unguarded trench or excavation in this alley, over which this appellant had stumbled and fallen; that the amended complaint charged the respondent with negligence in leaving pieces of rock and concrete on the pavement of this alley; and that these are entirely different torts, involving entirely different rules and defenses.

In the original complaint it was alleged that this appellant, while walking through this alley, stumbled and was forcefully thrown "by reason of the negligent, careless, wilful and unlawful conduct of defendant in leaving an excavation in said alley in a dangerous and unprotected condition". In the third amendment it was alleged that the defendant on or about the month of April, 1938, in the course of its operations entered this alley and dug an excavation or trench therein, piling the excavated material from said trench upon the paved and traveled portion of the alley; that the defendant on or about May 1, 1938, refilled said trench or excavation but negligently left a portion of the excavated material consisting of rock, dirt and jagged pieces of cement concrete pavement upon the easterly side of the traveled portion of said alley; that this constituted a dangerous and hazardous condition; and that this appellant on a certain day stumbled and tripped upon the excavated material thus left upon the paved portion of the alley. In the original complaint it was not alleged that this appellant fell into or over an excavation, but it was alleged that she stumbled and was forcibly thrown by reason of the negligent act of the respondent "in leaving an excavation in said alley in a dangerous and unprotected condition". While the third amendment to the complaint went more into detail, the cause of action was not changed and it was still alleged that the plaintiff was injured because of the respondent's negligent act in leaving the excavation in a dangerous and unprotected condition through leaving certain material on the pavement after the excavation had been filled. No authorities are cited which are here applicable, and we are constrained to hold that the cause of action was not so changed as to bring it within the bar of the statute of limitations.

The judgment appealed from is reversed, with directions to deny the motion for a judgment notwithstanding the verdict, whereupon the defendant may, if it desires, present its application for a new trial as provided for in section 629 of the Code of Civil Procedure.

We concur: MARKS, J.; GRIFFIN, J.

MOORE et al. v. NORWOOD.
Civ. 11981.

District Court of Appeal, Second District.
Division 1, California.
Nov. 6, 1940.

1. Evidence ⚷508

Opinion evidence is admissible where the ultimate fact to be proved is one of science, art, trade upon the subject of which the witness is skilled. Code Civ.Proc. § 1870, subd. 9.

2. Evidence ⚷474½, 506, 507

Whenever the question of fact to be determined is the result of the common experience of all people of ordinary education, or such result is to be inferred from particular facts, such inference must be drawn by the jury and opinion evidence thereof is inadmissible. Code Civ.Proc. § 1870, subd. 9.

3. Evidence ⚷506

Admission of opinions of expert witnesses, that plaintiff could have avoided collision with a truck parked on plaintiff's right-hand side of highway but for the necessity of swerving right to avoid striking defendant, who after passing on left shoulder cut sharply in front of plaintiff, and that after thus necessarily swerving to right there was nothing plaintiff could do to avoid collision with parked truck was error, as the conclusions thus expressed invaded the province of the jury and were not properly the subject of expert testimony.

4. Evidence ⚷536

A highway traffic engineer was not competent to give expert testimony as to the reaction time of the average automobile driver as bearing on physical impossibility of plaintiff avoiding a collision in an emergency.

5. Appeal and error ⚷1170(7)

Submission of expert testimony as to whether plaintiff could have avoided colliding with a truck parked on highway when defendant's automobile cut sharply in front of plaintiff a short distance from parked truck, under instruction that expert testimony was intended to supplement general knowledge and experience of the jury and aid it in reaching a just verdict was reversible error. Code Civ.Proc. § 475; Const. art. 6, § 4½.

6. Trial ⚷79

Where an objection to evidence is distinctly made and overruled, objection need not be repeated to the same class of evidence subsequently received, although the evidence is given by another witness.

7. Trial ⚷412

One who objected to the admission of evidence, but subsequently cross-examined the witness as to the evidence objected to did not thereby "waive" his objection for the purposes of appeal.

> See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Allen Moore, Russell Badley and Union Marine & General Insurance Company against J. T. Norwood for damages resulting from an automobile accident. From a judgment for plaintiffs, defendant appeals. Pursuant to stipulation the appeal was dismissed except as to the part of judgment in favor of the insurance company.

Reversed and remanded.

C. F. Jorz, of Los Angeles, for appellant.

Tripp, Penney & Callaway, of Los Angeles (D. Paul White, of Los Angeles, of counsel), for respondent.

WHITE, Justice.

In an action for damages arising out of an automobile accident a verdict was rendered in favor of plaintiffs, and from the judgment entered on such verdict defendant prosecutes this appeal. Pursuant to stipulation and motion, an order was entered herein dismissing the appeal as to the plaintiff and respondent Allen Moore, who was injured in the accident, and the only portion of the judgment now under attack is that in favor of Union Marine and General Insurance Company, which paid for the cost of repairs to the truck owned by plaintiffs Moore and Badley.

From the evidence adduced at the trial, it appears that on April 24, 1937, on a public highway between the cities of Lordsburg and Douglas in the state of Arizona, a 1935 Dodge two-ton truck owned by plaintiffs Allen Moore and Russell Badley was being driven in a westerly direction by Bert Acevedo, an employee of Moore, who also was riding in the truck at the time of the accident. The accident occurred at about 3 o'clock in the afternoon on the open highway, which at this point was paved with concrete 18 feet wide. On either side of the road was a dirt shoulder 4 feet wide. At the scene of the accident two highway repair trucks were parked on the north half of the concrete strip, facing east, each with its left-hand wheels on the north edge of the pavement. These trucks were 7 feet wide. A flag warning marker had been placed in the center of the north half of the road about 200 feet east of the highway repair trucks. The plaintiffs' truck passed to the left of the flag marker and continued on its course straddling the white center line. As the truck was passing the flag, or immediately after it had passed, appellant, J. L. Norwood, driving a Ford sedan, attempted to overtake and pass the truck. In this effort appellant, when first seen by Mr. Moore, was partly on the shoulder and partly on the pavement, "wobbling and zigzagging", apparently experiencing some difficulty in steering the automobile. Appellant's automobile, however, passed the truck and returned to the paved portion of the highway in front of the Moore truck. When the latter reached a point about 35 or 40 feet distant from the parked highway repair trucks, Moore yelled to his driver to "miss those trucks". However, although plaintiffs' driver testified he applied the brakes and turned right, the respective left front fenders of the Moore truck and the highway repair trucks contacted, and the Moore truck left the paved portion of the highway and traversed a field abutting the highway for a distance of 125 feet and then upset. Appellant's automobile continued westerly and stopped at a point some 200 feet beyond or to the west of the highway repair trucks.

At the trial it was plaintiffs' theory that defendant's automobile swerved from the shoulder of the road alongside the Moore truck to a position directly in front of it, by reason whereof it was prudent and necessary in order to avoid impact that the truck driver turn to the right, and that consequently the sole proximate cause of the accident was the negligent driving of the defendant. The only ground urged for reversal upon this appeal is that the trial court committed prejudicial error by admitting in evidence certain testimony embracing the opinions of two witnesses assertedly qualified as experts.

At the trial R. L. Kirk, an eyewitness to the accident was sworn and testified that he had resided in the state of Arizona 22 years; was employed by the Arizona state highway department; that prior to that time he had served as a soldier in the Spanish-American war, the Philippine insurrection and the first world war; that during his service in the last-named war he was assigned to military police duty in connection with which he had had occasion to and was required to investigate accidents. He also testified that over a long experience as a peace officer his duties consisted of investigating automobile accidents. Over objection of defendant, plaintiffs were permitted to ask this witness the following questions, to which he gave answers favorable to the latter:

"Q. Now, Mr. Kirk, based upon your experience in investigating accidents, would you say that at the point where the Norwood car passed in front of the Moore truck, that if the Moore car had not veered over to the right, he could have avoided striking the Norwood car in front of him?

"Q. Now, at the rate of speed that you observed the Moore truck, was it possible at the angle at which the Norwood truck passed in front of it for the Moore car to have avoided him?

"Q. Mr. Kirk, in other words, what I am asking you now—you have already answered the first question, that if he had continued in a straight line he could not have avoided striking the Norwood car in front of him.

"Q. When I asked you, was it possible in the distance that intervened between the Moore car and your car, where the Norwood car passed in front of it, to have remained on the highway?

"Q. You testified, Mr. Kirk, that there was 35 feet between the Moore car and your car when the Norwood car passed in front of it; is that correct? A. Correct.

"Q. Now, at the rate of speed that you observed the Moore car traveled veering off to the right, as you testified it did, in your opinion was it possible, under the circumstances, for the Moore truck to have remained on the north side of the road without running into the parked highway truck? * * * A. No.

"Q. * * * Mr. Kirk, had Mr. Norwood proceeded along in the direction in which he was proceeding just before he made a turn to the right, could the Moore truck have passed between the State Highway trucks and the Norwood car? A. Yes."

Another witness, Ethelbert Favary, was called and testified that he was a consulting automotive engineer, in connection with which profession he had years of experience with Richfield Oil Company, Moreland Motor Truck Company, had written books on motor vehicle engineering, and served in a technical capacity on an advisory committee on motor vehicle legislation in the state of California; and further, that he had appeared as an expert before the Interstate Commerce Commission and the California railroad commission in matters affecting motor vehicle transportation. After testifying without objection that an automobile or truck going 35 miles per hour would travel 51 feet per second, the witness, over objection of defendant, was asked and permitted to answer the following questions:

"Q. Now, Mr. Favary, from your experience, when a person sees an object suddenly loom in front of him, have you made any tests, or are you familiar with any official tests, to determine the time of reaction of the driver in operating his automobile? A. I am familiar with the test and have made some myself."

Following objection on the ground that the question called for expert medical testimony, the witness was permitted to state that there had been official tests made, not of a medical type, but rather automotive tests, to determine what is called "coordination" or "time reaction", in the course of which he testified as follows:

"I refer to a driven automobile. When a driver sits in the front of an automobile and all of a sudden he sees an object or obstruction in front of him, he will naturally turn or try to get out of the way of that obstruction. It takes some time from the time that he sees that object before he allows his muscle to take hold of the wheel or brake, as the case may be, and apply action. I mean, in respect to the brake, he goes about half a second in time, after he sees the object, before he can apply the brake. In steering to one side—that is what I believe you refer to—it would take him one-fifth of a second on an average, varies from about .18 to .25 of a second, before, from the moment he perceives the object, he is ready to do something, and then he takes about another quarter of a second before he actually does. We usually figure the average reaction time as one-half second."

Then followed the question, "We are talking about a sudden emergency. Then it would be half a second before a man, as I understand it, would have an opportunity to change his course, just merely a matter of mathematics—51 feet a second—would be 25.5 feet in half a second", to which the witness answered, "About."

Thereupon plaintiffs' counsel propounded the following question:

"Now, Mr. Favary, assuming that a truck was straddling the white line in the middle of that road, and going, we will say, about 35 to 40 miles an hour, and that there was a parked highway truck 35 to 40 feet in front of this truck, headed the opposite direction, and that that truck was either 6 or 7 feet in width from fender to fender, parked with the left wheels on the outer edge of the pavement; that would be the north side here. Could a driver within that time have turned or maneuvered the truck so as to have avoided coming in contact with that parked truck on the highway? A. Well, by turning or continuing to turn in the right direction here, that is the only thing he could have done to avoid it. Now—."

Then followed these interrogatories:

"Q. Ten to fifteen feet to maneuver the truck. Now, could the driver have maneuvered the truck so as to have avoided that highway truck in the position in which you have it headed? A. All the truck could have done was to continue going. There was no room to do anything else. If it is going 35 miles an hour, you can't make a sharp turn either to the right or left.

"Q. What would have happened if he had made a sharp turn? A. He would have been liable to turn over. In fact, the centrifugal force at 35 miles an hour is considerably greater than the force of adhesion between the tires and the ground. Therefore it would just slide sideways. I think every automobile driver knows what happens when he tries to make too sharp a turn going that fast.

"Q. In other words, he could not have kept the road under those circumstances which I have propounded to you in that hypothetical question? A. He could not have done anything but continue in this direction because he could not turn in less than 150 diameter, 150 yards.

"Q. In that 40 feet he could not have turned and kept his truck on the road; that is the point we want to get. A. Well, no, he could not, if he is in this position, within 15 feet of this object, he could not turn and go back to the road.

"Q. When you say, 'go back to the road', you mean he could not turn to the left? A. He could not turn to the left; you said whether he could stay on the road.

"Q. When he is headed in this direction, within 15 feet, you say he could not have turned to the left? A. No.

"Q. Make a sharp turn without turning over? A. No.

* * * * *

"Q. Mr. Favary, if the plaintiff's truck had been traveling, as you indicated on the diagram, straddling the center line of the 18-foot paved highway, and within 35 to 40 feet of the paved highway truck on the north side of the road, with its left wheels on the north edge of the pavement, assumed to be 7 feet in width, and a truck or an automobile suddenly loomed in front of the plaintiff's truck, causing him to turn to the right, could the plaintiff's truck have turned to the left and avoided striking the parked highway truck on the right? * * * The Witness: I cannot answer this question unless we go by the figures and the dimensions that have been furnished me here; in other words, if this truck was within 15 feet of this truck, with the steering gear partly turned in this direction, then he could not have gone back to the left.

* * * * *

"Q. Under those circumstances, and taking into consideration the position of the trucks and all the other facts I have given you in the hypothetical question, was there anything the driver could have done to have avoided running off the road? * * * The Witness: There is nothing the driver could have done over here except to go in this direction. He was too close to stop the car, from here to here."

[1-3] It is the law that upon a trial facts may be proved by opinion evidence when the ultimate question is one of science, art trade upon the subject of which the witness is skilled, Code Civ.Proc., sec. 1870, subd. 9; but opinion evidence is never admissible upon a subject which is capable of direct proof and when the ultimate question can be otherwise ascertained and made intelligible to the trier of fact. In other words, whenever the question to be determined is the result of the common experience of all people of ordinary education, or such result is to be inferred from particular facts, such inference must be drawn by the jury and not by the witness. Except in the instances provided in subdivision 9 of section 1870 of the Code of Civil Procedure, the general rule is that witnesses must testify to facts and not to opinions. Sappenfield v. Main St. R. R. Co., 91 Cal. 48, 59, 27 P. 590. Whether, when at the point where the defendant's automobile passed in front of the Moore truck, the accident could have been avoided if the Moore truck had not veered over to the right; whether under the circumstances it was possible for the Moore truck to have remained on the north side of the road without running into the parked highway repair trucks; whether, had defendant proceeded along in the direction he was going just before he made a turn to the right, the Moore truck could or could not have passed between the highway repair trucks and the defendant's car; whether there was anything the driver of the Moore truck could have reasonably done to have avoided running off the road; and whether such truck could have been turned to the left and thereby avoided striking the parked highway trucks on the right, were all issues in the case for the jury to determine from the factual circumstances that might be shown. No special training or experience was required to determine the aforesaid questions. Based upon the facts which supported the opinion of the expert witnesses, the jury could just as readily and correctly have drawn the conclusions as could the witnesses; and it was error to permit the opinions of the witnesses to be substituted for those of the jury and to allow, as the court did by instructions, a verdict to be based upon the opinions of these witnesses. The answers to the foregoing questions called for the very conclusions that the jury were to pass upon and invaded as well as usurped the province of the latter. The questions as to whether both plaintiff and defendant drivers used prudent and proper care, caution and judgment in the operation of their respective motor vehicles were for the determination of the jury from all the evidence. These were not questions upon which the opinions of expert witnesses were allowable. Th jury were called to pass upon the question of negligence on

the part of the drivers of both vehicles, and there was no need for the opinion evidence given by the expert witnesses. It clearly trenched upon the province of the jury because it permitted the witnesses to decide the very questions upon which the jury alone is competent to pass judgment. Carty v. Boeseke-Dawe Co., 2 Cal. App. 646, 649, 84 P. 267; Holroyd v. Gray Taxi Co., 39 Cal.App. 693, 179 P. 709; Eaton v. Southern Pac. Co., 22 Cal.App. 461, 474, 134 P. 801; Fishman v. Silva, 116 Cal.App. 1, 8, 2 P.2d 473; Wilkerson v. El Monte, 17 Cal.App.2d 615, 62 P.2d 790.

[4] It was clearly error to permit the witness Favary to answer questions of which the following are examples:

"Q. Now, Mr. Favary, from your experience, when a person sees an object suddenly loom in front of him, have you made any tests, or are you familiar with any official tests, to determine the time of reaction of the driver in operating his automobile?

"Q. Is there a certain coordination within which a driver—coordination of mind, of course, and body, in what he does in a situation of that kind?"

As was said in Fishman v. Silva, supra [116 Cal.App. 1, 2 P.2d 476], "The questions under investigation were not the subject of expert testimony, as it is obvious that no expert outside of the so-called psychiatrist can even venture an opinion as to what two different people might do in the management of a car in an emergency."

[5] We cannot agree with respondent in its claim that the expert testimony in question served only to clarify before the jury the mental picture painted by the expert witness Kirk from the factual situation to which he as an eyewitness testified, because this witness, as well as the witness Favary, was permitted to answer for the jury the question of whether respondent driver was or was not negligent in running off the road. In thus allowing the jury to be influenced upon questions of which they were the sole arbiters, appellant was deprived of his right to have the jury render its verdict upon the facts of the case; and to that extent the judgment of the so-called experts as to the prudence, caution and care or the lack thereof on the part of the truck driver was substituted for what should have been the judgment of the jury. Manifestly such so-called expert testimony might or could have considerable weight with the jury, or possibly some members thereof, and would have a tendency to overcome any doubt they might entertain as to the ultimate question of negligence in the conduct of respondent's driver. That such result would ensue is immediately suggested by the following instruction given to the jury at respondent's request: "The purpose of the introduction of the opinions of experts as evidence, is to supplement the general knowledge and experience of the jury in relation to matters before the jury, and thereby to aid the jury in the exercise of their own judgment, to the end that a more just and accurate conclusion may be drawn from the evidence." We entertain no doubt that in giving to the jury this inadmissible evidence as a ground for their verdict appellant was prejudiced in his substantial rights to a trial by jury. The result might easily have been different had the objectionable testimony been excluded. Therefore the saving grace of section 4½ of article VI of the Constitution and section 475 of the Code of Civil Procedure cannot be put in operation to save the judgment.

[6, 7] We find no merit in respondent's contention that seasonable and appropriate objections were not made to the challenged evidence at the trial. As stated in 64 Corpus Juris, page 179, section 201, "Where an objection to evidence is distinctly made and overruled it need not be repeated to the same class of evidence subsequently received, although the evidence is given by or the question asked of, another witness." Neither does the fact that appellant cross-examined respondents' expert witnesses deprive the former of the benefit of his objections made at the trial, nor does such action militate against him on appeal. The rule in this regard is thus succinctly stated in Jameson v. Tully, 178 Cal. 380, 384, 173 P. 577, 578: "By the presentation on his own part of such independent proofs the objecting party, of course, waives his objection and point upon appeal; not so, however, when the objecting party undertakes to exercise his right to cross-examine a witness as to statements to which he has erroneously been permitted to testify. Were it otherwise, one of the main functions of cross-examination would be most seriously impaired; for a party, after rightfully objecting to the admission of evidence, may, by his cross-examination,

lay the foundation for an obviously proper motion to strike it out, or may compel its contradiction or withdrawal, or may utterly destroy its effect, and thus render unnecessary his remedy by appeal from the court's erroneous action."

For the foregoing reasons, that part of the judgment from which this appeal was taken is reversed and the cause remanded for a new trial thereon.

We concur: YORK, P. J.; DORAN, J.

* * *

41 Cal.App.2d 375

HILTON et al. v. CAREY et al.

Civ. 12043.

District Court of Appeal, Second District, Division 1, California.
Nov. 6, 1940.

1. Evidence 🔑588

In action for injuries and death resulting from intersectional automobile collision, evidence of physical facts of damage to right rear fender and dent in right front door of automobile driven by deceased and damage to left front fender of defendant's automobile sustained judgment for plaintiffs, as against contention that physical facts established beyond contradiction that defendant's automobile had first entered intersection and had right of way and that deceased was guilty of negligence which was sole proximate cause of collision.

2. Trial 🔑295(7)

Portion of instruction that, if jury should find from a preponderance of the evidence that intestate's automobile was being driven at a lawful speed and one which was reasonable and proper having due regard to the traffic and entered intersection before defendant's automobile, then intestate had right of way, was not erroneous as according to intestate right of way regardless of any act or omission on her part, where remainder of instruction set forth necessity of finding intestate free from contributory negligence and instructed as to law governing rights of way of vehicles at intersection. Vehicle Code, § 550, St.1935, p. 186.

3. Automobiles 🔑246(20)

Instruction that persons who operate motor vehicles upon the public highways must at all times have their automobiles under such control as to be able to stop promptly if it becomes necessary, and that, if at time of collision or immediately prior thereto defendant did not have his car under control and as a result was unable to stop automobile promptly, such conduct would constitute negligence which if found to be a proximate cause of accident would require verdict for plaintiff in absence of contributory negligence, was not erroneous as imposing on defendant a greater degree of care than reasonable care.

4. Trial 🔑260(1)

Refusal of a requested instruction covered by other instructions requested by defendant and given by the court was not error.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Harry Hilton, individually, and as guardian ad litem of Calvin Hilton and others, and another, against Charles P. Carey and others, for injuries sustained in automobile collision. From a judgment for the plaintiffs, defendants appeal.

Affirmed.

Nourse, Betts & Jones, of Los Angeles, for appellants.

Flanagan & Sampson and Richard Hunt Sampson, all of Los Angeles (Dan O'Neill, of Los Angeles, of counsel), for respondents.

DORAN, Justice.

This is an appeal by defendants from a judgment on the verdict of a jury in plaintiffs' favor in an action for damages for injuries sustained as the result of an automobile accident.

The accident in question resulted in personal injuries to respondent Rabel Baker Rollice and in the death of Alba Hilton, the wife of respondent Harry Hilton, and occurred on July 7, 1937, at about eleven in the morning, when a 1928 Chrysler sedan, driven by the deceased, Alba Hilton, and a 1937 Pontiac sedan, driven by one of the appellants, collided at the intersection of West Fifth street and Manhattan place, in the city of Los Angeles.

Manhattan place runs north and south, Fifth street east and west, and the intersection in question is at right angles. It appears that just prior to the collision the Pontiac sedan was traveling south on Manhattan place, and the Chrysler sedan west on Fifth street. According to the testimony of one of the police officers who investigated the scene after the accident the point of impact was 18 feet south of the north curb line and 24 feet west of the east curb line in the intersection. Fifth street at that point is 40 feet wide and Manhattan place 45 feet wide, so that, according to the testimony of the officer, the cars collided in the northwest quarter and close to the center of the intersection, about two feet north and one and one-half feet west of the center of the intersection.

Pictures of the respective cars produced in evidence show damage to the right rear fender and a dent in the right front door of the Chrysler, and damage to the left front fender of the Pontiac.

[1] The oral testimony, as in most automobile accident cases, is conflicting. Appellants contend that the physical facts establish beyond contradiction that the deceased, Alba Hilton, was guilty of negligence which was the sole proximate cause of the accident in question; and that error was committed by the court in giving certain instructions to the jury and in refusing to give an instruction requested by defendants (appellants here).

Much of the appellants' argument as to the physical facts would be more properly addressed to a jury than to an appellate court. The burden of it is that the physical facts show uncontrovertibly that the right front of the Chrysler must have struck the left front of the Pontiac, and that therefore the Pontiac had first entered the intersection and had the right of way over the Chrysler. The main difficulty with this argument is that it completely ignores the damage shown to have been done to the right rear of the Chrysler.

Respondents contend that the Chrysler car entered the intersection first and at a lawful rate of speed; that the Pontiac entered the intersection at a later time and at such an excessive rate of speed as to be unable to stop in time to avoid the accident.

The physical facts, if anything, tend more to support respondents' claim than that of appellants, and hence support the verdict of the jury. There is no merit in appellants' first contention.

[2] Appellants assign as error a portion of one of the instructions given to the jury. The portion objected to reads as follows: "Should you find from *a preponderance* of all the evidence that the Chrysler automobile driven by the decedent Alba Hilton was being driven at a lawful speed and one which was reasonable and proper, having due regard to the traffic, surface and width of the highway, and that the Chrysler automobile entered the intersection of Fifth and Manhattan streets before the Pontiac automobile driven by the defendant Charles P. Carey entered the intersection, then and in that event, I instruct you that the decedent Alba Hilton had the right of way; that is to say, she had the right to the immediate use of the highway and a preferential right thereto over the Pontiac automobile operated by the defendant Charles P. Carey."

Appellants contend the instruction is erroneous in that it accorded to the deceased the right of way in the event the jury found that she entered the intersection first, regardless of any act or omission of negligence on her part, so long as she entered the intersection at a reasonable rate of speed. The criticism is not justified. The language excepted to is only a part of the instruction given. The balance of the instruction took into account the factor of contributory negligence and the necessity of finding decedent free therefrom in order to bring in a verdict for the plaintiffs. Moreover, the jury was fully instructed as to the law governing the right of way of vehicles at intersections, the instruction thereon being given in the language of section 550 of the California Vehicle Code St.1935, p. 186. The instruction objected to, when read as a whole, was not erroneous, particularly in the light of other instructions given. See Howard v. National Ice Cream Co., 115 Cal.App. 639, 2 P.2d 211, cited by respondents.

[3] Appellants also assign as error the giving of an instruction which was in substance that it is the law of this state that persons who operate motor vehicles upon the public highways must at all times have their automobiles under such control as to be able to stop promptly if it becomes

necessary; that if it was found that at the time of the accident or immediately prior thereto defendant did not have his car under control, and as a result was unable to stop his car promptly, such conduct on his part would constitute negligence, which, if found to be the proximate cause of the accident, would require a verdict in favor of plaintiffs in the absence of a finding of contributory negligence.

Appellants' objection to this instruction is that it required of the defendant a greater degree of care than reasonable care.

Where a jury was instructed that it is part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collision with other persons using the highway with ordinary care and prudence, such an instruction was held not to be erroneous. Butcher v. Thornhill, 14 Cal.App.2d 149, 156, 58 P.2d 179. And as to the care to be exercised by drivers of automobiles it has been said: "The law indeed imposes upon them a degree of care commensurate with the peculiar hazard attending the operation of these modern vehicles." Meyers v. Bradford, 54 Cal.App. 157, 159, 201 P. 471, 472. See Devecchio v. Ricketts, 66 Cal.App. 334, 341, 226 P. 11, wherein it is stated that the rule of reasonable precaution which the law enjoins upon a driver of an automobile upon a public highway includes such control as that the vehicle may be stopped promptly. The instruction in question set for defendants no greater degree of care than that which might reasonably be expected of the driver of an automobile. The rule as therein set forth does not, as argued by appellants, require a driver to exercise such control over his vehicle as to absolutely avoid all collisions. If there could be any doubt as to the validity of the instruction it was amply cured by other related instructions given.

[4] Appellants complain of the court's refusal to give a requested instruction apparently to the effect that the driver of the Pontiac was not required to anticipate anything which it would be unreasonable to expect a person of ordinary intelligence, exercising reasonable care, to expect. The situation intended to be covered thereby was more explicitly and more clearly covered by two other instructions requested by defendants and given by the court. Furthermore, the requested instruction as drawn was so involved that its rejection was warranted to avoid confusion.

There being no errors in the record, the judgment is affirmed.

We concur: YORK, P. J., WHITE, J.

JAFFE v. STONE et al.

Civ. 11137. *

District Court of Appeal, First District, Division 1, California.

Oct. 29, 1940.

Hearing Granted Dec. 26, 1940.

1. Malicious prosecution 🔑51

A complaint for malicious prosecution alleging merely that a committing magistrate, after hearing and on motion of accused, dismissed the felony charge for insufficiency of evidence, did not state a cause of action without further allegations to show final termination of the prosecution. Pen. Code, §§ 871, 1117, 1387.

2. Malicious prosecution 🔑16, 38

Actions for malicious prosecution have never been favored in law, although they have always been readily upheld when the proper elements therefor have been presented, and are sustained only when it is shown that the prosecution was in fact actuated by malice and that the party instigating it had no reasonable ground for causing the prosecution.

3. Malicious prosecution 🔑47

In action for malicious prosecution, complaint must allege the institution of the proceeding complained of, malice, want of probable cause, and final termination of the proceedings in favor of plaintiff.

4. Malicious prosecution 🔑36

As respects rule that action for malicious prosecution should not be brought until the prosecution upon which it is based is terminated, dismissal of proceedings before a committing magistrate does not preclude the institution of further proceedings before the same tribunal or an indictment by a grand jury.

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* Subsequent opinion 114 P.2d 335.

5. Malicious prosecution 🔑36

In malicious prosecution actions based upon preliminary hearings in criminal actions, as affecting status of "dismissal of proceedings" or "dismissal of the charge" as final termination of the prosecutions, the word "dismissal" ordinarily has reference to the removal of a cause out of court before judgment on the merits, and there is not necessarily an adjudication that an offense against the law has not been committed, or an idea of "finally ended". Pen.Code, § 1387.

See Words and Phrases, Permanent Edition, for all other definitions of "Dismissal".

6. Malicious prosecution 🔑36

The word "discharged", referring to disposition of preliminary hearing as constituting final termination so as to authorize action for malicious prosecution, merely means that accused is released from custody and his bail exonerated, and there is not necessarily an adjudication that an offense against the law has not been committed, or an idea of "finally ended." Pen.Code, §§ 871, 1117.

See Words and Phrases, Permanent Edition, for all other definitions of "Discharged".

7. Malicious prosecution 🔑36

"Terminated", within requirement for malicious prosecution action that the previous prosecution be finally terminated, implies permanent, complete disposition of the action.

See Words and Phrases, Permanent Edition, for all other definitions of "Terminated".

8. Malicious prosecution 🔑51

In action for malicious prosecution, it was incumbent upon plaintiff to plead that a new proceeding was not instituted after discharge of plaintiff on preliminary hearing; that is, that the deposition of the criminal case had been finally determined without legal possibility of revival.

9. Malicious prosecution 🔑36

Dismissal of complaint and discharge of accused, though a proper and legal order, was not "final" termination of prosecution, so as to authorize action for malicious prosecution, in that it did not legally bar a further prosecution for the same offense.

See Words and Phrases, Permanent Edition, for all other definitions of "Final".

10. Courts 🔑90(1)

In determining sufficiency of petition in malicious prosecution action, alleging that the prosecution was terminated by action of the committing magistrate, cases wherein judgments for plaintiffs in malicious prosecution actions, based on actions of committing magistrates, were affirmed, were not authority where the point was not mentioned in such cases.

11. Malicious prosecution 🔑51

An essential averment in complaint for malicious prosecution is that the proceeding upon which it is based has terminated in favor of accused, in a form that renders order or judgment final, without the possibility of legal revival.

12. Limitation of actions 🔑55(4)

The statute of limitations in the filing of a malicious prosecution complaint does not begin to run until termination of the proceedings upon which it is based.

13. Pleading 🔑345(1)

Where complaint in action for malicious prosecution alleged that order to dismiss the criminal action was made in response to a motion by accused, judgment on the pleadings for defendant was authorized under rule requiring final termination of the prosecution and distinguishing between dismissal on behalf of prosecution and dismissal obtained by accused.

14. Malicious prosecution 🔑51

In complaint for malicious prosecution, the true test of "final determination" of the prosecution as a necessary element, as applied to a preliminary hearing, depending upon the facts in each case, should be an averment that the statute of limitations has expired as regards further prosecution for the offense, or that complainant has abandoned the prosecution of the charge, or that the preliminary hearing proceeding has been dismissed and a reasonable time has elapsed within which to institute a revival thereof, or an averment of facts from which the necessary legal conclusion follows that the prosecution has finally ended and terminated in favor of accused.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Determination".

PETERS, P. J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Aaron L. Jaffe against Richard I. Stone and others for malicious prosecution. From a judgment for defendants, plaintiff appeals.

Affirmed.

Werner Olds, Albert Picard, and E. Coke Hill, all of San Francisco, for appellant.

Morris, Jaffa & Sumski, of San Francisco, for respondents.

WARD, Justice.

An appeal from a judgment in favor of defendants after the granting of their motions for judgment on the pleadings. The action is one for malicious prosecution, the complaint being based upon the fact that a charge of felony, to-wit, grand theft, had been brought against plaintiff in the justice's court. Defendants' motions for judgment on the pleadings were based upon plaintiff's failure to allege in his complaint herein a final determination of the criminal proceedings in his favor, his only allegation in that regard being that such proceedings were dismissed on motion of the accused upon the ground that there was no testimony or evidence to prove him guilty of the offense charged.

[1] The question involved is whether a complaint for malicious prosecution which alleges merely that a committing magistrate, after a hearing and on motion of the accused, dismissed the felony charge for insufficiency of evidence, states a cause of action without alleging also, directly or by way of averment of facts, that by such dismissal the prosecution was finally terminated. In various jurisdictions different conclusions have been reached upon the question as to what constitutes a final termination.

An analysis of the conflicting opinions discloses that they are mainly influenced by the viewpoint of the particular court as to whether the degrading effect to the individual of a criminal prosecution is of greater importance than the interest of the state in prosecuting persons charged with violating the law. In some states confusion has arisen in the failure to discriminate between malicious prosecution actions based on civil cases and those founded on criminal charges. An abandonment or dismissal of a civil case is somewhat different from a dismissal of a criminal action. Assuming that in either a further prosecution may be had, still the state is more interested in the prosecution of those guilty of criminal offenses than in the maintenance of actions between civil litigants. The prosecution of a civil action is wholly in the hands of the party instituting it, whereas the continuation of a criminal proceeding is directed and determined by a representative of the law enforcement branch of the government. Precise principles have been established based on conclusions reached on this often-debated question, resulting in extremely stringent or slack rules according to the particular legal tenet adopted by the court.

[2] California has adopted the rule that the punishment of crime shall not be hampered by the fear of a citizen that, in bringing a charge against one who he has reasonable ground to believe has committed an offense, he may be sued for damages, if a jury, because of a reasonable doubt, fails to convict, or a legal obstacle presented in the form of objection, motion, demurrer or order of dismissal intervenes to free him. California's stand is well expressed in Ball v. Rawles, 93 Cal. 222, 228, 28 P. 937, 938, 27 Am.St.Rep. 174: "Actions for malicious prosecution have never been favored in law, although they have always been readily upheld when the proper elements therefor have been presented. They are sustained, however, only when it is shown that the prosecution was in fact actuated by malice, and that the party instigating it had no reasonable ground for causing the prosecution. It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule if he have reasonable grounds for his belief, and act thereon in good faith, in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime * * *." Paskle v. Williams, 214 Cal. 482, 6 P.2d 505; Perry v. Washington Nat. Ins. Co., 14 Cal.App.2d 609, 58 P.2d 701, 59 P.2d 158; Haydel v. Morton, 8 Cal.App.2d 730, 48 P.2d 709; D'Alessandro v. Pickford, 22 Cal.App.2d 239, 70 P.2d 646; Dunlap v. New Zealand F. & M. I. Co., 109 Cal. 365, 42 P. 29; Garfield v. Peoples Fin. & Thrift Co., 24 Cal.App.2d 144, 74 P.2d 1061; Richter v. Neilson, 11 Cal.App.2d 503, 54 P.2d 54. In Griswold v. Griswold, 143 Cal. 617, 622, 77 P. 672,

674, the court said: "It is the policy of the law to encourage prosecutions when there are facts and circumstances that would induce the belief in the mind of a reasonably cautious man of the guilt of the party accused. And so in case a party is insane and dangerous to be at large. It would not do to hold honest parties in heavy damages for an error of judgment. If so, it would be difficult to get responsible parties to make complaints."

[3] In consonance with this rule, California has laid down four essentials to justify the bringing of an action for malicious prosecution, namely, the institution of the proceeding complained of, malice, want of probable cause and the final determination of the proceeding so that it is not susceptible of revival. The last requirement, namely, final termination, is as essential as the other three. In White v. Brinkman, 23 Cal.App.2d 307, 318, 73 P.2d 254, 259, the court said: "In an action grounded on malicious prosecution not only must the complaint allege that the prosecution was with malice and without probable cause, but it is equally essential that there be an adequate averment of final termination of the proceeding in favor of the plaintiff. A complaint deficient in that particular is amenable to a general demurrer." Monk v. Ehret, 192 Cal. 186, 219 P. 452; Holliday v. Holliday, 123 Cal. 26, 55 P. 703; Roos v. Harris, 203 Cal. 201, 263 P. 225; Dowdell v. Carpy, 129 Cal. 168, 61 P. 948; Carpenter v. Nutter, 127 Cal. 61, 59 P. 301.

[4-7] In Wilson v. Troy, 19 Cal.App.2d 156, 64 P.2d 1141, the complaint alleged malice, the want of probable cause, the dismissal of the criminal cause and that the proceedings against plaintiff had been "terminated". In the instant case, the complaint is substantially in the language used in Wilson v. Troy, except that the pleader herein did not state that the proceedings had "terminated", but relied upon the allegation of the dismissal of the proceedings and the discharge of the plaintiff. An action for malicious prosecution should not be brought until the prosecution upon which it is based is terminated. A dismissal of proceedings before a committing magistrate does not preclude the institution of further proceedings before the same tribunal or an indictment by a grand jury. In malicious prosecution actions based upon preliminary hearings in criminal actions, some confusion has arisen as a result of the use of the terms "a dismissal of proceedings", "a dismissal of the charge", and "discharge of the prisoner". The word "dismissal" ordinarily has reference to the removal of a cause out of court before judgment on the merits. People v. Latham, 53 Cal. 386. "* * * an order for the dismissal of the action is not a bar if the offense is a felony". Pen.Code, sec. 1387. The word "discharged" as used in the present proceeding merely means that the accused is released from custody and his bail exonerated. Pen.Code, secs. 871 and 1117. There is not necessarily an adjudication that an offense against the law has not been committed. Neither word carries with it the idea of "finally ended". "Terminated" implies permanent complete disposition of the action. 62 C.J. p. 732. To this extent there was more merit in the appeal in Wilson v. Troy than in the instant case.

In deciding the point involved it is my opinion that we must follow the California rule. Practically the identical question (with the exception that there was also involved the point whether or not the accused in a criminal proceeding "was tried"), was the subject of determination in Wilson v. Troy, supra, where, at page 158 of 19 Cal. App.2d, at page 1142 of 64 P.2d, the court said: "That such dismissal terminates proceedings on the specific indictment or information will be conceded. But, if under the order made, a new indictment or information may be filed, the order does not terminate the proceedings. True it is that the plaintiff alleges said action terminated, but that does not meet the rule. He should have alleged facts showing that it had finally terminated." In White v. Brinkman, supra, the court said, at page 317 of 23 Cal.App.2d, at page 259 of 73 P.2d: "But one of the essentials of artful pleading of such cause is an averment of termination of the prosecution in favor of the accused in such manner as not to be legally susceptible of revival. Plaintiff does not allege in terms in his complaint that the prosecution was finally terminated in his favor." In Roos v. Harris, supra, an accused, found guilty of petit larceny, as it was then termed, subsequently filed a complaint in the superior court for malicious prosecution. It was not alleged that the conviction was appealed or reversed upon appeal. An order granting a motion for judgment on the pleadings was affirmed because the finality of the criminal proceeding had not been alleged. In Holliday v. Holliday, supra, at page 32 of 123 Cal., at page 704 of 55 P., the court said: "* * * where a justice sits as a committing magistrate with power merely to discharge a defendant or to hold him to answer for trial before a higher tribunal, the order made by the magistrate in such cases, lacking the essentials of a final judgment, is not held conclusive upon the question of probable cause. At the most it is but prima facie evidence." In the Holliday case the court also held that when the complaint in a malicious prosecution action alleges that the principal prosecution is "wholly ended", it is sufficient. In the instant case, the complaint simply alleges that the motion to dismiss the complaint and charge was granted. No allegation appears that the proceeding was "wholly" or "finally" ended.

[8, 9] Appellant in his closing brief states: "We freely admit that the discharge we have alleged as a termination of the proceeding was not a bar to a new proceeding against the defendant. The point is a new proceeding must be instituted." But it was incumbent upon appellant to plead that a new proceeding was not instituted; that is, that the disposition of the criminal case had been finally determined without legal possibility of revival. The point to emphasize is that while the dismissal of the complaint, and the discharge of the accused, may have been and undoubtedly constituted a proper and a legal order, it was not final in that it did not legally bar a further prosecution for the same offense.

[10] The weakness of appellant's contention is demonstrated by reference to certain cases, some of which were affirmed on appeal. Attention is directed to the fact that in those wherein plaintiff recovered judgment as the result of the action of the committing magistrate, not one was reversed for failure to allege or prove termination of the original proceeding. That point, which is the crux of the instant appeal, is not even mentioned in the cases cited; and hence those cases are not authority here. Black's Law of Judicial Precedents, p. 47, sec. 10; 21 C.J.S., Courts, p. 299, § 186; 7 Cal.Jur. p. 641, sec. 46.

Disregarding, as authority for the case at bar, Wilson v. Troy, supra, and a series of decisions of the District Courts of Appeal which are enlightening relative to the rule followed in this state, we may rest its decision upon Supreme Court opinions on this question as expressed in Fetterley v. Gibson, 210 Cal. 282, 291 P. 411; Paskle v. Williams, supra; Carpenter v. Nutter, supra; Crews v. Mayo, 165 Cal. 493, 132 P. 1032; Ex parte Fenton, 77 Cal. 183, 19 P. 267; Roos v. Harris, supra; Holliday v. Holliday, supra; Dowdell v. Carpy, supra; Monk v. Ehret, supra; Anderson v. Coleman, 56 Cal. 124; Kellogg v. Cochran, 87 Cal. 192, 25 P. 677, 12 L.R.A. 104; Carter v. Paige, 80 Cal. 390, 22 P. 188; Berson v. Ewing, 84 Cal. 89, 23 P. 1112; Hibbing v. Hyde, 50 Cal. 206.

People v. Bomar, 73 Cal.App. 372, 238 P. 758, cited by appellant, merely decides that when a magistrate holds a defendant to answer for a public offense, he exhausts his power and jurisdiction. Nothing therein may be construed as indicating that when the committing magistrate dismisses the charge he may not reacquire jurisdiction to hear and determine the question of the sufficiency of the evidence to hold the defendant to answer upon a complaint subsequently filed within the statutory period. I do not find anything stated in Wood v. Lehne, 30 Cal.App.2d 222, 85 P.2d 910, cited by appellant, inconsistent with the views expressed herein. The question under discussion in Harrington v. Tibbet, 143 Cal. 78, 76 P. 816, was whether a defendant in a malicious prosecution action could base his defense upon the fact that the criminal complaint failed to state a public offense. Nor does the case of Hurgren v. Union Mutual Life Ins. Co., 1904, 141 Cal. 585, 75 P. 168, lend any more than a suggestion of authority to appellant's contention. That was a malicious prosecution action for alleged institution of certain civil suits in which a nonsuit had been granted. At page 587 of 141 Cal., at page 168 of 75 P., the court said: "* * * it is now the well-established rule that a verdict or final determination upon the merits of the malicious civil suit or criminal prosecution complained of is not necessary to the maintenance of an action for malicious prosecution, but that it is sufficient to show that the former proceeding had been legally terminated. The fact that such legal termination would not be a bar to another civil suit or criminal prosecution founded on the same alleged cause is no defense to the action for malicious prosecution * * *." It may be noted that the action was one for prosecution of civil suits, and the statement therein in reference to a criminal prosecution was not necessary to the decision. At page 589 of 141 Cal., at page 169 of 75 P., the court said: "There are no decisions of this court to the contrary." This statement is incorrect.

In Carpenter v. Nutter, supra, decided five years earlier (1899), at page 63 of 127 Cal., at page 302 of 59 P., the court said: "In actions for malicious prosecution, it must be alleged that the prosecution is at an end, either by alleging that defendant was acquitted of the charge, or by alleging facts showing the legal termination of the prosecution complained of, in favor of defendant, prior to the commencement of the action. 1 Chit.Pl. 680; Newell, Mal. Pros., p. 327, sec. 1; Holliday v. Holliday, 123 Cal. [26] 31, 55 P. 703; Hibbing v. Hyde, 50 Cal. 206." It was further stated in the Carpenter case that it must "appear by direct averment, or by a statement of facts which show the necessary legal conclusion, that the prosecution has finally ended and terminated in favor of plaintiff". The conclusion reached in Carpenter v. Nutter was followed with approval in Plum v. Becket, 1932, 120 Cal.App. 507, 7 P.2d 1111, in Donati v. Righetti, 1908, 9 Cal.App. 45, 97 P. 1128, and in Wilson v. Troy, supra.

There seems to be some inconsistency in the language used in the Hurgren and Carpenter opinions. To follow the Hurgren case without an analysis thereof would mean that every other case upon this subject in California must be disapproved. In Wilson v. Troy, appellant, citing both of these cases, but relying specifically upon the language used in the Hurgren case, petitioned for a hearing before the Supreme Court. The petition was denied. It is interesting to note that the courts of appellate jurisdiction in this state seldom cite the Hurgren case, and then merely quote its language, in accord with the Nutter case, to the effect that "It is not necessary to show that it was tried on its merits, but there must be a showing that it has gone beyond the power of the plaintiff to continue it." Crews v. Mayo, supra, 165 Cal. at page 495, 132 P. at page 1033. See, also, Merron v. Title Guarantee, etc., Co., 11 Cal.App.2d 565, 54 P.2d 61; Merron v. Title Guarantee, etc., Co., 27 Cal.App.2d 119, 80 P.2d 740.

In Crews v. Mayo, supra, 1913, 165 Cal. at pages 495, 496, 132 P. at page 1033, the court said: "It is not necessary to show that it [the suit] was tried on its merits, but there must be a showing that it has gone beyond the power of the plaintiff to continue it. Hurgren v. Union Mutual Life Ins. Co., 141 Cal. [585] 587, 75 P. 168. * * * In Carpenter v. Nutter, 127 Cal. 61, 59 P. 301, it was decided that in an action for damages on account of malicious prosecution it must be shown that the prosecution had terminated, and the mere discharge of the defendant in that prosecution would not be sufficient." Andrews v. Young, 1937, 21 Cal.App.2d 523, 69 P.2d 891; Dowdell v. Carpy, supra, 1900.

[11, 12] Whether the matter be referred to as "wholly", "legally" or "finally" determined, California has adopted the rule that an essential averment in a complaint for malicious prosecution is that the proceedings upon which it is based have terminated in favor of the accused, in a form that renders the order or judgment final, without the possibility of legal revival. Those familiar with proceedings before committing magistrates know full well that many complaints are dismissed upon technicalities of law, involving, for instance, jurisdiction, the disappearance of necessary witnesses, to save the reputation of the complainant, particularly should she be a woman, to obviate the embarrassment of publicity to the relatives of an accused if the interests of justice will not suffer too much thereby, and for other reasons that need not be mentioned. If it were possible for an accused, by the prompt filing of a malicious prosecution action, to intimidate and coerce a complainant to such a degree as to result in a discontinuance of the criminal proceeding, the state might be precluded from a proper enforcement of the law, whereas any injury resulting to the accused would only be by way of a delay until allegations in a malicious prosecution complaint could be conscientiously made that the criminal action was wholly, completely, legally and finally ended.

The statute of limitations in the filing of a malicious prosecution complaint does not begin to run until the termination of the proceedings upon which they are based. Berson v. Ewing, supra. It is seldom necessary to await the running of the statute, but, assuming that it is impossible to show final determination until the end of the statutory period, that hardship upon the accused would not outweigh the injustice of permitting him to file a malicious prosecution action and intimidate a complainant so that he would refuse to assist further in the prosecution of a crime. In dealing with a civil matter the court, in the Berson case, 84 Cal. at pages 92, 93, 23 P. at page 1113, said: "One of the essential facts to the maintenance of an action of the kind before us is, as above stated, that the malicious suit terminated in favor of the party against whom it was prosecuted. Were this not so, the plaintiff might recover for the malicious suit, and still have judgment rendered against him in such suit."

[13] In the instant case an additional reason may be given why the motion for judgment on the pleadings was properly granted. In some jurisdictions a distinction is made between an action dismissed on behalf of the prosecution and one obtained through the direct effort of the accused. 18 R.C.L. p. 23, sec. 12. This rule was recognized by the supreme court of this state in Holliday v. Holliday, supra, where at page 35 of 123 Cal., at page 705 of 55 P., the court said: "It is, of course, true that the dismissal of a charge at the procurement of the accused cannot be construed as such a final determination of the matter in her favor as to support an action for malicious prosecution." The complaint in the present case alleges that the order to dismiss the criminal action was made in response to a motion by the accused. The language used by the supreme court in the Holliday case was a sufficient justification for the trial court herein to order judgment for the defendant upon the pleadings.

[14] In a complaint for malicious prosecution, the true test of final determination as applied to a preliminary hearing, depending upon the facts in each case, should be an averment that the statute of limitations, as regards further prosecution of the criminal offense, has expired, or that the complainant has abandoned the prosecution of the charge, or that the preliminary hearing proceeding has been dismissed and that a reasonable time has elapsed within which to institute a revival thereof, or an averment of facts from which the necessary legal conclusion follows that the prosecution has finally ended and terminated in favor of the accused. The facts alleged in the instant complaint are insufficient. A dismissal in a preliminary hearing is not necessarily a final termination.

California having established its policy of encouraging the exposure of crime by shielding from liability a complaining witness in a criminal proceeding, unless, in an action for malicious prosecution, there be an averment of the four essentials heretofore set forth, including an adequate averment of final termination of the proceeding in favor of the accused, it is my opinion that the conception of the law as enunciated by the highest appellate court of this state must be followed. The "juristic philosophy" of the judges of the Supreme Court may not be rejected. Their adjudication of a question of law may not only be followed with propriety, but must be accepted as final.

The judgment is affirmed.

KNIGHT, Justice (concurring).

I agree with Mr. Justice WARD that the judgment should be affirmed. As stated by him, the appeal was taken by plaintiff from a judgment on the pleadings. The single question to be decided is, therefore, solely one of pleading; namely, does the complaint allege all of the elements essential to constitute a cause of action for malicious prosecution. In this regard it is well settled that in order to state such a cause of action the complaint must allege the institution of the proceeding complained of, malice, want of probable cause, "and the final termination of the proceedings in favor of the plaintiff" (16 Cal.Jur. p. 744); and particularly, as to the latter element, the complaint must allege "that the prosecution is at an end, either by alleging that defendant was acquitted of the charge, or by alleging facts showing the legal termination of the prosecution complained of, in favor of the defendant, prior to the commencement of the action." Carpenter v. Nutter, 127 Cal. 61, 59 P. 301, 302, citing 1 Chitty on Pleading, 680; Newell on Malicious Prosecution, sec. 1, p. 327; Holliday v. Holliday, 123 Cal. 26, 31, 55 P. 703; Hibbing v. Hyde, 50 Cal. 206; Wilson v. Troy, 19 Cal.App.2d 156, 64 P.2d 1141. Such appears to be the prevailing rule of pleading in all jurisdictions. 18 R.C.L. 68. The obvious reason for the rule is that until the complaining party has shown that there has been a final termination in his favor of the prosecution about which he is complaining, it cannot be logically held that such prosecution was instituted without probable cause. In other words, if he were permitted to sue before he had won the first suit he might secure a recovery for the bringing of an action which the court entertaining such cause found to be well brought. 18 R.C.L. 22.

Here the complaint failed to meet the requirements of the foregoing mandatory rule of pleading, in that there is an absence of any appropriate allegation, direct or by way of averments of facts, showing that prior to the commencement of the action the criminal prosecution about which plaintiff complains was finally terminated or brought to an end. The complaint does allege that after preliminary hearing and pursuant to plaintiff's motion based on the ground that there was no testimony or evidence to prove him guilty of the charge, the magistrate dismissed the proceeding and discharged the plaintiff; but such a dismissal does not necessarily end the prosecution of a charge, nor of itself constitute a final termination thereof, for under statutory provisions, and decisions of long standing construing them, there may be a continuation of the prosecution by recharging the accused with the same offense before the same or another magistrate, and thereafter he may be legally held to answer and found guilty in the superior court; or he may be subsequently indicted by the grand jury for said offense and thus placed on trial and found guilty. That such future course is open is not disputed. In fact, plaintiff in his closing brief states: "We freely admit that the discharge we have alleged as a termination of the proceeding was not a bar to a new proceeding against the defendant." Therefore, bearing in mind the elementary rules that a pleading must be construed most strongly against the pleader and that courts are not permitted to indulge in an assumption of the existence of essential facts which the law requires a plaintiff to plead, it is quite evident that the trial court was justified in holding that without the essential affirmative allegation above mentioned the complaint herein failed to state a cause of action. White v. Brinkman, 23 Cal.App.2d 307, 73 P.2d 254; Wilson v. Troy, supra; Carpenter v. Nutter, supra.

It has been suggested that if, following the dismissal by the magistrate, any subsequent proceedings were invoked for the continuation of the prosecution, it would be a matter of defense for the defendants to plead in their answer. But it is a well-recognized requirement in all jurisdictions that before a plaintiff may maintain an action of this kind he "must allege and prove" the final termination in his favor of the prosecution he alleges has been malicious and without probable cause (18 R.C.L. p. 21); and manifestly, to allow a plaintiff to proceed to trial upon a complaint which by timely objection thereto is shown to be fatally defective in its statement of a cause of action would be violative not only of the rights of the defendant but also of a common and well-established rule of practice (Carpenter v. Nutter, supra); and especially would this be true where, as here, the action sought to be maintained is one upon which the law looks with disfavor.

In disposing of a like situation in Carpenter v. Nutter, supra, wherein also the plaintiff failed to comply with the rule of pleading requiring an allegation of the final termination of the prosecution, the court said: "If it had been alleged that the information was dismissed by the court, the facts would have to be alleged in such manner as to show that the dismissal was an end of the prosecution. It is an elementary rule that the allegations of a pleading will be most strongly construed against the pleader. In no case can the court, in face of a demurrer, presume any facts to exist except such as are stated in the complaint. If the plaintiff in this case was in fact discharged by an order of the superior court of San Joaquin county, and the order was such as to end and finally determine the prosecutions under the informations, he could have so alleged in his complaint. He has not done so under the law as we understand it." And so here, if in fact no subsequent proceedings were had against plaintiff following his dismissal by the magistrate, he could have so alleged in the complaint; or having failed so to do he could have asked leave to amend at the time the fatal defect was pointed out on motion for judgment on the pleadings; but no claim is made that such leave was requested. And even though, as seems to be held in some cases from other states, the omission of the element causing the fatal defect in the complaint might be supplied by the answer, the plaintiff herein would be in no better position because the allegations of the answer herein do not touch upon that issue.

In all jurisdictions it is well recognized that under certain circumstances the dismissal by a magistrate of a felony charge for insufficiency of evidence will constitute a final termination of the prosecution sufficient to enable a party to institute an action for malicious prosecution. One of the most common types of this class of cases is where it appears from the allegations of the complaint that the dismissal has been brought about by the voluntary abandonment of the charge by the complainant, or is granted at his request. 18 R.C.L. p. 23. The case of Brown v. Randall, 36 Conn. 56, 4 Am.Rep. 35, serves as an apt illustration of the application of the foregoing doctrine.

However, this is not such a case, for here it is affirmatively alleged in the complaint that the dismissal was granted pursuant to a motion made in that behalf by plaintiff. Then, again, there is that class of cases where, following a dismissal by a magistrate on motion of the accused, the complainant for an unreasonable length of time makes no effort to continue the prosecution of the charge. Where such facts appear it may be deemed that there has been an abandonment of the charge by the complainant, and therefore that the dismissal constitutes a final termination of the prosecution sufficient to entitle the accused to institute an action for malicious prosecution without being compelled to await the running of the statute of limitations against the crime he was charged with having committed. Hartshorne v. Smith, 104 Ga. 235, 30 S.E. 666; Schippel v. Norton, 38 Kan. 567, 16 P. 804. As said in the former case [104 Ga. 235, 30 S.E. 667]: "It is probably true, if, upon the dismissal of the warrant and the discharge of the accused by the magistrate, the prosecutor had abandoned a further prosecution of the accused, or had delayed the same for such an unreasonable time as to lead the accused to believe that he had discontinued the prosecution, the action would lie"; and further on the court said: "As before stated, if a criminal prosecution has been dismissed with no intention of commencing it again, or if delay has been made in commencing the prosecution again, so as to lead the accused to believe that it had been finally terminated, and if he had then and at once commenced his action for a malicious prosecution, he might probably maintain the same." Language almost identical with the foregoing was used also in deciding the case of Schippel v. Norton, supra. But manifestly in this latter class of cases, as in all others, a plaintiff is not relieved of the duty of complying with the universal mandatory rule of pleading requiring him to allege facts from which it is made to appear that there has been a final termination of the prosecution; and for aught the complaint here shows, subsequent proceedings for the continuation of the prosecution may have been instituted after the dismissal by the magistrate, and were in fact pending at the time of the filing of the complaint herein.

As pointed out by Mr. Justice WARD, there is no substantial difference between the present case and the cases of Carpenter v. Nutter, supra, White v. Brinkman, supra, and Wilson v. Troy, supra, except it would seem that here the complaint was more defective than those under consideration there; whereas, on the other hand, the case before us is easily distinguishable from Holliday v. Holliday, 123 Cal. 26, 55 P. 703, for there, in addition to the allegation that the accused was discharged from custody, the complaint went on to allege in terms that "said prosecution is wholly ended and determined", which fairly imports that no further proceedings whatever were had.

The plaintiff relies chiefly upon the case of Hurgren v. Union Mutual Life Ins. Co., 141 Cal. 585, 75 P. 168, but in my judgment the decision therein on the particular point there presented cannot be said to be contrary to the rule hereinabove adverted to, by which the present case must be controlled. The case arose out of the filing and dismissal by the defendant therein of three civil suits, and the determinative issue involved a matter of proof and not a rule of pleading. As shown by the opinion therein, the precise question the court was called upon to decide was whether the trial court was in error in holding as it did, in granting a nonsuit, that an action for malicious prosecution could not be maintained until there had been a determination *on the merits* of the action complained of as being malicious. After stating the issue the court explained that the trial court's view was first sustained by a department decision, but that upon further consideration the court in bank had reached a different conclusion, which was stated in the following language: "* * * it is now the well-established rule that a verdict or final determination upon the merits of the malicious civil suit or criminal prosecution complained of is not necessary to the maintenance of an action for malicious prosecution, but that it is sufficient to show that the former proceeding had been *legally terminated*." In reaching such conclusion the court alluded to and quoted from four or five cases from other states; and in closing its discussion the court said: "There are many other decisions to the same effect, but the foregoing are sufficient to cite here in support of a principle which we deem to be well founded in reason. There are no decisions of this court to the contrary." But obviously the "principle" thus referred to was the principle that it was not essential in order to maintain an action for malicious prosecution that the action claimed to be malicious be first "determined upon the merits"; and it would appear that the decisions from other states from which the court quoted were invoked only by way of argument in support of the conclusion reached by the court on the precise question then before it. Here, however, that principle of law is in no way involved, nor has anyone challenged its soundness. Quite to the contrary, all parties concede that such is the law of this state. To repeat, the question here is one of pleading; and further analysis of the decision in the Hurgren case discloses that the complaint there conformed to the rule of pleading restated and applied in the three principal cases above mentioned. To quote from the opinion itself: "It is averred in the complaint * * * that plaintiff refused to receive the [life insurance] policy or to pay the $103.40 [premium thereon, on the ground that he had not applied for such a policy]; that afterwards defendant brought suit against plaintiff, in a justice's court in Santa Rosa township, county of Sonoma, to recover said last-named sum of money, and that, after plaintiff had appeared in said action, the defendant (plaintiff there) dismissed it; that afterwards defendant brought another similar action in said justice's court; that plaintiff appeared to defend, and that on the day fixed for hearing the cause defendant failed to appear, and the action was dismissed; that afterwards defendant brought a third similar action in the justice's court of the city and county of San Francisco; that the plaintiff again appeared and attended court on the day fixed for trial, and that before that time defendant had dismissed the action." Continuing, the court said: "These averments—under the views above expressed—state a sufficient legal ending of the suits; and, as to the dismissals, the averments are beyond question sustained by the evidence." Thus it will be seen that the complaint there fully complied with the mandatory rule of pleading with which we are here concerned by pleading facts which of themselves were legally sufficient to warrant the court in holding as a matter of law that there had been such a legal ending of the actions claimed to be malicious, namely, an abandonment thereof by the complainant, on three separate occasions, as to justify the filing of the suit for malicious prosecution. Construed, therefore, in the light of the issues there presented and determined, the decision in that case cannot be said to be out of harmony with the doctrine of any of the cases hereinbefore referred to, but to the contrary would seem to be in accord therewith.

It is true that some of the foreign cases quoted from in the Hurgren decision would appear to state a rule implying that instantly upon the dismissal of a charge by a magistrate on motion of the accused for any reason whatever, including defective complaint or insufficiency of evidence, the accused is entitled to file suit and secure a judgment thereon for malicious prosecution, despite the fact that the complainant or the prosecuting officer may continue the prosecution of the identical charge by way of filing a new complaint or indictment by the grand jury. Thus in Casebeer v. Drahoble, 13 Neb. 465, 14 N.W. 397, in a two-page opinion and without setting forth the allegations of the complaint, the court said: "We think the allegations of the petition sufficient as to the termination of the alleged malicious prosecutions. While there is a conflict of authorities, the weight of authority, as well as of reason, is in favor of the position that *the right of action is complete* whenever '*the particular prosecution* be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one.'" (Italics ours.) And in seeking the aid of those cases plaintiff contends that the term "particular prosecution" as there used should be construed to mean the "particular proceeding" then pending against the accused, and that therefore instantly upon the dismissal by a magistrate of an accused on his motion as the result of a preliminary examination "the right of action is complete" upon which the accused may file suit and recover a judgment, regardless of the fact that subsequently and within a reasonable time the complainant or the prosecutor may initiate further proceedings against the accused on the identical charge by filing a new complaint or securing a grand jury indictment. Such, however, is not the universal rule, for cases are to be found in various jurisdictions wherein after such dismissal by the magistrate further prosecution of the identical charge has been initiated by filing a new complaint or securing a grand jury indictment; and in such cases it has been held that pending the determination of the newly initiated proceeding an action for malicious prosecution cannot be maintained. Among the cases so holding is Hartshorne v. Smith, supra. The pertinent part of the decision therein reads as follows:

"It is contended by the defendant in error that his discharge by the magistrate upon the preliminary hearing under the warrant sworn out by the plaintiff in error, was such a termination of the prosecution as that the action to recover damages for a malicious prosecution would lie. In this view, however, under the facts of this case, we cannot concur. It is probably true, if, upon the dismissal of the warrant and the discharge of the accused by the magistrate, the prosecutor had abandoned a further prosecution of the accused, or had delayed the same for such an unreasonable time as to lead the accused to believe that he had discontinued the prosecution, the action would lie. But in the present case it appears that on the 24th day of June, 1893, the prosecutor swore out the warrant against the accused; that on July 8, 1893, the magistrate, after hearing evidence, discharged the accused; and that at the September term, 1893, a Floyd superior court (which was the first sitting of that court after the hearing before the magistrate), the prosecutor, following up the prosecution against the accused, procured the indictment against him, by the grand jury, for the same offense with which he was charged in the warrant previously sworn out. This action on the part of the prosecutor negatived any intention on his part to discontinue the prosecution, and showed that he, with due diligence, was following up and continuing the original prosecution in a court having jurisdiction to try the case upon its merits." Schippel v. Norton, supra [38 Kan. 567, 16 P. 806], is another case of the same kind, the court there saying: "If the criminal prosecution in the present case had been dismissed, with no intention of commencing it again in the district court or elsewhere, or if the delay had been made in commencing the criminal prosecution again, so as to lead the plaintiff to believe that the criminal prosecution had been finally terminated, and if he had then, and at once, commenced his action for malicious prosecution, he might probably maintain the same. But in all reason he should not be allowed to maintain such an action when substantially the same criminal prosecution as the one upon which he founds his action is still in the courts undisposed of." In short, as stated in Newell on Malicious Prosecution, at page 343, "Preliminary examinations of persons charged with violations of the criminal law before magistrates are sometimes terminated by dismissals. In these cases the question as to whether the dismissal is a sufficient termination of the prosecutions or suits complained of as malicious must depend largely upon the circumstances of each particular case." Similar language was used in Apgar v. Woolston, 43 N.J.L. 57 (one of the cases cited in the Hurgren decision), the court there saying: "* * * the rule is universal that no action can be maintained unless the prosecution has terminated in favor of the plaintiff, and that an action for a malicious prosecution is prematurely brought if it be commenced before the criminal prosecution is finally ended. The cases are uniform on that subject. But there is considerable diversity of views with regard to the nature of the decision or determination which shall be considered a final termination of the prosecution. In some cases it has been held that nothing short of a final acquittal will be sufficient; in other cases it has been held that a nolle prosequi by the prosecuting officer will be a sufficient discharge; in others, not." After all, it would seem from an examination of the various cases upon the subject that the most that can be said for the rule stated in Casebeer v. Drahoble, supra, is that it means simply, as held in the Hurgren case, that a determination on the merits of the action complained of is not essential to the filing of an action for malicious prosecution. In any event, it is quite clear that the court in the Hurgren case had no intention of abrogating, overruling or narrowing the decision in Carpenter v. Nutter, supra, because although that case was decided only five years prior thereto, it is nowhere cited in the Hurgren decision; moreover, as pointed out by Mr. Justice WARD, the Carpenter case has since been cited and followed on numerous occasions.

Some apprehension has been expressed that the effect of continuing the doctrine of the three principal California cases hereinabove mentioned will be to open the door to the filing and dismissal by an individual of successive groundless criminal prosecutions against an innocent person without subjecting the complainant to civil liability. But this suggestion overlooks the fact that under the law of this state criminal prosecutions are under the direction, administration and control of duly constituted authorities, and it cannot be presumed that any such abuses would be tolerated, much less authorized.

With respect to the numerous cases in this state wherein judgments for the plaintiff have been affirmed in actions brought after discharge by a committing magistrate or other termination prior to trial on the merits, it would seem sufficient to say that it does not appear from any of them that the question of pleading was raised therein; consequently, in the absence of anything in the opinions showing to the contrary it must be presumed that the complaints therein conformed to the mandatory rule of pleading which the plaintiff here failed to observe. Nor is the case of Harrington v. Tibbet, 143 Cal. 78, 76 P. 816, 817, upon which plaintiff also strongly relies, helpful to him, for there, as shown by the opinion, the complaint alleged, among other things, that after causing the arrest of the plaintiff therein, the complainant "*failed to appear or prosecute the said charge* * * * and the proceeding was finally dismissed, and plaintiff discharged from custody". (Italics ours.)

As stated in the beginning, I join with Mr. Justice WARD in the affirmance of the judgment.

PETERS, Presiding Justice (dissenting).

I dissent from the conclusions reached by both of my associates.

First, as to the opinion prepared by Mr. Justice WARD. It holds that a dismissal of a felony charge by a committing magistrate on the ground that the prosecution failed to offer prima facie proof of the accused's guilt, is not a sufficient termination of the criminal proceeding to found an action for malicious prosecution, even though the criminal proceeding was admittedly instituted with malice and without probable cause. Such a rule cannot be supported by reason or logic, or upon any principle of justice or fair play.

This opinion is predicated upon the premise, frankly stated, that malicious prosecution actions are not favored in this state. Based on this premise, a strained unnatural construction is adopted in order to defeat the cause of action. The basic premise of this formula states the rule too broadly. The courts should, and do, indulge in every reasonable intendment in favor of one who brings a criminal charge against another, in order that punishment of crime shall not be hampered by fear of a citizen that in bringing a criminal charge he may be subjecting himself to civil liability. That is a sound and salutary rule. In determining whether the accuser acted without malice and with probable cause, every reasonable intendment should be indulged in his favor. Stated another way, until malice and lack of probable cause are clearly shown, malicious prosecution actions are not favored in the law. But where it is shown that the prosecution was actuated by malice, and that no reasonable or probable ground existed for the instigation of the prosecution, then the court should be jealous in protecting the reputation and rights of the accused. The very cases cited by Mr. Justice WARD, and particularly the cases of Ball v. Rawles, 93 Cal. 222, 28 P. 937, 27 Am.St.Rep. 174, and Griswold v. Griswold, 143 Cal. 617, 77 P. 672, quoted from in his opinion, demonstrate that this is the proper rule. The courts should not permit a person who is actuated by malice and who acts without probable cause to use the judicial processes so as to ruin the reputation of another, and then grant him immunity from civil liability for the supposed reason that the dictates of public policy require that actions for malicious prosecution should be discouraged. It is just as much a part of the public policy of this state to protect the reputations and credit of its citizens, and to see that their reputations and credit are not attacked maliciously and without probable cause, as it is to see that persons who act without malice and with probable cause shall be protected in bringing criminal prosecutions. The true rule in my opinion, is that, until malice and lack of probable cause are clearly shown, malicious prosecution actions are not favored, but where these elements are shown to exist the courts should be jealous in protecting the rights of the person unjustly and maliciously accused.

Applying this rule of construction to the facts presented on this appeal, there can be no doubt, in my opinion, that the rule stated by Mr. Justice WARD is unsound. Malice and lack of probable cause are alleged in the complaint. This being an appeal from a judgment on the pleadings, for the purposes of this appeal we must conclusively presume that the criminal prosecution was instigated by defendants with malice and without probable cause. The case, so far as the pleadings disclose, is one where the defendants, with malice and without probable cause, by agreement among themselves, caused a complaint to be filed charging plaintiff with the theft of wine of the value of $6,875. Plaintiff was arrested by reason thereof. At the preliminary hearing the defendants were unable to produce even a prima facie case against plaintiff, and the proceeding was dismissed, and plaintiff discharged from custody. The opinion prepared by Mr. Justice WARD holds that, even though such a dismissal was a final determination of the proceedings pending before the committing magistrate, it was not a sufficient final determination to found an action for malicious prosecution, because another complaint could be filed based on the same charges. To constitute a final determination of the criminal proceeding, according to this opinion, the criminal case must be finally determined without legal possibility of revival. That apparently means either that there must be an acquittal on the merits at the trial of the criminal charge, or the statute of limitations must have run on such charge. If that be the rule then the accuser whose conduct is the most reprehensible from a moral standpoint is favored over the accuser whose conduct is less reprehensible. To illustrate: If "A" maliciously and without probable cause accuses "B" of a felony, and his proof is so flimsy that it does not convince the committing magistrate, who dismisses on the ground that the complainant has failed to offer even prima facie proof of the accused's guilt (which is exactly the instant case), then, under the rule stated by Mr. Justice WARD, "A" cannot be held civilly liable in a malicious prosecution action because there is a possibility that another new complaint could be filed based on the same facts. But if "A" produces some evidence before the committing magistrate —sufficient evidence so that the accused is held to answer—and then in the superior court, "B", on conflicting evidence, is acquitted, "A" may properly institute an action for malicious prosecution, if the other requisite elements are present. It seems clear to me that the obvious result of the rule announced by Mr. Justice WARD is to deny a remedy to the accused in those cases where the criminal charge was least justified, and most harmful. Obviously, it is in just such cases, where the evidence is insufficient to warrant holding the accused, that the action is most likely to have been brought without probable cause and with malice.

Another result of the rule announced in this opinion is that one actuated by malice and acting without probable cause may bring successive accusations against an innocent man, and have them dismissed, and be immune from civil liability. The damage is done when the accused is charged and arrested. His subsequent dismissal for lack of evidence does not remedy this damage.

The only justification for the rule announced by Mr. Justice WARD, given in the few cases which have adopted that rule, is that, unless there is a termination which will preclude the possibility of a new action based on the same facts, the accused, after recovery of a judgment in the malicious prosecution suit, might be held guilty of the crime involved in the criminal prosecution. This argument has not been overlooked in those cases adopting the rule advocated in this dissent. It is well-settled that, where a new proceeding is in fact instituted with diligence, an action for malicious prosecution of the first action may not be maintained (the cases are collected in 38 Cor.Jur. p. 443, sec. 93). This qualification of the rule that a discharge by the committing magistrate on the ground of insufficiency of the evidence affords a basis for the malicious prosecution action, affords a sufficient protection against the possibility of conflicting decisions.

Although it must be conceded that there is some authority in other states to support the rule announced in Mr. Justice WARD'S opinion, in most of the cases the pronouncement was dictum. Text writers, the legal encyclopedias, and other legal writers are all agreed that the overwhelming weight of authority, and the soundest legal arguments, support the views advocated in this dissent. Newell on Malicious Prosecution, p. 349, sec. 16; 38 Cor.Jur. p. 442, sec. 92 et seq.; 14 Harv. Law Review, p. 223. In 18 Ruling Case Law, page 23, section 12, the rule is stated as follows: "Some authorities apparently take the view that where the action complained of was a criminal prosecution, nothing less than an acquittal will be a sufficient showing of a successful termination for the plaintiff to support an action for malicious prosecution, but such expressions are believed to be mostly dicta. To require a trial of the action on the merits resulting in an acquittal would be to permit a prosecutor to do all the damage which a malicious prosecution can possibly effect, and then deny the accused the opportunity to vindicate himself by a trial, by having the proceeding quashed or dismissed, and thus escaping all liability for the wrong unlawfully inflicted. So, as a general rule, all that is required is that there be an end to the particular proceeding. That the party can again be brought into court for the same alleged offense will not matter if in order to do this it will be necessary to start afresh. The weight of authority in this country is apparently to the effect that the entry of a nolle prosequi without the procurement or consent of the defendant is such a termination of a proceeding as will support an action for malicious prosecution, though in England and in some of the states the contrary view obtains. In any event it would seem that a nolle prosequi is sufficient if followed by a discharge by the court, and the accused has had no hand in bringing this about. It has also frequently been held that there is a sufficient termination where the action is abandoned either by the prosecuting attorney or the complaining witness. Abandonment of the prosecution with formal discharge of the accused makes a still stronger case. So the discharge of the accused in a criminal proceeding by the committing magistrate has been declared to end the prosecution favorably for him."

The many cases cited to support the above text, and cited by Newell and in Corpus Juris, all hold that there is a final determination of the criminal prosecution when the committing magistrate dismisses for lack of evidence. The basis of this holding is that upon such dismissal that proceeding is forever and finally terminated. Upon such dismissal the committing magistrate has completely exhausted his jurisdiction and power. See People v. Bomar, 73 Cal.App. 372, 238 P. 758. After such dismissal the committing magistrate cannot revive that proceeding or reacquire jurisdiction over it. While a new complaint may be filed based on the same facts, that is a new proceeding and not a revival of the old one.

Mr. Justice WARD recognizes that there is a conflict in authority on this question, but adopts the narrow, and what I consider to be the unfair, rule on the theory that prior decisions of the District Courts of Appeal and of the Supreme Court compel this conclusion. The rule of stare decisis is one of policy, and is inherently sound. There can be no doubt that if it were a fact that the Supreme Court had clearly adopted the rule announced by him, that this court would be legally bound to follow the rule so announced. But where there is a conflict in the decisions of the Supreme Court, this court is free to adopt that conclusion which to it seems sound and reasonable.

What is the status of the California decisions on this question? Apparently the first case discussing the problem is Carpenter v. Nutter, 127 Cal. 61, 59 P. 301, 302. In that case the accused was held to answer, and then, according to the complaint, "he was discharged from custody and the informations dismissed by Hon. Joseph H. Budd, judge of the said superior court". The trial court sustained a demurrer. The Supreme Court affirmed this ruling. The opinion is not clear as to whether it is based on the theory that the allegations in reference to the trial judge's authority to dismiss were deficient, or whether the allegations concerning the final determination were deficient. It is probable, however, that one of the grounds of the decision was that a dismissal by the superior court is not a sufficient basis for a malicious prosecution action. It must also be conceded, so far as the face of the opinion discloses, however, that the court did not consider nor discuss the arguments heretofore mentioned supporting the majority rule. The decision was written by Cooper, a court commissioner, and concurred in by two other court commissioners. Three justices of the court, constituting one department, adopted the opinion. A hearing in bank was denied.

Some five years later the Supreme Court in bank (in Hurgren v. Union Mutual Life Ins. Co., 141 Cal. 585, 75 P. 168) again considered the problem. This was an appeal from a judgment of nonsuit in an action for the malicious prosecution of certain civil suits. The trial court granted the nonsuit on the theory that to found the action there must be a determination of the prior action on its merits—exactly the contention of respondent in the instant case. This view was sustained by a decision of the Supreme Court in department, but a hearing in bank was granted, and on such hearing, the court unanimously repudiated the department decision. The court considered the problem at some length and came to the conclusion that the weight of authority, logic and reason supported the rule that a final determination on the merits of the prior prosecution or civil suit was not necessary to constitute a legal or final determination of the prior action to serve as a basis for the malicious prosecution suit. Among other things, the court stated (141 Cal. at page 587, 75 P. at page 168):

"The learned judge of the trial court granted the nonsuit upon the ground that it had not been shown that the former suits complained of as malicious had been determined *upon the merits* in favor of the defendant therein, and this view was sustained when the appeal was decided here in department. But upon further consideration of the question we are satisfied that, whatever may have been some of the former decisions in England and this country, it is now the well-established rule that a verdict or final determination upon the merits of the malicious civil suit or criminal prosecution complained of is not necessary to the maintenance of an action for malicious prosecution, but that it is sufficient to show that the former proceeding had been *legally terminated.* The fact that such legal termination would not be a bar to another civil suit or criminal prosecution founded on the same alleged cause is no defense to the action for malicious prosecution; otherwise a party might be continuously harassed by one suit after another, each dismissed before any opportunity for a trial on the merits. It is suggested that the plaintiff might commence the suit upon a perfectly good cause of action, and for some legal reason dismiss it, and afterwards bring and successfully prosecute to judgment a second suit; while in the meantime the defendant might have brought and maintained an action for the malicious prosecution founded upon the first action. If such an improbable thing could be imagined, the law would not thereby be changed. But it must be remembered that plaintiff in the action for malicious prosecution must show affirmatively, not only that the action complained of had been terminated, but that it was commenced maliciously, and without probable cause; which could not well be done in the case suggested. The many cases cited in 19 American & English Encyclopedia of Law, p. 681, fully sustain the text, which correctly states the law on the subject, and is as follows: 'It is not easy to lay down in a few words any general rule that would satisfactorily state when proceedings may be regarded as terminated for the purposes of an action of malicious prosecution. It may be briefly said, however, that a prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute proceedings *de novo.*' We will refer briefly to a few of the many cases to the point (the italics are ours): In Clark v. Cleveland, 6 Hill (N.Y.) 344, the court, speaking through Cowen, J., say: 'Nor can it be essentially necessary that there should be an adjudication of the magistrate, or, indeed, any judicial decision *upon the merits by any court.* * * * The technical prerequisite is only that the *particular prosecution* be disposed of in such a manner that it cannot be revived, and the prosecutor must be put *to a new one.* * * The mere discontinuance of a civil suit in any way satisfies the rule.' In Apgar v. Woolston, 43 N.J.L. 57, the court declare (we quote from the syllabus, which correctly states the decision) as follows: 'The law requires only that the particular prosecution complained of shall have been terminated, and not that the liability of the plaintiff for prosecution for the same offense shall have been extinguished, before the action for malicious prosecution is brought. Consequently, the refusal of the grand jury to file an indictment, a nolle prosequi, or any proceeding by which the particular prosecution is disposed of in such a manner that it cannot be revived, and that the prosecutor, if he intends to proceed further, must institute proceedings de novo, is a sufficient termination of the prosecution to enable the plaintiff to bring his action.' In Casebeer v. Drahoble, 13 Neb. 465, 14 N.W. 397, the court say: 'The weight of authority, as well as of reason, is in favor of the position that the right of action is complete whenever the particular prosecution be disposed of in such manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one.' In Casebeer v. Rice, 18 Neb. 203, 24 N.W. 693, a criminal charge had been made by defendants against plaintiff before a county judge, and 'such proceedings were had as resulted in a dismissal of the cause and the discharge of the accused by reason of the failure of the prosecution to give security for costs,' and this was held to be such a determination of the proceeding as to warrant the action for malicious prosecution; the court restating the language used in Casebeer v. Drahoble. In Lytton v. Baird, 95 Ind. 349, the court held that an order quashing an indictment and discharging the defendant was a sufficient termination of the prosecution to warrant an action for malicious prosecution. In Brown v. Randall, 36 Conn. 56, 4 Am.Rep. 35, the court held as follows: 'It is not necessary, to sustain an action for malicious prosecution, that the defendant should be acquitted in the criminal proceeding. It is sufficient that the defendant was discharged without a trial, by a withdrawal or abandonment of the prosecution, not made at his request or by arrangement with him, if the jury should find on the whole evidence that there was want of probable cause.' There are many other decisions to the same effect, but the foregoing are sufficient to cite here in support of a principle which we deem to be well founded in reason."

It is true that the court did not mention its prior decision in the Nutter case, supra, and in fact stated: "There are no decisions of this court to the contrary." 141 Cal. at page 589, 75 P. at page 169. But the fact remains that the Hurgren case is the only case in California where the problem has received exhaustive and careful consideration.

The next case where the problem was discussed is Wilson v. Troy, 19 Cal.App.2d 156, 64 P.2d 1141—the case that the trial court in the instant case, with considerable reluctance felt bound to follow, and upon the authority of which the judgment on the pleadings was granted. The complaint in that action charged defendants with filing a complaint charging plaintiff with burglary. In connection with the termination of that charge the complaint alleged (19 Cal.App.2d at page 157, 64 P.2d at page 1141): "That plaintiff was tried on said charge; and, on the 13th day of May, 1935, the said criminal prosecution of plaintiff terminated in plaintiff's favor and said charge of burglary was, thereupon, dismissed; that on said date the criminal proceedings against plaintiff terminated."

Relying on the Nutter case, supra, and without any reference to the Hurgren case, supra, and adopting a strict rule of construction of the pleadings—a rule, it might be added, out of line with the many recent decisions holding that in the absence of a special demurrer pleadings should be liberally construed to the end that causes may be tried on their merits—the appellate court held the allegation insufficient. A reading of the opinion demonstrates that the court did not consider nor discuss the convincing arguments presented in the Hurgren case.

In White v. Brinkman, 23 Cal.App.2d 307, at page 317, 73 P.2d 254, the court makes the statement quoted in Mr. Justice WARD'S opinion that a termination beyond the possibility of revival is essential. But no cases are cited and no discussion is had concerning the basis or theory of the rule.

In Mr. Justice WARD'S opinion some fifteen Supreme Court cases are cited, starting with Fetterley v. Gibson, 210 Cal. 282, 291 P. 411, and ending with Hibbing v. Hyde, 50 Cal. 206, which, it is implied, sustain the views therein announced. The only one of the fifteen cases cited that at all discusses the point here involved is the Nutter case, supra, which has already been discussed. None of the other fourteen cases is in point. Most of them hold that before a malicious prosecution action may be properly instituted, there must be a termination of the prior civil or criminal action. That rule is fundamental and is not challenged in this dissent. The question here involved is what constitutes such a termination. Not one of the fourteen cases cited is in point on this issue. Most of the cases cited are where the plaintiff in the malicious prosecution suit was found guilty in the prior action, or was found insane, or the prior civil action was still pending. Such cases are obviously not in point, and their holdings have no application to this appeal.

We are thus faced with a situation where one Supreme Court department case and two Appellate Court cases have adopted the narrow, technical, and what I consider essentially unfair inequitable rule, accepted by the majority opinion. In none of these three cases was the problem discussed at length, nor were the convincing arguments advanced in support of the majority rule considered or discussed. As opposed to these cases, there is one Supreme Court case —the only one considered by the court in bank on its merits—where the court, after a full and complete consideration of the problem and of the arguments on both sides, adopted the rule adopted by the majority of other states.

In addition to the Hurgren case, supra, it should be added that there are at least seventeen cases in California where judgments in favor of plaintiffs in malicious prosecution actions were affirmed on appeal, and where, from the face of the opinions, it appears that so far as the legal determination of the criminal prosecutions were concerned, such legal determinations were based upon dismissals of felony charges by committing magistrates. These cases are: Russell v. Dennison, 45 Cal. 337; Williams v. Casebeer, 126 Cal. 77, 58 P. 380; Murphy v. Davids, 181 Cal. 706, 186 P. 143; Burke v. Watts, 188 Cal. 118, 204 P. 578; Fleischhauer v. Fabens, 8 Cal.App. 30, 96 P. 17; Auener v. Norman, 39 Cal.App. 425, 179 P. 219; Braga v. Ponte, 50 Cal.

App. 94, 194 P. 514; Krauskopf v. Brooking, 59 Cal.App. 683, 211 P. 469; Pickering v. Havens, 70 Cal.App. 381, 233 P. 346; Robinson v. McKnight, 103 Cal.App. 718, 284 P. 1056; Green v. Stewart, 106 Cal. App. 518, 289 P. 940; Gooding v. McAlister, 114 Cal.App. 284, 299 P. 774; Mills v. Friedman, 119 Cal.App. 74, 5 P.2d 901; Carroll v. Pacific Coast Auto Ass'n, Inc., 123 Cal.App. 568, 11 P.2d 660; Diggs v. Arnold Bros., Inc., 132 Cal.App. 518, 23 P. 2d 71; Davidson v. De Sousa, 20 Cal.App. 2d 311, 66 P.2d 740; Wood v. Lehne, 30 Cal.App.2d 222, 85 P.2d 910.

While it is true that in none of these seventeen cases did the courts discuss the sufficiency of the termination of the criminal prosecution, nevertheless the effect of Mr. Justice WARD'S opinion is to necessarily hold that these seventeen cases were incorrectly decided, and that the able lawyers and judges—trial, appellate and Supreme—that handled and considered these cases, overlooked an obvious point, that had it been raised would have caused reversals. Certainly, in view of the clear-cut holding in the Hurgren case, supra, and of the negative holding in the above seventeen cases, we can at least say there is a conflict in the opinions of the higher courts of this state. Since that is so, this court is free to adopt what it considers to be the soundest and most equitable rule. If I am sound in this conclusion, and I believe I am, then I believe that reasonable minds cannot differ on which rule should be adopted in this state.

I also disagree with the concurring opinion of Mr. Justice KNIGHT. He takes the position that a dismissal of the criminal case by a committing magistrate may or may not constitute a final determination sufficient to found the action of malicious prosecution, dependent on the facts of each case. Thus, he concedes that, if it had been alleged that the dismissal constituted a "final determination", or that after the dismissal of the criminal charge the complainant had abandoned the prosecution, or that an unreasonable length of time had elapsed after such dismissal without the institution of a new prosecution, then the complaint in the malicious prosecution action would be sufficient. Such a proposition can be supported by neither reason nor authority. Such a rule would violate fundamental rules of pleading. To require the plaintiff to plead the conclusion that the dismissal constituted a "final determination" of the criminal prosecution would be to require him to plead a conclusion of law. Under our system of pleading the plaintiff is required to plead "the facts constituting the cause of action, in ordinary and concise language". Sec. 426, Code Civ.Proc. He is not required or permitted, except in certain types of cases of which this is not one, to plead conclusions of law. Here the plaintiff has pleaded that the criminal prosecution was dismissed by the committing magistrate, and that he was discharged from custody. Those are the facts. Either a dismissal by a committing magistrate is or is not a sufficient termination of the criminal proceeding to found the malicious prosecution action. There is no middle ground. If it is not, it is because as held by Mr. Justice WARD, a dismissal by a committing magistrate, as a matter of law, is an insufficient determination of the criminal prosecution. The inherent unsoundness of that rule has already been discussed. If such facts are sufficient to found the action, as held by the overwhelming weight of authority elsewhere, it is because the dismissal of the criminal prosecution by the committing magistrate, as a matter of law, is a final determination. As already pointed out, the overwhelming weight of authority is to the effect that a dismissal by a committing magistrate is a final determination of that proceeding. If a new prosecution based on the same facts is instituted, that is not a revival or continuation of the prosecution that has been dismissed,—that prosecution has been finally terminated—it is the institution of a new prosecution. The concurring opinion holds that the institution of the new prosecution is a "continuation" of the old prosecution. That is the same misconception that appears in Mr. Justice WARD'S opinion. The new prosecution is neither a revival nor a continuation of the old prosecution—that prosecution has finally terminated. It is a new prosecution.

The fundamental fallacy of the concurring opinion, as I see it, is that it confuses facts which would constitute a defense with the facts constituting plaintiff's cause of action. If, after the dismissal of the criminal prosecution by the committing magistrate, a new prosecution is seasonably instituted based on the same facts, that would clearly be a defense to the malicious prosecution suit. That is all that was held in Hartshorne v. Smith, 104 Ga. 235, 30 S.E. 666, and Schippel v. Norton, 38 Kan. 567, 16 P. 804, so strongly relied upon in the concurring opinion. But the plaintiff in the malicious prosecution suit is not required to anticipate that defense. He is not required to plead that no such new prosecution in fact has not been instituted. To make such a requirement would be to compel him to anticipate a defense in violation of fundamental rules of pleading.

The concurring opinion concedes that several of the foreign cases cited and quoted from with approval in the Hurgren case establish the rule that the cause of action for malicious prosecution is complete upon the dismissal of the criminal prosecution by the committing magistrate. But the concurring opinion states, in effect, that, by quoting from the portions of those cases establishing that rule, the court did not mean to approve or adopt that rule in this state. The reason given for this conclusion is that the court did not cite the department decision of five years before—the Carpenter case, supra. This is clearly a non sequitur. A fair reading of the Hurgren case demonstrates that the court meant to, and did, adopt the rule that upon dismissal by a committing magistrate the cause of action for malicious prosecution is complete. No other conclusion is reasonably possible.

It is my view that the rules advocated by my associates are inherently unsound and unfair, and should not be adopted in this state.

KEY NUMBER SYSTEM

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41 Cal.App.2d 470

MILLER et ux. v. CRANSTON et al.

Civ. 2485.

District Court of Appeal, Fourth District, California.

Nov. 12, 1940.

1. Automobiles ⇨208, 226(2)

A motorist who commenced left turn from far side of highway without seeing that movement could be made in safety and in face of approaching automobile which had right of way and which collided with motorist's automobile after it crossed center stripe, was guilty of negligence proximately contributing to collision and could not recover for injuries. Vehicle Code, §§ 540, 543, 544, 551, St.1935, pp. 184–186.

2. Automobiles ⇨246(58)

Where there was evidence in motorist's action for injuries that motorist attempted left turn from far left side of highway without seeing that the movement could be made in safety in face of an approaching automobile which jury could have found had right of way, and motorist consequently placed himself in a position of danger, it was not error to give instruction embodying statutes regulating making of turns on highway, and informing jury that if motorist violated any of the statutory provisions and such violation was negligence proximately contributing to accident, motorist could not recover. Vehicle Code, §§ 540, 543–546, 551, St.1935, pp. 184–186.

3. Automobiles ⇨246(60)

In motorist's action for injuries sustained in collision when attempting left turn on highway in face of approaching automobile, both parties were entitled to instructions to the effect that mere fact that an accident happened, considered alone, would not support an inference that some party, or any party to action was negligent.

4. Trial ⇨244(4)

Instruction that "mere fact that" an accident occurred raised no presumption that defendant was negligent and that "mere fact that" an accident did occur did not change degree of care required by defendant was not erroneous on ground that use of quoted words on three occasions in same instruction emphasized defendant's freedom from liability which amounted to an instruction on a question of fact.

5. Trial ⇨217

Instruction that action for injuries sustained in automobile collision was between the named parties and that "no insurance company is a party to or interested in this action" was not error as against contention that plaintiff had right to go to jury free from an instruction which told them that no insurance company was interested.

6. Trial ⇨253(4)

Instruction that negligence on part of defendant was of no consequence unless it was the proximate cause of the accident was not error as against contention that instruction should have stated that negligence on part of either plaintiff or defendant was of no consequence unless the proximate cause of the accident.

7. Automobiles 🔑246(58)

Instruction that motorist was required to proceed while in intersection in a careful and prudent manner, and if he failed to exercise such care, even though he originally may have had the right of way across the intersection, and that such negligence if any proximately contributed in any degree however slight to happening of accident, then motorist could not recover was not error as against contention that evidence showed that motorist as a matter of law had right of way.

8. Automobiles 🔑246(58)

In motorist's action for injuries sustained in collision when attempting a left turn on a highway in face of approaching automobile, court properly gave instruction on the doctrine of imminent peril leaving application of doctrine to jury where evidence if believed was sufficient to support rule.

9. Trial 🔑255(11)

In motorist's action for injuries sustained in collision where motorist failed to request an instruction on imminent peril rule, court was absolved from duty of giving such instruction even if applicable.

10. Automobiles 🔑246(58)

Instruction that if situation in which motorist found himself before attempting to make left turn was such as would have compelled a reasonable person under same circumstances to stop and wait for approaching traffic to pass before attempting to cross center of highway then it would have been negligent for motorist to cross center of highway was properly given under evidence.

11. Trial 🔑296(3, 4)

In motorist's action for injuries sustained in collision, a portion of long general instruction on negligence and contributory negligence to effect that only circumstances under which finding for plaintiff could be had was in the event that accident proximately resulted from negligence, if any, of defendant and his negligence alone, if erroneous, was not prejudicial in view of another instruction.

12. Trial 🔑260(1)

The refusal of requested instructions which were covered by other instructions given was not error.

13. Trial 🔑253(9)

In motorist's action for injuries sustained in collision, refusal of proffered instructions on the doctrine of "res ipsa loquitur" was not error where circumstances of accident were fully explained by witnesses and there was no reason for application of the doctrine.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

14. Appeal and error 🔑1068(5)

In action for injuries resulting from automobile collision, plaintiffs were not prejudiced by variance between instruction requested and instructions given on the elements of damage, where question of liability was resolved in favor of defendant.

15. Trial 🔑261

In motorist's action for injuries sustained in collision, refusal of an erroneous instruction as to the care required of defendant in operation of his automobile was not error.

16. Automobiles 🔑243(1)

In motorist's action for injuries sustained in collision, admission of testimony as to whether defendant's wife was rendered unconscious as result of the accident was not error where plaintiffs showed that defendant did not immediately go to aid of motorist and wife after collision.

17. New trial 🔑68

In motorist's action for injuries sustained in collision where there was evidence to support a finding that motorist was guilty of contributory negligence, denial of new trial was not error.

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Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by John T. Miller and wife against George E. Cranston and others, for injuries sustained in an automobile collision. From a judgment for the defendants, plaintiffs appeal.

Affirmed.

Miguel Estudillo, of Riverside, for appellants.

Jennings & Belcher, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for respondent.

GRIFFIN, Justice.

This is an action brought by plaintiffs and appellants to recover damages for personal injuries received by reason of an automobile collision. The case was tried before a court sitting with a jury. The jury returned its unanimous verdict in favor of the defendant and respondent George E. Cranston. The other named defendants sued herein were fictitious. An appropriate judgment conforming to the verdict was entered. A motion for a new trial was denied. Appellants have appealed from the judgment.

On August 5, 1939, at 3 o'clock p. m., respondent was driving his car, accompanied by his wife, in a northerly direction on highway No. 395, in Riverside county, which highway was paved and was approximately 30 feet in width with a shoulder of 7½ feet on each side thereof. Appellant John T. Miller, accompanied by his wife, Blanche M. Miller, was driving his car in a southerly direction on the same highway. Both automobiles were approaching an intersection formed by the entry from the east into highway No. 395 of another public highway known as Murrieta Hot Springs road. This road widens and terminates at highway No. 395, forming a "T", and does not proceed across or through it. As appellant John T. Miller drove along highway No. 395, he intended to make a left turn and proceed in an easterly direction on the Murrieta Hot Springs road. Being apparently uncertain as to whether the intersection in question was the place where he should turn he, upon approaching it, drove his automobile to his right and to the west side of highway No. 395 and stopped his car in order that he might read the direction sign. While he was reading this sign, the right wheels of his automobile were entirely off the pavement and on the gravel shoulder on the west side of the highway. While in this position, Miller read the direction sign and then started his automobile to make a left turn into the Murrieta Hot Springs road. When Miller commenced this turn he did so without making any observation of the Cranston automobile, which was approaching the intersection in full view from the south.

Respondent Cranston testified that he was about 500 feet from the scene of the accident, driving at about 45 miles per hour, when he first observed the Miller automobile, and at that time the Miller car was approaching slowly from the opposite direction and was approximately 50 feet north of the intersection; that when he was 300 feet from respondents he reduced his speed to 35 miles per hour; that Miller drove his automobile to the intersection and stopped at the west edge of the pavement; that as he, Cranston, neared the intersection at about 25 miles per hour, Miller "abruptly" pulled his automobile across the highway to the east and drove the front wheels of his automobile over the center line of the highway; that Cranston, seeing the sudden maneuver in front of him, and inferring that Miller was going on across the road, swung his car to the left; that Miller then stopped his car about 2 feet over the center line and in Cranston's pathway; that he, Cranston, applied the brakes of his automobile, which automobile "slid sideways into the car of Mr. Miller".

As to whether he stopped his car suddenly near the center line of highway No. 395, appellant Miller's testimony, as reflected in his deposition, varies from his testimony at the trial, as appears from an excerpt therefrom:

"Q. Let us refer to page 22 of your deposition, and I will ask you if these questions were asked you, and if you did not make these answers * * * 'Q. Not what your car may have done, or rolled, but what do you remember it doing in that regard? A. As I said, I was very intent in watching the other car in its actions, you know, and I was afraid that car was going to sideswipe me, and I believe my car did roll a few feet forward when I released the pressure on the brakes, and I think I did it unconsciously to get even farther away from the white line, fearing a sideswipe from the car, it weaving as it approached me.' Did you make that answer? A. Yes, I did."

[1] Viewing the evidence most favorable to respondent, it is obvious from the testimony of both Mr. Cranston and Mr. Miller that the latter committed several negligent and dangerous acts. He commenced a left turn from the far left side of the highway and did so without seeing that the movement could be made in safety, and in the face of an approaching automobile which the jury may have rightfully believed had the right of way, and consequently placed himself in a position of danger. From an examination of the record we are convinced that a finding of negligence on the part of appellant John T. Miller, proximately contributing to the happening of the accident, would be amply supported by the evidence. Secs. 540, 543, 544 and 551, Vehicle Code, St.1935, pp. 184–

186; Leek v. Western Union Tel. Co., 20 Cal.App.2d 374, 66 P.2d 1232.

Appellants next complain of ten instructions given at the request of respondent and claim prejudicial error in the refusal of the court to give eight instructions offered by appellants.

[2] Respondent's instruction No. 18 embodied all or portions of sections 540, 543, 544, 545, 546, and 551 of the Vehicle Code. Appellants admit that section 551 was properly given to the jury. They contend, however, that the balance of the Vehicle Code sections included in the instruction were inapplicable to the cause and that the instruction therefore was prejudicially erroneous, citing Gootar v. Levin, 109 Cal. App. 703, 293 P. 706; Adams v. Warren, 11 Cal.App.2d 344, 53 P.2d 780; and Zaferis v. Bradley, 28 Cal.App.2d 188, 82 P.2d 70. We perceive no error. The jury could not have been misled by the instruction as given. The evidence justified the court's action in so instructing the jury. At the conclusion of the instruction the court also properly informed the jury that if plaintiff John T. Miller "violated any of the provisions of the law which I have just read to you, such violation, if any, on his part would be negligence, and if such negligence, if any, proximately contributed to the happening of the accident * * * your verdict must be for the defendant".

[3] Appellants next complain of respondent's instruction No. 5, in which is used the words: "The mere fact" that an accident occurred raises no presumption that the defendant Cranston was in any wise negligent or careless or "the mere fact" that an accident did occur does not change or alter the degree of care required of defendants, contending that by the use of the words "the mere fact", on three occasions in the same instruction the trial court emphasized the defendant's freedom from liability which amounted to an instruction on a question of fact, citing Sullivan v. Market Street Ry. Co., 136 Cal. 479, 69 P. 143. Both parties to this action would have been entitled to an instruction to the effect that the mere fact that an accident happened, considered alone, would not support an inference that some party, or any party, to the action was negligent. Van Derhoof v. Chambon, 121 Cal.App. 118, 125, 8 P.2d 925; Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38.

In Hubbert v. Aztec Brewing Co., 26 Cal. App.2d 664, 688, 80 P.2d 185, 197, 1016, it was held that the "mere fact that an accident has occurred does not of itself result in any inference of negligence as against a defendant".

[4] In Sullivan v. Market Street Ry. Co., supra, where there was no contributory negligence shown, it was held error in that action to give a similar instruction. The rule there cited is not applicable to the facts in the instant case. This same point was decided by this court adversely to appellants' contention in Bramble v. McEwan, Cal. App., 104 P.2d 1054, 1060. We perceive no prejudicial error in the giving of this instruction. Depons v. Ariss, 182 Cal. 485, 188 P. 797.

Respondent's instruction No. 20 was as follows: "In your examination for the purpose of determining your fitness to act as jurors in this case, you were questioned (by counsel for plaintiffs) concerning your interest in any casualty insurance company. This was merely for the purpose of determining your frame of mind. I instruct you that this is a case between John T. Miller and Blanche M. Miller on the one hand, and George E. Cranston on the other. No insurance company is a party to or interested in this action." Appellants agree that no insurance company was a party to the action and that in this respect the instruction was correct, but complain of the added statement that no insurance company was "interested" in the action because the evidence did not disclose whether such a company was or was not interested in the case, and argue that plaintiffs had the right to go to the jury free from an instruction which told them that no insurance company was interested. Except as to the names of the parties litigant, the instruction in question is identical with that given in the case of Brown v. Yocum, 113 Cal.App. 621, 298 P. 845. In that case, upon the same argument now made by appellants, the court affirmed a judgment for the defendants.

[5] In Elmore v. Lassen County, 10 Cal. App.2d 229, 51 P.2d 481, where the defendant asked for an instruction to the effect that no insurance company was a party to or interested in the action, the court struck out the words "or interested in", and as so modified, gave the instruction. The appellate court upheld the trial court's action upon the ground that there was no evidence that any insurance company was or was not interested in the case. While a trial court might be justified in

striking that portion complained of in certain cases, the last-cited case does not change the rule laid down in Brown v. Yocum, supra, which held directly that it was not error to give it under the facts related. It therefore cannot be held to have been given erroneously in the instant case.

[6] Respondent's instruction No. 3 instructs the jury that negligence on the part of the defendant is of no consequence unless it was a proximate cause of the accident. Appellants admit that it is a proper instruction but complain that the instruction is "onesided" and should state that negligence on the part of either the plaintiffs or the defendant is of no consequence unless the proximate cause of the accident, citing Griffith v. Oak Ridge Oil Co., 190 Cal. 389, 392, 212 P. 913. In reply respondent maintains that he is "under no burden to prepare plaintiffs' instructions", and regardless of the fact that "it normally will be assumed that the plaintiffs themselves will request any proper instructions which they may deem essential to their case", that the court in its instructions made it plain to the jury that contributory negligence would not bar a recovery by the plaintiffs unless it was a contributing cause of the accident, and quoted plaintiffs' instruction No. 32, which is to that effect. There is no merit to appellants' contention.

Appellants' objections to respondent's instructions No. 6 and No. 7 have been examined carefully and we likewise find no merit to the objections.

[7] Respondent's instruction No. 13, to the effect that "whether or not you may find from the evidence that the plaintiff Miller at the time he drove into the intersection had the right of way, I instruct you that the plaintiff Miller was required to proceed while in the intersection in a careful and prudent manner * * *" and "If you should find from the evidence that the plaintiff Miller failed to exercise such care and prudence, even though he originally may have had the right of way across the intersection, and that such negligence, if any, proximately contributed in any degree, however slight, to the happening of the accident, then your verdict must be for the defendant" was given. Appellants claim that the evidence shows that Miller was in the intersection while Cranston was 300 feet away and that the court should have instructed the jury that Miller had the right of way as a matter of law, citing Osgood v. City of San Diego, 17 Cal.App.2d 345, 350, 62 P.2d 195; Lee v. Stephens, 8 Cal.App.2d 650, 47 P.2d 1105; Couchman v. Snelling, 111 Cal.App. 192, 295 P. 845; and Page v. Mazzei, 213 Cal. 644, 3 P.2d 11. The instruction given was fully justified under the evidence and the holding in Donat v. Dillon, 192 Cal. 426, 429, 221 P. 193.

[8, 9] Respondent's instruction No. 14, on the "imminent peril rule" was given. Appellants contend, among other things, that under the evidence the rule was not applicable, because respondent was not without negligence on his part, citing Carnahan v. Motor Transit Co., 65 Cal.App. 402, 411, 412, 224 P. 143. Appellants further claim that they were entitled to a similar instruction. The court properly instructed the jury on the doctrine of imminent peril and left the application of the doctrine to the jury under evidence which, if believed by it, was sufficient to support the rule. Cusick v. Boyne, 1 Cal.App. 643, 646, 82 P. 985; Baddeley v. Shea, 114 Cal. 1, 6, 45 P. 990, 33 L.R.A. 747, 55 Am.St.Rep. 56. Appellants did not request a similar instruction. The court was therefore absolved of the duty of giving such instruction, even if applicable. Bramble v. McEwan, supra, Scandalis v. Jenny, 132 Cal.App. 307, 313, 22 P.2d 545.

[10] Respondent's instruction No. 15 reads: "If you should find that the situation in which the plaintiff John T. Miller found himself before attempting to make the left turn was such as would have impelled a reasonable and prudent person under the same or similar circumstances to stop and wait for approaching traffic to pass before attempting to cross the center of the highway, then I instruct you that it would have been negligence for the plaintiff John T. Miller to cross the center of the highway in such a situation." Appellants' complaint is that this is an instruction upon a fact and that there is no evidence to support or justify the inference therein made that Miller found himself in a situation which would impel him as a reasonable and prudent person to wait for approaching traffic to pass, based on the theory that the evidence showed that Miller's car was standing still when struck. The trial court left to the jury the question whether the facts set forth were established. The evidence supports a foundation for the instruc-

tion. On the authority of Baddeley v. Shea, supra; Cusick v. Boyne, supra; and Nilson v. Oakland Traction Co., 10 Cal.App. 103, 101 P. 413, no error appears.

[11] Respondent's instruction No. 21, after correctly defining contributory negligence and proximate cause, added that "the only circumstance under which you may find in favor of the plaintiffs is in the event, and only in the event, you find that the accident proximately resulted from negligence, if any, of the defendant George E. Cranston, *and his negligence alone*". (Italics ours.) Appellants argue that the law does not require the negligence of the defendant to be the sole cause of the injuries in order for plaintiffs to recover, and cite Griffith v. Oak Ridge Oil Co., supra. The case cited completely answers appellants' argument, although it is stated therein that "The law does not require that negligence of the defendant must be the sole cause of the injury complained of in order to entitle the plaintiff to damages therefor. All that is required in either respect is that the negligence in question shall be a proximate cause of the injury complained of * * *." [190 Cal. 389, 212 P. 914.] In affirming the judgment in that case it should be noted in reference to the instruction therein considered, as in the instant case, the language quoted was but a small portion of a long general instruction given on the subject of negligence and contributory negligence which first defined negligence and then correctly set forth the rules as to the burden of proof of negligence and contributory negligence. Then followed the portion above quoted. If the jurors could have had any doubt, after reading that instruction concerning the rule, that doubt must have been dispelled by the many additional instructions given them upon the subject of negligence and contributory negligence in several of which the jurors were told, in effect, that "if you find from the evidence that both the plaintiff John T. Miller and the defendant George E. Cranston were negligent and that the negligence, if any, of both of said parties proximately contributed to the happening of the accident, then your verdict must be for the defendant George E. Cranston". Under the authorities cited the error complained of, if any, was not prejudicial.

[12] Appellants' proffered instructions No. 6 and No. 7, which the court refused to give, involved the right of way rule at an intersection, which was sufficiently covered by other instructions given.

Appellants' proffered instruction No. 8 was sufficiently covered by respondent's instruction No. 13 as given.

[13] Appellants' instruction No. 10 purports to apply the "res ipsa loquitur" rule to the case. They cite Irwin v. Pickwick Stages System, Inc., 134 Cal.App. 443, 25 P.2d 998; Finnegan v. Giffen, 89 Cal.App. 702, 265 P. 496; Ellis v. Jewett, 18 Cal. App.2d 629, 64 P.2d 432; Bauhofer v. Crawford, 16 Cal.App. 676, 117 P. 931; and Roller v. Daleys, Incorporated, 219 Cal. 542, 28 P.2d 345. Under the facts of the instant case the court was justified in refusing to give the proffered instruction on the doctrine of res ipsa loquitur. Keller v. Cushman, 104 Cal.App. 186, 189, 285 P. 399; Curry v. Williams, 109 Cal.App. 649, 652, 293 P. 623. In this case the circumstances of the accident were fully explained by a number of witnesses and there was no reason for the application of the doctrine. Bramble v. McEwan, supra, 104 P.2d at page 1060; Bailey v. Wilson, 16 Cal.App.2d 645, 61 P.2d 68; Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915.

Appellants' proffered instruction No. 14, to the effect that Miller had the right to assume that Cranston would so operate the automobile he was driving as to permit the plaintiff, exercising ordinary care, to proceed without his life, limb or property being in danger, was refused. This instruction was sufficiently covered by appellants' instruction No. 25 as given. That instruction states the rule correctly and applies it to both parties.

[14] Appellants' proffered instruction No. 24 in reference to the compensation that might have been awarded to the plaintiffs for physical and mental pain and suffering was sufficiently covered by appellants' instruction No. 35, which was given. Although there was some variance between the two instructions as to the elements of damage, in view of the verdict of the jury on the question of liability being resolved in favor of the defendant, appellants are not prejudiced.

Appellants' proffered instruction No. 26 was sufficiently covered by respondent's instruction No. 2 on the question of the credibility of witnesses.

[15] Appellants' proffered instruction No. 28 contained matters which were fully

covered by other instructions that were given bearing on the question of the right of way, and in addition thereto contained the following erroneous and confusing statement of law: "If you find that the defendant Cranston did not operate his car as was incumbent upon him to do under the circumstances, that his failure to so operate his car with the care required of him at that time constituted negligence on his part, and that such negligence was the proximate cause of the plaintiffs' injuries." For the reasons already expressed, the instruction as offered was properly refused.

[16] Appellants next complain of certain alleged errors of law claimed to have been committed by the trial judge in admitting certain evidence objected to by the appellants. A portion of that evidence bore on a question propounded to Mrs. Cranston as to whether she was rendered unconscious as a result of the accident. Many reasons could be assigned why the evidence was admissible, one of which would be to account for the reason Mr. Cranston did not immediately go to the aid of appellants but chose to remain and render aid to his wife, which issue had been previously brought out by appellants.

There are other claimed errors bearing on certain questions asked and answers that were given by witnesses which it is argued were self-serving, not responsive, not proper cross-examination, incompetent, immaterial, leading and unintelligible and that the witnesses were not qualified to answer certain questions propounded relative to the speed of the car. Without setting forth the questions and answers in full, suffice it to say we have carefully examined the record and find no prejudicial error in the rulings of the court.

[17] Finally, it is argued that the trial court, after considering all of the claimed errors above specified, erroneously denied appellants' motion for a new trial. Even if it be assumed that respondent was guilty of negligence, the evidence would support a finding that appellant driver was guilty of contributory negligence. In view of the conclusions here reached, the trial court was fully justified in denying to appellants a new trial.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

MOREHEAD v. TURNER et al.

Civ. 6296.

District Court of Appeal, Third District, California.

Nov. 6, 1940.

Rehearing Denied Dec. 6, 1940.

Hearing Denied Jan. 2, 1941.

1. Pleading ⚷420(2)

Where defendants, in action for accounting, failed to demur to amended complaint, there was a "waiver" by them of any right to a more specific description of the property for which they were compelled to account.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

2. Pleading ⚷252(2)

An amended complaint supersedes the original complaint, and it furnishes the sole basis of the cause of action.

3. Pleading ⚷254, 420(2)

If defendants seek to avail themselves of a defective description of property involved in a suit for an accounting, or of an alleged uncertainty or ambiguity in the complaint, it is necessary for them to renew their demurrer to the complaint after it is amended, or there will be a "waiver" of the defects.

4. Pleading ⚷12

In a suit for accounting for personalty, brought by the executor of an estate against those who have possession of the property, wherein it appears from the complaint that the defendants have knowledge of facts or of the description of the property involved and the executor lacks the means of securing a more particular description, a demurrer for uncertainty with respect to the property does not lie.

5. Pleading ⚷12

In a suit for accounting, the pleader is not required to state specifically facts peculiarly within the knowledge of the opposite party.

6. Gifts ⚷49(6)

In action by executor to compel nieces of deceased to account for securities belonging to the estate, wherein the nieces contended that the deceased had made a gift of the securities to them before her death, evidence supported judgment for the executor.

7. Appeal and error ⚷994(3)

The determination of the credibility of witnesses in accounting suit was the sole province of the trial judge.

8. Gifts ⚷18(2)

To consummate a "gift" of personalty without consideration, under the statute, it is necessary that there shall be an immediate surrender of the article which is the subject of the gift, together with all dominion and control over it, and, if dominion and control over the gift is retained by the donor until his death, it becomes merely an unexecuted and unenforceable promise to make a future gift. Civ.Code, §§ 1146–1148.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

9. Gifts ⚷18(2)

If a donor reserves the right of dominion and control over property given, it is fatal to the legality of the gift. Civ.Code, §§ 1146–1148.

10. Appeal and error ⚷1073(1)

Order and judgment in accounting action that defendants should deliver certain shares of stock to the plaintiff, though the shares had already been delivered by the defendants to the plaintiff, was harmless.

◆

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by J. F. Morehead, as executor of the last will and testament of Missouri E. Clark, deceased, against Elma Turner and Elsa Boydstun, for an accounting for certain stocks, bonds, notes, and collaterals belonging to the estate, in the hands of the defendants. From an adverse judgment, the defendants appeal.

Judgment modified and, as modified, affirmed.

Clarence H. Wilson, of Hanford, and Hubert I. Townsend, of Oroville, for appellants.

Grayson Price and Ware & Ware, all of Chico, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The executor of the last will of Missouri E. Clark, deceased, brought suit against the defendants for an accounting for certain stocks, bonds, notes and collaterals belonging to the estate, in the hands of the defendants. The answer alleges that the property in question was given to the defendants by the testatrix in her lifetime. The court determined that no gift of the property or any part thereof was made to the defendants or either of them and rendered judgment against them for delivery of the property, together with the value of such portion thereof as had been disposed of or appropriated to their use. From that judgment this appeal was perfected.

It is contended the amended complaint fails to adequately describe the property in question; that the findings and judgment are not supported by the evidence, and that the judgment is not supported by the findings.

A general and special demurrer to the original complaint was sustained as to the first count of that pleading, an amended complaint, couched in five separate counts, was subsequently filed. The second count charged that certain "sums of money, shares of corporate stock, bonds, certificates of building and loan associations and other securities", the character and amounts of which were unknown to the plaintiff, but known to the defendants, aggregating the value of $5,000, were entrusted by Missouri E. Clark during her lifetime to the defendants "for the purpose of keeping and preserving" said property for her; and that Mrs. Clark died possessed of that property; and upon demand therefor by the executor of her estate the defendants neglected and refused to deliver to him said property or any part thereof. No demurrer to the amended complaint was filed. The defendants answered the amended complaint, denying the material allegations thereof, and affirmatively asserting that the property in question was given by the deceased to the defendants.

Missouri E. Clark was a widow eighty-two years of age, residing in her own home at Chico. She was possessed of both real and personal property. The executor, Mr. J. F. Morehead, is a nephew of the deceased. He was formerly president of the Savings and Commercial Bank of Chico. The defendants are nieces of the deceased. Elsa Boydstun was a school teacher who resided at Chico. Elma Turner lived at Oroville. Both of the defendants are daughters of a brother of the deceased. There are many other nieces and nephews of the deceased. In October, 1935, Mrs. Clark conveyed her home in

Chico by deed to Elsa Boydstun. In the spring of 1935, Mrs. Clark handed to her niece, Elma Turner, a package containing the notes, bonds and collaterals in question. They were placed in a safe deposit box belonging to the custodian. The following spring Mrs. Clark fell and broke her hip, as a result of which she died April 28, 1936. Her nephew, J. E. Morehead, was appointed and qualified as executor of her last will. As such executor, he promptly demanded of the defendants the custody and possession of the personal property entrusted to their care by the deceased, which they refused, claiming that the property, with the exception of one $1,500 note executed by A. H. Sanborn, was given to Elsa Boydstun by the deceased in her lifetime. This suit for an accounting was then commenced.

The court found that Missouri E. Clark entrusted to her niece Elma Turner as her agent, for safe keeping, to be returned to her upon demand the following property:

Two mortgage gold bonds of the face value of $500 each of the Washington-California Company, due September 1, 1944; two Miller & Lux bonds of the face value of $1,000 each, due in 1935, and 1945, respectively; one Yosemite Lumber Company bond of the value of $500, due January 1, 1940; 250 shares of the capital stock of the Equitable Credit Company of Delaware; 50 shares of the capital stock of Peoples Savings and Commercial Bank of Chico; one promissory note of $1,500 executed by Roy Uhl and secured by Coos Bay Lumber Company stock, and one $1,500 note executed by A. H. Sanborn.

The court further found that the two Washington-California Company mortgage gold bonds of $500 each, upon demand, were duly surrendered to the executor; that the Uhl note of $1,500 matured and was surrendered to the deceased in her lifetime; that the Yosemite Lumber Company bond of $500 was sold by Elma Turner for $622.43 which sum was paid to and appropriated by Elsa Boydstun; that the $1,500 Sanborn note was endorsed by the decedent in her lifetime to Elma Turner, as her agent, for the sole purpose of collection; that all of the property, except the two Washington-California Company bonds and the Uhl note, were wrongfully retained and appropriated by the defendants.

The court specifically found that none of the property in question was given by Mrs. Clark to the defendants, or either of them, and upon the contrary that they had wrongfully retained and appropriated all of said property to their use; that they had received from the Yosemite Lumber Company bond, at the time of its redemption, the sum of $622.43 and from the two Miller & Lux bonds the further sum of $2,000, the reasonable value thereof, which sums they failed and refused to account for, and that they now retain and refuse to deliver to the executor the remaining property belonging to the estate, consisting of the Sanborn note, the Coos Bay Lumber Company stock, 250 shares of the stock of Equitable Credit Company of Delaware and 50 shares of the stock of Peoples Savings and Commercial Bank of Chico. Judgment was thereupon rendered against the defendants for damages in the sum of $2,622.43, and for immediate return and delivery to the executor of the said property in their possession. From that judgment this appeal was perfected.

[1-3] The defendants waived their objection to a more specific description of the property which was involved in the accounting by their failure to demur to the amended complaint. A general and special demurrer to the original complaint was sustained as to the first count. An amended complaint couched in five separate counts was filed. No demurrer to the amended complaint was presented. It has been definitely held an amended complaint supersedes the original complaint and that it furnishes the sole basis of the cause of action. If the defendants seek to avail themselves of a defective description of property involved in a suit for an accounting or of an alleged uncertainty or ambiguity in the complaint it is necessary for them to renew their demurrer to the amended pleading or the defects will be waived. Morris v. Hartley, 26 Cal.App. 61, 69, 146 P. 73; Marsh v. Lapp, 180 Cal. 231, 180 P. 533; 21 Cal.Jur. 275, sec. 192.

[4, 5] Moreover, in a suit for accounting for personal property brought by the executor of an estate against defendants who have possession of the property, when it appears from the complaint that the defendants have knowledge of facts or of the description of the property involved, and the plaintiff lacks the means of securing a more particular description, a demurrer for such uncertainty does not lie. Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 P. 1025, 67 P. 759. In a suit

for accounting the pleader is not required to specifically state facts peculiarly within the knowledge of the opposite party. Brea v. McGlashan, 3 Cal.App.2d 454, 459, **39 P.** 2d 877.

[6] The judgment is adequately supported by the evidence. The evidence does not show that Mrs. Clark made a gift of the property to Elsa Boydstun in 1934. All that she testified to was that her aunt said to her "I want you to have my securities." She did not then use language indicating a present conveyance of title. She did not hand her the documents. She did not even show her the package containing the instruments. She did not tell Miss Boydstun what "securities" she wished her to have. They were then kept by Mrs. Clark in a tin box in her own possession. There was no acceptance of the purported gift. Miss Boydstun thanked her and replied "I could not take them." She added that she did not have a deposit box in which to keep them. Certainly that transaction fails to show a consummated gift of unidentified securities.

[7] There is ample evidence to support the court's findings that the instruments were not given by Mrs. Clark to Elma Turner for her sister, Elsa Boydstun. Elma Turner testified that in the spring of 1935 her aunt handed her the package of documents and "told me to take them and keep them for Elsa, and I asked her when she wanted me to give them to her, and she said, 'now'". Upon being asked when she actually handed them to her sister, Elma said "when she (Elsa Boydstun) came over after her aunt's death". The very statement of the aunt regarding her intention is conflicting. First Elma said her aunt told her she wanted her to *"keep them* for Elsa". When she was asked when she wanted her to give them to Elsa she replied, "now". Yet the documents were not given to Elsa Boydstun until after the death of Mrs. Clark. It was the sole province of the trial judge to determine the credibility of the witnesses. He found that the instruments were handed to Elma Turner to hold as the agent of Mrs. Clark. The evidence shows that the two Miller & Lux bonds of $1,000 each were not included in the package handed by Mrs. Clark to Elma Turner in April or May, 1935. It appears those bonds had been lost and that the company issued new certificates to Mrs. Clark in the summer of 1935. Mrs. Clark gave a bond to secure her good faith in claiming that the bonds had been lost. Mrs. Clark paid the premium on that surety bond. Interest on those bonds was subsequently paid by the company to Mrs. Clark. She received the entire income from those bonds to the time of her death in April, 1936.

The evidence further shows that in November, 1935, the Yosemite Lumber Company wrote Mrs. Clark, telling her that their bonds held by her would be redeemed and paid January 1, 1936. Her nephew, Mr. Morehead, called upon his aunt in that regard. She instructed him to collect the money due on those bonds. When he told her, "I will have to have the bonds" to collect the money due, she replied, "You will have to call up Elma and get them, *because she is taking care of it for me."* Morehead testified that he called Elma and told her what their aunt had said regarding the bond; that she then made no claim that the bond belonged to her sister, and that she never made any such claim prior to the death of Mrs. Clark. But Elma did not send him the bond. On the contrary, she delivered it to a bank for collection, and paid the money received therefrom to her sister on August 11, 1936, after the death of their aunt. Elma received the sum of $622.43 on that transaction.

The subsequent conduct of Mrs. Clark with respect to the Sanborn and Uhl notes of $1,500 each is in conflict with the defendants' contention that the entire package of instruments, including those two notes, was handed to Elma Turner in the spring of 1935, to be immediately transferred as a gift to Elsa Boydstun. It is conceded the package did contain those two notes. But the following transaction indicates that Mrs. Clark did not intend to give those notes to the defendants or either of them. In fact, the answer which was filed in this case alleges that the Sanborn note was assigned to Elma Turner to collect for Mrs. Clark and that "the proceeds were to be paid to Henry Boydstun and Henry Hansen", two other nephews of the deceased. In the fall of 1935, the Uhl note matured and it was paid to Mr. Morehead at the request of Mrs. Clark, and accounted for by him in the estate. The note was procured from Elma and surrendered. The proceeds therefrom were retained by Mr. Morehead at the request of Mrs. Clark, and subsequently accounted for in the estate proceedings. Roy Uhl testified that he went with Mr. Morehead to see Mrs. Clark about paying the note; that she then said to Mr. Morehead: "Frank, I want you to go and get my stuff from her (Elma Turner) * * * I am afraid she might be planning to do something" with it. When the Uhl note was paid, Mrs. Clark said to her nephew, Mr. Morehead: "Now, Frank, I want you to take care of this (money) for me."

The allegations of the answer refute the possibility that the Sanborn note was delivered to Elma Turner to be immediately given to Elsa Boydstun, in spite of the fact that it was contained in the same package, and no reservation with respect to that note was made by Mrs. Clark when she handed the package to her niece. Elma Turner testified that: "She (Mrs. Clark) said that $1000.00 was to go to Jim (Boydstun) from Roy's note, and $500.00 of Roy Uhl's note was to go to Henry Hansen." On the contrary, Elsa Boydstun testified that her aunt had told her that Henry and Jim Boydstun were each to get $1,500. The inference is that they were to get that sum from the two $1,500 notes entrusted to the care of Elma Turner, which refutes the theory that either of those notes was given to the defendants, or either of them.

Another circumstance occurred which is inconsistent with the defendants' claim that the instruments were given to Elsa Boydstun. April 30, 1937, after the appointment of the executor of the estate of Missouri E. Clark, deceased, his attorney wrote to Miss Boydstun demanding the immediate delivery of all stocks, bonds, certificates, notes and securities, as property belonging to the estate. In compliance with that demand, Mr. Townsend, who was then her attorney, wrote a letter to the executor's attorney, enclosing the two Washington-California bonds of $500 each, together with the certificates of stock in the People's Savings and Commercial Bank of Chico. Neither the defendants nor their attorney then made any claim that those instruments were given or belonged to either of the defendants. Yet those instruments were also enclosed in the package of documents which it is claimed were given to Elsa Boydstun.

Several witnesses testified to acts and declarations of Mrs. Clark, made after she broke her hip and while she was in a hospital, which are inconsistent with the theory that any of those instruments was given to the defendants or either of them. The record abundantly supports the findings of the court that a gift of the instruments was never made or intended to be made by the deceased to the defendants or either of them.

[8, 9] It is a uniform rule that to consummate a gift of personal property without consideration, under sections 1146–1148 of the Civil Code, it is necessary that there shall be an immediate surrender of the article which is the subject of the gift, together with all dominion and control over it. If dominion and control over the gift is retained by the donor until his death, it becomes merely an unexecuted and unenforceable promise to make a future gift. Beebe v. Coffin, 153 Cal. 174, 94 P. 766; 13 Cal.Jur. 40, sec. 7. In Azevedo v. Azevedo, 1 Cal.App.2d 504, 36 P.2d 1078, it is said an intention to make a gift is an essential element to consummate the gift. If the donor reserves the right of dominion and control over the property, it is fatal to the legality of the gift. 13 Cal.Jur. 36, sec. 4. The record in this case abounds with evidence that Mrs. Clark did not intend to give the package of instruments to her nieces, and on the contrary, that she did reserve and exercise the right of dominion and control over the documents.

The cases relied upon by the appellants in support of their contention that an absolute gift of the instruments was made to her nieces may all be reconciled by the differences between the facts of those cases and the circumstances of the present case. We think those authorities do not control in the present case.

We have carefully examined the findings which were adopted by the court in the light of the judgment which was rendered, and with one immaterial exception we are of the opinion the findings fully sustain the judgment.

[10] The exception previously mentioned has reference to the order in the judgment for the defendants to forthwith deliver to the executor the fifty shares of the capital stock of the People's Savings and Commercial Bank of Chico. It appears, as we have previously stated, that, in response to a demand for the instruments, the bank stock shares were delivered to the executor just after the commencement of this suit. The record shows that the bank failed in 1933, and that the stock was valueless. But

the order of the judgment to surrender those shares is harmless, for it has already been accomplished.

The judgment is, however, modified by striking therefrom the order for the delivery of the fifty shares of bank stock.

As so modified the judgment is affirmed, respondent to recover costs on appeal.

We concur: PULLEN, P. J.; TUTTLE, J.

SEFTON v. SAN DIEGO TRUST & SAVINGS BANK et al.

Civ. 2382.

District Court of Appeal, Fourth District, California.

Nov. 7, 1940.

As Modified on Denial of Rehearing

Dec. 4, 1940.

Hearing Granted Jan. 6, 1941.

1. Creditors' suit 🔑13

A "creditor's bill" is an extraordinary proceeding in equity and can only be resorted to after a judgment creditor has exhausted all his legal remedies and has failed to collect his judgment, or it is made to appear that legal remedies would be unavailing.

See Words and Phrases, Permanent Edition, for all other definitions of "Creditor's Bill".

2. Creditors' suit 🔑4

A "creditor's bill" is ordinarily used only in a case where judgment debtor has property which judgment creditor cannot subject to the lien of his judgment by means of any ordinary remedy at law.

3. Divorce 🔑276(4)

Evidence supported trial court's finding that trust, made by husband for benefit of another prior to divorce proceedings, in which husband was named as trustee, was made in good faith, that husband did not place any of properties therein with intent to hinder, delay, or defraud wife who had recovered judgments against husband for default in payments pursuant to property settlement, and that wife had no equitable lien upon any of properties of trust for payment of her judgments.

4. Divorce 🔑276(4)

Proof of husband's management of trust, made by husband for benefit of another prior to divorce proceedings, in which husband was trustee, did not demonstrate that husband personally owned property in trust and only used trust as a cover for his operation to prevent wife, who had recovered judgments against husband for default in payments pursuant to property settlement, from subjecting the properties to payment of her judgments, though it was established that husband determined when securities belonging to trust should be sold and when and what others should be purchased, where it appeared that profits from the transactions went into the trust.

5. Trusts 🔑324

The right of a trustee to reimburse himself from trust for school expenses of beneficiary after trustee had paid them could not be raised by one who was not a party in interest and who had no interest in trust or any of its assets.

6. Trusts 🔑9

Where owner of stock in company created a trust in which a bank was named as trustee and in which owner himself was named as beneficiary, and there was no evidence that placing properties in trust rendered owner bankrupt or was an act of bankruptcy, the declaration of trust vested legal title to the stock in the trustee with equitable beneficial interest vested in owner.

7. Fraudulent conveyances 🔑86, 115(1)

A pre-existing debt is sufficient "consideration" to support a transfer of property, and, when such a transfer is made to one creditor, ordinarily it cannot be attacked by another even though transfer rendered debtor insolvent. Civ.Code, § 3432.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

8. Fraudulent conveyances ⚿115(1)

The statutory right of a debtor to prefer one creditor to another is based upon principle that in absence of fraud owner may do with property as he pleases. Civ. Code, § 3432.

9. Fraudulent conveyances ⚿115(1)

Debtor's preference of one creditor is not rendered void by fact that it hinders or delays other creditors with knowledge of preferred creditor. Civ.Code, § 3432.

10. Fraudulent conveyances ⚿110(1)

If a transfer which appears to be a lawful preference is made with actual fraudulent intent that transfer shall be a mere simulated transfer, and that grantor shall retain full beneficial interest, the fraudulent intent will vitiate the transfer. Civ.Code, § 3432.

11. Fraudulent conveyances ⚿115(1)

The statute in permitting preferences contemplates that a preference may hinder or delay one creditor and favor another. Civ.Code, § 3432.

12. Corporations ⚿1

To establish the "alter ego" doctrine, it must be shown that the stockholders disregarded the entity of the corporation, made corporation a mere conduit for the transaction of their own private business, and that the separate individualities of the corporation and its stockholders in fact ceased to exist.

See Words and Phrases, Permanent Edition, for all other definitions of "Alter Ego".

13. Divorce ⚿276(4)

Evidence failed to establish that corporation was but the "alter ego" of two stockholders owning all of the stock, and hence assignment by one of stockholders to corporation of his interest in a trust as security for loan made by corporation to stockholder, which assignment was made prior to stockholder's divorced wife recovering judgments for default in payments pursuant to property settlement, created a valid lien on trust fund prior to wife's lien, as against contention that assignment was in reality a preference made to stockholder himself. Civ.Code, § 3432.

14. Trusts ⚿58

Where mother created trust, the corpus of which was 1,500 shares of stock in company, in which beneficiaries named were herself, her son and grandchildren, and it appeared that at time of execution of the trust mother owned only a life interest in the stock and son was actual owner, a purported amendment of declaration of trust made by son after mother's death did not have effect of establishing a new trust in terms of old as amended by purported amendment, where amendment was not in itself a sufficient declaration of trust and, considering original declaration of trust and amendment together, beneficiaries were not designated with reasonable certainty. Civ. Code, § 2221.

15. Divorce ⚿271
Trusts ⚿140(3)

Where mother created trust, the corpus of which was 1,500 shares of stock in company, in which beneficiaries named were herself, her son and grandchildren, and it appeared that at time of execution of trust mother owned only a life interest in stock and son was actual owner, son became owner of entire estate in stock free from trust upon mother's death, and hence stock was subject to lien of judgments recovered by son's divorced wife for default in payments pursuant to property settlement.

16. Divorce ⚿271

Where trustor created trust, the corpus of which was 1,000 shares of stock in company, in which trustor was to have beneficial interest during her lifetime, and after her death her son and another, as joint tenants with right of survivorship, were to be immediate beneficiaries, son's beneficial interest in trust after mother's death was subject to lien of judgments recovered by son's divorced wife for payments pursuant to property settlements.

Appeal from Superior Court, San Diego County; Frank J. Macomber, Judge.

Action in nature of a creditor's bill by Helen Thomas Sefton against San Diego Trust & Savings Bank, Joseph W. Sefton, Jr., Minna Gombel Sefton, Thomas W. Sefton, and the Sefton Investment Company, and others, to subject to the liens of two judgments the assets of four trusts in which Joseph W. Sefton, Jr., was either trustor or a beneficiary, or both. From judgment entered, the plaintiff and named defendants appeal.

Judgment in accordance with opinion.

Charles C. Crouch, of San Diego, and George W. Crouch, of Los Angeles, for plaintiff.

Luce, Forward, Lee & Kunzel, of San Diego, for defendants.

MARKS, Justice.

This is an action in the nature of a creditor's bill to subject to the liens of two judgments the assets of four trusts in which Joseph W. Sefton, Jr., was either trustor or a beneficiary, or both. The San Diego Trust & Savings Bank was the trustee of each of the trusts. We will designate each by the number it bore on the books of the bank, namely, Trust No. 1, Trust No. 51, Trust No. 255 and Trust No. 256. It will also be necessary to consider Trust No. 93 in which Joseph W. Sefton, Jr., was trustor, the San Diego Trust & Savings Bank was trustee and Helen Thomas Sefton was beneficiary.

Plaintiff and Joseph W. Sefton, Jr., were married more than thirty years ago. An interlocutory decree of divorce was rendered in 1927 and a final decree in 1928. On January 26, 1928, before the entry of the final decree, the parties entered into a contract settling their property rights wherein Joseph W. Sefton, Jr., agreed to pay to plaintiff five hundred dollars per month during her lifetime, payments to terminate on her remarriage. Trust No. 93 was created to secure these payments to plaintiff.

Payments were made regularly under the contract until January 1, 1933. On November 18, 1932, plaintiff, in writing, agreed to a reduction of the payments to three hundred dollars per month for eighteen months, commencing in January, 1933. By another written contract dated August 30, 1934, she agreed to accept two hundred dollars per month for one year, commencing on September 1, 1934. Another written contract extended these provisions for a second year commencing on September 1, 1935. These reduced payments were made and accepted according to the terms of these contracts. Without written authorization Mr. Sefton continued making the payments of two hundred dollars per month for three or four months after September 1, 1936. Thereafter plaintiff brought suit against Mr. Sefton to recover the amount of the delinquent payments and on September 7, 1937, recovered judgment against him for $5,265.40. Execution was issued and returned unsatisfied. Supplemental proceedings were had and the only relief given plaintiff was permission to file an action in the nature of a creditor's bill to subject Mr. Sefton's assets to the lien of the judgment.

This action in the nature of a creditor's bill was filed on March 17, 1938. The foregoing facts were alleged. It was also alleged that the San Diego Trust & Savings Bank was indebted to Joseph W. Sefton, Jr., in an amount unknown to plaintiff; that it had in its possession property belonging to him consisting largely of stocks, bonds and promissory notes; that the bank denied any indebtedness to Joseph W. Sefton, Jr., and claimed an interest in the property it held by reason of the four trusts designated as Trusts No. 1, No. 51, No. 255 and No. 256. The terms and conditions and corpora of the four trusts were alleged very generally.

Near the close of the trial and on November 29, 1938, plaintiff, with leave of court, filed amendments and a supplement to her complaint. She alleged that on July 7, 1938, she had recovered a second judgment against Joseph W. Sefton, Jr., in the sum of $1542.21, which was wholly unpaid; that Joseph W. Sefton, Jr., had admitted under oath "that he is insolvent, and that he has no property or assets available for the payment of the judgment sought to be collected herein, or any part of the same"; that in the republication of Trust No. 1, on November 25, 1932, and in the formation of Trust No. 255, and in the administration of both trusts, Joseph W. Sefton, Jr., sought to hinder, delay and defraud plaintiff who was his creditor; that an assignment of the corpus of Trust No. 51 was made with the purpose and intent on the part of Joseph W. Sefton, Jr., Sefton Investment Company and San Diego Trust & Savings Bank to hinder, delay, cheat and defraud plaintiff and to prevent her from collecting her debts from Joseph W. Sefton, Jr.; that the assignment was made without any consideration; that he was not indebted to the Sefton Investment Company. The original complaint contained no allegations of fraud. Only the assignments of the corpus of Trust No. 51, not its creation, was attacked.

The Sefton Investment Company was a corporation organized by Joseph W. Sefton, Sr. He was the father of Joseph W. Sefton, Jr., and Lena Sefton Clark and the then husband of Harriet Sefton Campbell who remarried after his death. Its capital stock was divided into five thousand shares of the par value of one hundred dollars each and was owned by Joseph W. Sefton, Sr., up to the time of his death. We are not informed of their exact ownership immediately following his death and the distribution of his estate. The evidence indicates that in 1914, Harriet Sefton Campbell owned 1500 shares and Joseph W. Sefton, Jr., and Lena Sefton Clark owned one thousand shares each. At the time of the trial one thousand shares were in the corpus of Trust No. 51, 1500 shares were in the corpus of Trust No. 255, and 2500 shares were owned by Lena Sefton Clark.

[1, 2] We should briefly consider the nature of a creditor's bill and the circumstances under which it may be brought. It is an extraordinary proceeding in equity and can only be resorted to after a judgment creditor has exhausted all his legal remedies and has failed to collect his judgment or it is made to appear that legal remedies would be unavailing. Ordinarily execution must have been issued and must have been returned unsatisfied and the judgment creditor must have unsuccessfully invoked the power of the court through supplemental proceedings. In other words, it is ordinarily used only in a case where the judgment debtor has property which the judgment creditor cannot subject to the lien of his judgment by means of any ordinary remedy at law. 7 Cal.Jur. 788 et seq.; Herrlich v. Kaufmann, 99 Cal. 271, 33 P. 857, 37 Am.St.Rep. 50; Matteson, etc., Co. v. Conley, 144 Cal. 483, 77 P. 1042; Shafer v. Fisher, 85 Cal.App. 43, 258 P. 651; McCutcheon v. Superior Court, 134 Cal.App. 5, 24 P.2d 911; Smedberg v. Bevilockway, 7 Cal.App.2d 578, 46 P.2d 820.

In our study of this rather involved case we have found it convenient to consider each of the several trusts separately. No one trust was, in its inception, dependent on any of the others. The validity of each trust depends to a certain extent on the manner and method of its creation. We will therefore consider each trust separately.

Trust No. 93.

This trust had its origin in a contract between plaintiff and Joseph W. Sefton, Jr., and a declaration of trust in which Joseph W. Sefton, Jr., was trustor, the San Diego Trust & Savings Bank, trustee, and Helen Thomas Sefton beneficiary, with Joseph W. Sefton, Jr., a contingent beneficiary. Both documents were dated January 26, 1928, and must be considered together as parts of one transaction.

The contract provided for the division of the property of plaintiff and Joseph W. Sefton, Jr., and for the support of plaintiff. Joseph W. Sefton, Jr., agreed to pay her five hundred dollars per month during her lifetime or until she remarried. It provided for the creation of a trust to secure these payments by Mr. Sefton depositing one hundred thirty-five shares of stock in trust in the San Diego Trust & Savings Bank. This stock was given the value of sixty thousand dollars at that time. It also made provision that Joseph W. Sefton, Jr., should, in his will, make provision for the conveyance from his estate into the trust of additional property having a net cash value of sixty thousand dollars. It was also provided that the payments of five hundred dollars per month should be and remain a charge against the estate of Joseph W. Sefton, Jr., "until said additional property is or has been transferred to said San Diego Trust & Savings Bank". The contract also contained the following: "It is further agreed that the payments herein agreed to be made by said party of the second part (Mr. Sefton) are legal obligations of indebtedness of said party of the second part to said party of the first part (Mrs. Sefton), and that if he shall fail to make any of said payments at the time and in the amounts as herein provided, and notwithstanding any other right or rights the party of the first part may have to enforce said payments, she shall have in addition thereto the right to collect said payments, or any part thereof, by legal or equitable action from any earnings and property of the party of the second part, including the property which is herein declared to be the separate property of said party of the second part."

The declaration of trust was duly drawn and executed and the one hundred thirty-five shares of stock were deposited with the trustee. It contained the following: "In the event the said Helen Thomas Sefton shall serve notice in writing upon the said San Diego Trust & Savings Bank that the said Joseph W. Sefton, Jr., has failed to make any payment due to the said Helen Thomas Sefton under the terms of the said property settlement, which written notice shall be accompanied by a statement that the said Helen Thomas Sefton remains unmarried to any person other than the said Joseph W. Sefton, Jr., then the said San Diego Trust & Savings Bank shall thereafter pay to the said Helen Thomas Sefton the sum of Five Hundred Dollars ($500.00) per month, from the entire net income of the entire trust property, if sufficient, and otherwise the deficiency in net income shall be made up from the principal of the trust property, at the option of the said Helen Thomas Sefton, commencing with the date of the service of said written notice upon the said San Diego Trust & Savings Bank, and continuing thereafter until the said Helen Thomas Sefton shall die or remarry, or the said Joseph W. Sefton, Jr., shall have resumed payments to the said Helen Thomas Sefton of the amounts in said property settlement agreement stipulated to be paid to her * * *."

The stipulation of the parties concerning additional evidence taken and to be considered by this court discloses that on March 17, 1938, the date this action was filed, there were one hundred seventy-two shares of the bank stock in this trust; that this stock had a market value of forty dollars a share, or a total value of $6880.00, available to plaintiff to pay her original judgment. The stipulation also discloses that the trustee, on request of plaintiff under the right given her, had sold a total of sixty shares of the stock for $2,400 and paid the money to plaintiff so that on June 22, 1940, there remained in the trust one hundred twelve shares of the stock having a market value of $4,480. At that time there was pending a request made by plaintiff to sell an additional fifteen shares of the stock so that there would remain in the trust only ninety-seven shares having a total value of $3,880.

These facts might have presented an interesting question to the trial judge on the original right to maintain this action. However, as many of them are developed here, (some of them post date the judgment in point of time) as they were not considered by the trial judge and as the trust fund has now been so reduced that it could only pay a portion of plaintiff's judgments, we do not regard it wise or equitable to consider it further nor to permit it to influence the final decision of this case.

Trust No. 1.

[3] This trust had its origin in a gift of one thousand dollars made in 1919 by Harriet Sefton Campbell to Thomas W. Sefton. It was deposited in the San Diego Trust & Savings Bank in an account designated as the J. W. Sefton, Jr., trustee for Thomas Sefton.

This account was still in existence at the time of trial and had a small credit balance. It was used throughout the years as the depositary for other donations made to Thomas W. Sefton, of interest and dividends on stocks and bonds which formed part of the corpus of the formal trust which was later established, and of the money received from the sale of securities belonging to the trust. Withdrawals were made largely to purchase additional securities for the trust and to recompense Joseph W. Sefton, Jr., for money expended by him in paying some of the expenses of Thomas' education which expenses were chargeable against the trust under the terms of the formal declaration of trust.

The formal declaration of Trust No. 1 was executed on January 25, 1923, and the property held in trust for Thomas, except the cash in the bank account, was transferred into this trust. The original declaration of trust was lost and it was republished under date of November 25, 1932, in language as closely resembling the original as the memory of those familiar with it permitted. Thomas W. Sefton was the original primary and principal beneficiary under this trust. Amendments to the declaration of trust have been made so that now Thomas W. Sefton and Minna Gombel Sefton, the present wife of Joseph W. Sefton, Jr., with various other secondary and contingent beneficiaries not necessary to detail here, are the present beneficiaries.

According to her evidence, plaintiff knew of the creation of this trust and originally approved it. She testified that she supposed that its corpus would be limited to about the sum of ten thousand dollars and that she did not anticipate its value would reach its present very considerable proportions.

The trial court found "that the said trust was made in good faith by the defendant Joseph W. Sefton, Jr.; he has not placed any of the said properties therein with intent to hinder, delay, or defraud the plaintiff, and the plaintiff has no equitable lien upon any of said properties for the payment of her said judgments". The judgment followed this finding.

Plaintiff has appealed from this portion of the judgment. Her principal ground of attack and the only one necessary to consider is lack of evidentiary support for the quoted finding.

There are only two arguments made under this contention which are necessary for us to consider. The first is based on plaintiff's exhibit Number Thirteen which details the securities belonging to the trust, and the second concerns management of the trust by Joseph W. Sefton, Jr.

The exhibit in question gives the date on which each security then held by the trust came into its corpus. With two exceptions each security was placed in the trust in the years 1932 to 1938 inclusive. From this it is urged that Joseph W. Sefton, Jr., must have placed these securities in the trust, on the several dates set forth, for the purpose of defrauding plaintiff by preventing her from collecting her monthly allowance from him.

There is no evidence in the record supporting this argument. All of the evidence is to the contrary.

The exhibit merely purports to show the securities in the trust on November 26, 1938, with the date upon which each particular security there listed came into the trust. No effort was made to show the source from which any security came. The only evidence in the record shows that for several years the income of the trust was accumulated and invested in securities; that when any security so advanced in price that a substantial profit could be made from its sale, it was sold and new securities purchased; that considerable profits were made by these dealings in securities. The inference is strong that each security listed, with two exceptions, which we will hereafter notice, and one one thousand dollar bond of the United States of Brazil acquired in 1923, were purchased with money accumulated in this manner. There is no evidence establishing that any of the securities listed ever belonged to Joseph W. Sefton, Jr., or were purchased with his private funds, though this may be true as to some of the securities originally placed in the trust.

[4] Plaintiff argues that the management of the trust funds by Joseph W. Sefton, Jr., demonstrates that he personally owned the property in the trust and only used the trust as a cover for his operations. It is true that he did largely assume the management of the trust funds. He was president of the San Diego Trust & Savings Bank. He, rather than the trust department of the bank, determined when securities should be sold and when and what others should be purchased. The declaration of trust gave Mr. Sefton this power. The profits from these transactions went into the trust. They did not go to Sefton. If there was any mismanagement of the trust funds, which is not disclosed in the evidence, Mr. Sefton may be made to account to the beneficiaries but not to Helen Thomas Sefton. As she had no interest in the trust nor in any of the securities it owned, she is not the proper party to complain. She was not injured by such mismanagement, if any.

Plaintiff points to the fact that Mr. Sefton personally paid the expenses of the education of Thomas and later repaid himself over eleven thousand dollars out of the trust funds. He gave the trust two promissory notes to reimburse it for the money he thus withdrew. One is dated January 1, 1937, is for $10,380.87, and is payable on demand. The other is dated January 1, 1938, is for $1,600 and is payable on demand. The amount of the school expenses paid by Mr. Sefton was $11,968.56. He testified that he desired to pay for the education of Thomas but that financial difficulties made it necessary for him to be reimbursed for the money he had so expended; that he expected to repay the trust the money so withdrawn and had given his notes to carry out that purpose.

The declaration of trust contained the following: "It is a further provision of this trust that any part or all of the income derived from this trust property or any part or all of the principal thereof may be used by the said Trustor (Joseph W. Sefton, Jr.) for the support, education and general well being of the said Thomas W. Sefton, the beneficiary hereunder."

[5] Under this provision it is clear that the bills incurred for the education of Thomas could have been paid out of the

trust as they were incurred. If there is any question of Mr. Sefton's right to reimburse himself for these expenses after he had paid them it cannot be raised by plaintiff who is not a party in interest and has no interest whatsoever in the trust or in any of its assets. The trial court so found and there is no substantial evidence to the contrary.

Trust No. 51.

[6] Trust No. 51 was created by a declaration of trust dated January 11, 1926, with Joseph W. Sefton, Jr., as trustor, San Diego Trust & Savings Bank as trustee, and Joseph W. Sefton, Jr., as beneficiary. The corpus of the trust is one thousand shares of the capital stock of the Sefton Investment Company.

Under date of November 23, 1933, Joseph W. Sefton, Jr., assigned all his right, title and interest in this trust to the Sefton Investment Company to secure it against loss by reason of its having loaned him eight hundred shares of Class A common stock of Containers Corporation of America. This stock was used by Sefton to secure his promissory note in the principal sum of $10,000.

Under date of January 22, 1934, Joseph W. Sefton, Jr., assigned all his right, title and interest in trust No. 51 to the Sefton Investment Company to secure his indebtedness, present and future, to that company. The trial court found on undisputed evidence that his indebtedness, exclusive of the loan on the stock, was $68,250.66.

Under date of October 5, 1935, an amendment to trust No. 51 was executed to carry out the purpose of the two assignments just referred to. It was also provided in this amendment that on the death of Joseph W. Sefton, Jr., the corpus of the trust should be delivered to the Sefton Investment Company out of which it should satisfy the obligations just mentioned and deliver the overplus, if any, into trust No. 1.

It should be observed that this trust was created prior to the divorce and prior to the time Mr. Sefton assumed any obligation to pay plaintiff anything and had no contractual obligation to her other than that growing out of the marriage relation. The creation of the trust, according to plaintiff's testimony, was discussed by Mr. Sefton with his then attorney while Mr. and Mrs. Sefton were living together. The property placed in the trust was the separate property of Mr. Sefton. With certain exceptions, not appearing in evidence here, Mr. Sefton had the legal right to deal with his own separate property as he saw fit. There is a complete lack of any evidence even suggesting that placing this property in the trust in 1926 rendered Mr. Sefton bankrupt or was an act of bankruptcy. Under the evidence he had a perfect right to place his own separate property in trust for his own benefit if he so desired. The legality of the creation of the trust is not attacked either in the pleadings nor in the findings.

The trial court found in so many words that "the defendant Joseph W. Sefton, Jr., is indebted to the defendant Sefton Investment Company in the amount of $68,250.66, together with four per cent interest per annum on the original indebtedness". The undisputed evidence supports this finding, except, perhaps, as to some accrued interest which may be included in the amount. Therefore, the fact of the indebtedness in the amount specified must be considered as established. It may not be questioned here. The loan of the Containers Corporation of America stock by the Sefton Investment to Joseph W. Sefton, Jr., and its use by him as collateral to secure his note in the sum of $10,000 was also found on undisputed evidence and is also a fact established in the case. Under these findings the good faith of the parties to these transactions, that is the creation of the trust and the assignment of its corpus to secure against loss by reason of the loan of the stock, cannot be questioned here. The only question that can be raised is the validity of the assignment to secure the loan of $68,250.66

The trial court found "That the defendant bank holds in the said 'Trust No. 51' the following properties, to wit: 1000 shares of the capital stock of the defendant Sefton Investment Company * * * That the defendant bank has no interest in the said property but claims that it holds the same subject only * * *" to trust No. 51. It was also found: "That at the time of the creation of the said trust the defendant Joseph W. Sefton, Jr., was the sole owner of the said stock, and, so far as the claims of the plaintiff herein are concerned, he ever since has been, and is now, the sole owner thereof, subject only to the lien of the defendant Sefton Investment Company thereon to secure the return to it of 800 shares of Class A Common Stock of Containers Corporation of America, or their equivalent in value, according to the terms of the assignment of the property in said trust hereinafter described, which said 800 shares of stock were by the defendant Joseph W. Sefton pledged to the First National Trust & Savings Bank of San Diego, California, to secure the payment of his note to said bank in the sum of $10,000.00."

The findings contain a copy of the assignment of November 23, 1933, whereby Sefton assigned his interest in trust No. 51 to the Sefton Investment Company to secure it against loss by reason of the loan of the eight hundred shares of stock of the Containers Corporation of America which was found to be a legal and valid assignment creating a lien superior to the lien of plaintiff's judgment.

The findings also set forth in full the assignment of January 22, 1934, whereby Joseph W. Sefton, Jr., assigned all his right, title and interest in trust No. 51 to the Sefton Investment Company to secure the loans it had made to Sefton. The trial court found that this assignment was void as against plaintiff as being made for the purpose of "hindering, delaying and defrauding plaintiff".

In this connection it should be noted that Sefton made all the payments due plaintiff up to September 1, 1936. It was found "that on the 10th day of September, 1936, said defendant defaulted in the making of said payments". Therefore, it is a fact that cannot be challenged here that on the date of the second assignment (January 22, 1934) he was not in default in any of his payments to plaintiff.

It is a significant fact that there is no direct finding that this trust was invalid for any reason at the time of its creation. Further there is no evidence to support such a finding had one been made. There is nothing to suggest any legal obstacle to the creation of this trust in 1926. The property placed in the trust was the separate property of Mr. Sefton. Certainly plaintiff was not his creditor at that time. He was the owner, subject to a life estate in his mother, of another 1500 shares of the capital stock of the Sefton Investment Company which had a very substantial value. There is nothing to indicate that on January 11, 1926, he had any substantial indebtedness other than to the Sefton Investment Company.

Assuming the validity of this trust in its inception, as we must, we have the following situation resulting from its creation: The San Diego Trust & Savings Bank became the owner of the legal title to the 1000 shares of stock which formed the corpus of the trust with Joseph W. Sefton, Jr., the equitable owner of the beneficial interest therein. Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am.St. Rep. 43. It should follow that the findings "that the defendant bank has no interest in said property" forming the corpus of the trust and that "Joseph W. Sefton, Jr., was the sole owner of said stock and * * * he ever since has been and now is the sole owner thereof" are contrary to the evidence in the case. The trial court should have found that the declaration of trust vested the legal title to the stock in the trustee with the equitable beneficial interest vested in Joseph W. Sefton, Jr. Whether or not the stock could be sold to satisfy plaintiff's judgment is another question.

We are unable to reconcile the findings to the effect that the assignment of November 23, 1933, from Joseph W. Sefton, Jr., to the Sefton Investment Company, to secure the corporation against loss by reason of the loan of the Containers Corporation of America stock, was valid and created a lawful lien on the corpus of the trust, with the finding to the effect that the assignment of January 22, 1934, between the same parties to secure Sefton's indebtedness to the corporation, was void as to creditors. The same evidence applies to both transactions. Either both were valid or both were void.

The only evidence pointing to any fraud in these transactions is contained in two letters written by Joseph W. Sefton, Jr., to Lena Sefton Clark.

The first of these two letters bears date of November 24, 1936, and contains the following:

"When Helen Thomas Sefton and I separated, a property agreement was signed and a trust created for her benefit to guarantee to her the faithful performance of the contract, which was a part of the property settlement. Into this trust was put such San Diego Trust & Savings Bank stock as I then owned, amounting at this time, to 250 shares. Under the property settlement agreement, she had the privilege of calling upon this trust for her payments or conserving the trust and suing me. She has chosen to allow the trust to remain and to sue me directly on the theory that her payments should come from me outside of the trust and that the trust should be used only in case I am found unable to make payments.

"Knowing this situation, and as I told you several times, for the protection of the stockholders of the Sefton Investment Company, I put 1000 shares of Sefton Investment Company stock which I owned outright, into a trust for myself and then as there was some doubt as to whether this trust would hold, should it be attacked under the property settlement agreement above referred to, I assigned my interest in the trust and in the corpus of the trust to the Sefton Investment Company, to secure anything I might owe that company."

In weighing the effect of this letter it should be borne in mind that this trust was created on January 11, 1926, almost two years before Mr. Sefton created his obligation to pay plaintiff a monthly allowance.

The second letter is dated December 11, 1936, and contains the following: "Kaufman showed me your recent letter relative to Bank loans and I told him I would answer that part pertaining to the loan at the 1st National Bank—San Diego—secured by 800 shares of Container 'A'—This is my *personal* note for $10,000—When you were here I think I mentioned to you, tho I may be mistaken, the fact that my Sefton Investment stock is subject to attachment by Helen Sefton in case of my death due to the agreement I entered into with her at the time of our separation.—It was my thought that S. I. Co. stock in her hands might prove embarrassing and costly to the other stockholders of the Co. and it would therefore be wise to tie my stock up as much as possible so that the *Co* could take it for any debts to it—to this end I have assigned *all* the S. I. Co. stock (1000 shares) that I control to the Co. as security for my debts to the Co.—as I could not do this without securing my note at the 1st Nat. I borrowed 800 shares of Container from the Co. for that purpose.—As the 1000 shares of S. I. Co. stock *should* be worth over $200,000 it would seem that the other stockholders of the Co are protected."

As the complaint did not allege, and as the trial court did not find any fraud in the creation of the trust, and as the trial court did find that the assignment of the corpus of the trust to secure the Sefton Investment Company against loss by reason of its loan of eight hundred shares of stock to Joseph W. Sefton, Jr., was a valid transaction free from any fraud, the portions of the letters relating to those events must be disregarded. The findings show that the implications in the letters concerning those two transactions were rejected by the trial judge and were regarded by him as untrue and overcome by other evidence before him. We can only consider the statements in the letters concerning the second assignment to secure the indebtedness of $68,250.66, which were accepted by the trial judge.

There are two questions necessary for consideration in connection with this trust and the second assignment. First: Does the fact that the trustor placed his own property in trust for his own benefit (which trust was lawful at the time of its creation) place the corpus of the trust beyond the reach of his subsequent creditors, or can one of those creditors reach that property itself as distinguished from Sefton's beneficial interest under the trust, by execution or in an action of this kind to satisfy a judgment against the trustor and beneficiary obtained years after the creation of the trust? Second: Can the trustor and beneficiary under such a trust lawfully prefer one of his creditors at the expense of another creditor by assigning to the first creditor his interest in such trust where it appears that such preference was intentionally given to delay the second creditor in subjecting the interest of her debtor in the trust property to the satisfaction of her judgment?

In considering the first question it should be pointed out that this is not a spendthrift trust; that the creation of this trust did not render the trustor insolvent nor execution proof.

Because of concessions of those defendants who have appealed from this portion of the judgment, our problem on this phase of the case is rendered quite simple. They concede that under the authority of McColgan v. Walter McGee, Inc., 172 Cal. 182, 155 P. 995, Ann.Cas.1917D, 1050, and other similar cases "the property of this trust is subject to the liens or rights of the creditors of the trustor". We accept this concession and consequent judgment rendered under it for the purpose of this case only as it amounts to a consent to this particular portion of the judgment by the appealing defendants. This must not be considered as a statement of a general rule of law to be broadly applied in other cases

In considering the question of preference of one creditor over another, we must again point out that the preference was not an act of bankruptcy and did not render the debtor insolvent; that besides the property involved in the preference he had other property of very considerable value; that the Sefton Investment Company was a bona fide creditor of Joseph W. Sefton, Jr., in the amount which we have already set forth. In the appraisement of the estate of Harriet Sefton Campbell, the 1500 shares of the Sefton Investment Company stock which formed the corpus of Trust No. 255 was given an appraised value of $366,465.

[7] Section 3432 of the Civil Code permits a debtor to prefer one creditor over another. A pre-existing debt is sufficient consideration to support a transfer of property and when such a transfer is made to one creditor ordinarily it can not be attacked by another even though the transfer rendered the debtor insolvent. Bradley v. Butchart, 217 Cal. 731, 20 P.2d 693.

In the case of Hibernia Savings & Loan Ass'n v. Belcher, 4 Cal.2d 268, 48 P.2d 681, 683, the plaintiff creditor attacked an assignment made by its debtor to the defendant Belcher. In holding that the debtor may prefer one creditor over another the Supreme Court there said: "While the Ellis Estate Company may have been insolvent in the sense that it could not pay its debts as they fell due, section 3432, Civil Code, provides that 'a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another.' Such preferences may be set aside in a bankruptcy proceeding in the manner prescribed by the statutes relating to such proceedings, but they are not subject to attack in an action such as that prosecuted by plaintiff herein."

[8, 9] In Ferguson v. Larson, 139 Cal. App. 133, 33 P.2d 1061, 1062, it was said: "The statutory right of a debtor to prefer one creditor to another is based upon the principle that in the absence of fraud the owner of property may do with it as he pleases (Heath v. Wilson, 139 Cal. 362, 73 P. 182), nor does the fact that such preference hinders or delays other creditors in the collection of their claims render it void, nor the fact that the preferred creditor had knowledge that such consequence would follow the preference. 12 Cal.Jur. 1010, 1011; In the Matter of Muller and Kennedy, 118 Cal. 432, 50 P. 660; Priest v. Brown, 100 Cal. 626, 35 P. 323."

[10] One rule by which fraud in cases of this kind is to be measured is thus stated in Kemp v. Lynch, 8 Cal.2d 457, 65 P.2d 1316, 1318: "However, if a transfer while appearing to be a lawful preference is made with actual fraudulent intent that it shall not pay the creditor or give him further security, but with the understanding that it shall be a mere simulated transfer, the grantor retaining the full beneficial interest, such fraudulent intent will vitiate the transfer. McGee v. Allen [7 Cal.2d 468], 60 P.2d 1026; Hanscome-James-Winship v. Ainger, 71 Cal.App. 735, 742, 236 P. 325; Roberts v. Burr, 135 Cal. 156, 67 P. 46; 12 Cal.Jur. 1012, 991."

[11] Here no one may question that Joseph W. Sefton, Jr., was actually indebted to the Sefton Investment Company in large amounts. All the evidence is to the effect that the assignments to that company were given and received to actually secure those debts. There is no evidence indicating that the assignee did not intend to hold and retain the benefits resulting to it from the assignments. There is nothing to suggest that either of them was a "simulated transfer" or that it was intended that Joseph W. Sefton, Jr., retain the full beneficial interest in the property transferred free from the liens created by the assignments. It is also clear from the letters from which we have quoted that the second assignment was given with full knowledge that it would hinder and delay plaintiff in the collection of her judgment by creating a prior lien on the trust or on its corpus. That a preference may hinder or delay one creditor and favor another is one of the necessary results of all preferences especially where the debtor is insolvent. The statute in permitting preferences contemplates such a result.

It is argued that Joseph W. Sefton, Jr., through the trusts, has an interest in the Sefton Investment Company and will profit from the preferences. This is not entirely true. Under a proper judgment the stock in the trust will be sold subject to the liens of the Sefton Investment Company. The liens will be satisfied from the proceeds of the sale and the amount of the debts secured by the liens will be paid into the treasury of the creditor company thereby substituting among its assets cash for the debts, but not increasing its net assets. If any benefit accrues from this change in the assets it will go to the purchaser of the stock at execution sale and not to Joseph W. Sefton, Jr.

Plaintiff argues at length that the Sefton Investment Company is but the alter ego of Joseph W. Sefton, Jr., and that the preference was in reality made to himself.

[12] It is true that a corporation may be the alter ego of one or two of its stockholders who own all of its stock. To establish the alter ego doctrine it must be shown that the stockholders, disregarded of the entity of the corporation, made it a mere conduit for the transaction of their own private business and that the separate individualities of the corporation and its stockholders in fact ceased to exist. Hollywood Cleaning, etc., Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.2d 709; Davis v. Perry, 120 Cal.App. 670, 8 P.2d 514; Estate of Greenwald, 19 Cal. App.2d 291, 65 P.2d 70.

[13] While all of the stock in the Sefton Investment Company is owned by Mrs. Clark and the trusts created by Mr. Sefton, which we will assume is Sefton himself, there is no unity of interest and purpose shown between these stockholders. The argument is conclusively answered by evidence received in this court at the request of plaintiff consisting of a contract dated in June, 1940, executed by Mrs. Clark, Mr. Sefton and the San Diego Trust & Savings Bank. The contract recites that such serious differences have arisen over the affairs and management of the Sefton Investment Company that it is deemed necessary to liquidate it and either sell or divide its assets. This should be sufficient answer to the argument that the corporation is but the alter ego of its stockholders.

Under the record before us we have reached the conclusion that the findings of fact and conclusions of law must be modified so that the assignment of January 22, 1934, by Joseph W. Sefton, Jr., to the Sefton Investment Company of all his right, title and interest in trust No. 51 to secure his indebtedness to that company in the sum of $68,250.66 be established as lawful and creating a valid lien on the 1000 shares of the Sefton Investment Company stock composing the corpus of trust No. 51 and subjecting plaintiff's lien on that stock to the prior liens created by the assignment of November 23, 1933, and the assignment of January 22, 1934.

Trust No. 255.

[14] This trust was created by a declaration of trust dated December 6, 1932, with Harriet Sefton Campbell as trustor, San Diego Trust & Savings Bank as trustee, and Harriet Sefton Campbell and Joseph W. Sefton, Jr., and grandchildren of Mrs. Campbell, including Thomas W. Sefton, as beneficiaries. Attached to the declaration of trust is a writing signed by Mrs. Campbell certifying that the 1500 shares of stock in the Sefton Investment Company constituting its corpus "is my own separate property". Another certificate signed by J. W. Sefton, Jr., recites "that although the above described stock stands in my name and is endorsed by me, I have no right, title or interest in or to same, having held the stock purely as a nominee for my mother, Mrs. Erskine J. Campbell".

On March 2, 1936, J. W. Sefton, Jr., and Mrs. Campbell made affidavits concerning ownership of this stock. Both affidavits were to the effect that the certificates we have just referred to were not complete, accurate or exact statements of the facts; that the facts were that on October 22, 1914, Mrs. Campbell gave the stock and delivered the certificate to Joseph W. Sefton, Jr., reserving to herself a life estate therein and "so long as she lived, the income therefrom". Mrs. Campbell's affidavit contained the following: "I knew at that time as I do now, that the actual ownership of said stock reposed in my son, the said J. W. Sefton, Jr., subject to my life estate."

The trial court found that at the time of executing the trust on December 6, 1932, Joseph W. Sefton, Jr., was the owner of the 1500 shares of stock in the Sefton Investment Company subject only to the life estate therein of Harriet Sefton Campbell. As this finding is supported by substantial evidence it is final and conclusive here.

It was also found that Mrs. Campbell died on June 4, 1936, and that "Joseph W. Sefton, Jr., is now, and ever since the death of his said mother has been, the sole owner of the property in the said trust"; that no other defendant has any right, title or interest therein; that plaintiff has an equitable lien on the stock for the payment of her judgments with interest thereon. The trial court ordered the stock sold under execution to pay the judgments.

It is clear that Mrs. Campbell could convey to another only the interest she owned in the property which she placed in trust. She could not convey a greater interest than the one she owned. As she owned only a life estate in the stock she could only convey to the trustee, and place in trust, the legal title to that life estate. That life estate terminated at the time of her death. It follows that as the trustee only held title to her life estate, its estate terminated on her death and the trust itself then terminated and Joseph W. Sefton, Jr., became the owner of the entire estate in the stock free from the trust.

Upon argument of this case, principally on suggestion of this court, the question was raised as to whether or not a purported amendment of the declaration of trust made by Joseph W. Sefton, Jr., on July 30, 1936, had the effect of establishing a new trust in the terms of the old as amended by the purported amendment. On further study we have reached the conclusion that it had no such effect and that the trust ended with the death of Mrs. Campbell.

The original trust had as its beneficiaries, Mrs. Campbell during her lifetime, Joseph W. Sefton, Jr., during his lifetime, and, after his death, Franklin Webster Wakefield, Joseph Sefton Wakefield, Dallas Clark, Henry Clark and Thomas W. Sefton.

It clearly appears that Mrs. Campbell created a spendthrift trust. Each beneficiary was prohibited from selling, transferring, pledging, mortgaging, hypothecating or alienating any part of a beneficial interest in the trust. The trust was made irrevocable but provided that Joseph W. Sefton, Jr., might be substituted as trustor and might terminate the trust and receive the corpus after the death of Mrs. Campbell.

The amendment in itself is not sufficient to create a trust without incorporating into it the provisions of the original declaration of trust. It substituted Joseph W. Sefton, Jr., as trustor, but did not name any beneficiary to receive the income during his lifetime so we must look to the original declaration of trust to find a named present beneficiary. The amendment provided that the corpus of the trust be paid into trust No. 1 on the death of Joseph W. Sefton, Jr.

If we read the original declaration of trust and the amendment together as we must to find a sufficient declaration of trust, we find the following as to the named beneficiaries: Joseph W. Sefton, Jr., is to receive the income from the trust during his lifetime; after his death the five grandchildren are to receive one hundred dollars each until reaching the age of twenty-eight years and then to receive a porportionate share of the corpus; on the death of Mr. Sefton the corpus of the trust is to be delivered into the corpus of trust No. 1. These provisions naming beneficiaries are flatly conflicting.

Section 2221 of the Civil Code provides that in an express trust the beneficiaries must be designated with reasonable certainty. This was not done if the two instruments be considered as a single declaration of trust. We must consider them together as the later instrument is not in itself a sufficient declaration of trust to create a trust. We believe these conflicting provisions as to beneficiaries clearly indicate that Mr. Sefton did not intend to establish a new trust by the document he signed on July 30, 1936, but merely intended to amend the original declaration of trust signed by his mother.

[15] It follows that Joseph W. Sefton, Jr., was and is the sole owner of the 1,500 shares of the capital stock of the Sefton Investment Company which formerly formed the corpus of trust No. 255; that such stock is subject to the liens of plaintiff's judgments; that sufficient of that stock may be sold under execution to satisfy those judgments together with interest thereon.

Trust No. 256.

[16] Trust No. 256 was created by a declaration of trust dated December 6, 1932, with Harriet Sefton Campbell as trustor, the San Diego Trust & Savings Bank as trustee, and Mrs. Campbell, during her lifetime, and after her death Joseph W. Sefton, Jr., and Lena Sefton Clark, as joint tenants with right of survivorship, as next immediate beneficiaries. After the death of Mr. Sefton and Mrs. Clark, the children of Mrs. Clark, together with Thomas W. Sefton, are made beneficiaries with provisions for succession in case of the death of any or all of them. The corpus of the trust was 1,000 shares of the capital stock of the San Diego Trust & Savings Bank, then owned by Mrs. Campbell as her separate property. There is an amendment to the declaration of trust, dated August 17, 1934, which was cancelled by a second amendment of April 8, 1936, which restored all the terms and conditions of the original declaration of trust.

The legal situation presented by this evidence is as follows: The trust was legally created by Mrs. Campbell. Only the beneficial interest of Joseph W. Sefton, Jr., in that trust as created and as it existed could be subjected to the payment of plaintiff's judgments against him. The San Diego Trust & Savings Bank held the legal title to the shares of stock subject to the trust imposed upon it. Of course Mrs. Campbell held the primary beneficial interest in the stock under the trust. At her death this beneficial interest terminated and then Joseph W. Sefton, Jr., and Lena Sefton Clark, as joint tenants with the right of survivorship, became the primary beneficiaries, with Mrs. Campbell's grandchildren and others the ultimate beneficiaries. These beneficial interests were in each and every share of the stock.

The parties now agree that after the creation of the trust there was a change in the capital structure of the bank so that the corpus of the trust was reduced to five hundred shares.

Mr. Sefton's beneficial interest in the trust constituted property that was subject to execution and sale, but it is only this interest that can be levied upon and sold. The trust itself, being lawful in its creation, cannot be destroyed by the sale nor can any part of its corpus be sold.

If we understand the judgment correctly this is what it purports to accomplish. With this explanation, the portion of the judgment affecting this trust needs no modification and may be affirmed.

It is ordered that:

The portion of the judgment which affects and treats with trust No. 1 be affirmed.

The portion of the judgment which affects and treats with trust No. 51, trust No. 255, and trust No. 256, is reversed with the following instructions to the trial court:

(a) Modify the findings of fact and conclusions of law treating with trust No. 51 in accordance with the views herein expressed so that the Sefton Investment Company, in addition to its lien securing it against loss by reason of its having loaned 800 shares of stock of Containers Corporation of America to Joseph W. Sefton, Jr., will have a lien on the 1,000 shares of stock forming the corpus of trust No. 51 securing its loan to Joseph W. Sefton, Jr., in the sum of $68,250.66 both to be prior and superior to the liens of plaintiff's judgments.

(b) Modify and re-enter the portion of the judgment treating with the lien upon and sale of defendant's interest in the corpus of trust No. 51 so that the liens of plaintiff's judgments and the sale be subject to the two liens of the Sefton Investment Company created by the assignments of Joseph W. Sefton, Jr., to it dated November 23, 1933, and January 22, 1934, respectively.

(c) Re-enter the present restraining order concerned with the dealing with the corpus of trust No. 51.

(d) Re-enter the portion of the judgment dealing and treating with the 1500 shares of stock formerly forming the corpus of Trust No. 255 and with the corpus of Trust No. 256 and the income of $250 from that trust, including the restraining orders, in their present form.

(e) Add to the judgment as re-entered the following: "Any defendant may satisfy this judgment by paying in full, with accrued interest, the two judgments of plaintiff against Joseph W. Sefton, Jr., upon which this action is based."

Plaintiff will recover her costs of appeal from Joseph W. Sefton, Jr., and the San Diego Trust & Savings Bank.

We concur: BARNARD, P. J.; GRIFFIN, J.

The petition for rehearing is denied.

41 Cal.App.2d 333

CITY OF OAKLAND v. HOGAN et al.
Civ. 11152.

District Court of Appeal, First District,
Division 1, California.
Nov. 6, 1940.

Rehearing Denied Dec. 6, 1940.

1. Municipal corporations 🔑719(1)

Under the allegations of a complaint that a private wharf extended from the ordinary low tideland "out, over and upon the said waters and state property", the city of Oakland in administering its public trust in regard to port facilities and wharves had a right, subject to and in conformity with the delegation of power from the state, to control the proper maintenance of the wharf, at least in so far as it extended above or over the waters of San Francisco Bay. St. 1927, pp. 1978–1982, 1984, §§ 206, 207, 212, 213.

2. Municipal corporations 🔑79

The adoption of a charter by the people and its ratification by the legislature is all that is required to make it a legislative enactment repealing all laws inconsistent therewith which might otherwise be applicable within its jurisdictional territorial confines. Const. art. 11, § 8.

3. Statutes 🔑199

The context and the apparent intent of the party or parties responsible for the use of the definite article "the" control in its interpretation and construction rather than the strict grammatical definition of the word.

4. Municipal corporations 🔑719(4)
Quo warranto 🔑24

The City of Oakland Port Commission, which has statutory authority to grant all leases, privileges, wharfing out rights, and water front or other franchises relating to the harbor or port and located within port area with control thereof, and to sue in name of city, had authority to control wharfing out rights and franchises relating thereto and to sue in the name of the city for the usurpation, intrusion, or unlawful holding or maintenance of the whole or any part of a particular private wharf. St.1931, p. 2677, § 216.

5. Quo warranto 🔑33

The City of Oakland Board of Port Commissioners to the extent that it has jurisdiction to grant or withhold franchises is a "legislative body" of the city and has the legal capacity to bring an action in quo warranto, without the presence of the attorney general appearing in the name of the people, to determine authority to operate and maintain a private wharf within territorial limits of city on public tidelands owned by the state without having obtained a franchise. St.1927, p. 1980, § 212, subds. 26, 27; St. 1931, p. 2677, § 216; Code Civ.Proc. §§ 803, 811.

See Words and Phrases, Permanent Edition, for all other definitions of "Legislative Body".

6. Appeal and error 🔑916(1)

Where complaint in quo warranto proceeding to determine defendants' authority to operate and maintain a private wharf within territorial limits of Oakland without having obtained a franchise did not allege that tolls were collected, the reviewing court was required to assume that if that fact existed the complaint would have so alleged.

7. Navigable waters 🔑37(4)

A grant of rights in tidelands or submerged lands is subject to a public easement, and, though the grant is absolute, the right to administer the public trust pertaining to the lands and the right to make changes and improvements in the interests of navigation and commerce are still vested in the public authorities.

8. Navigable waters 🔑43(2)

California law was controlling as the "law of the case" on the question whether a private owner of tidelands in the city of Oakland who charged no fee for the use of the facility was required to obtain a franchise to wharf out to navigable waters.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

9. Franchises 🔑1

A "franchise" is a special privilege conferred on a corporation or individual by a government duly empowered legally to grant it, and if the privilege is one that any individual may enjoy without a permit from the government, or if it is a right which one individual may grant to another without approval of the government, it is not a "franchise".

See Words and Phrases, Permanent Edition, for all other definitions of "Franchise".

10. Franchises 🔑1

A franchise must arise from the power of the government to bestow, and it is granted on the theory of some accruing benefit to the public.

11. Franchises 🔑4

The right to use land under a franchise is a special privilege in which the public may be interested, and it is therefore not exclusive unless expressly so declared in the grant.

12. Franchises 🔑1

A franchise is "property" but not more sacred than other property.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

13. Navigable waters 🔑43(2)

The right of "wharfing out" is a right to the exclusive use of submerged lands as by the affixing thereto or the establishment thereon of a permanent structure to some point within the navigable body of water, deep and wide enough to dock ocean-going vessels, and it presupposes exclusive use and to that extent may interfere with fishing or navigation.

See Words and Phrases, Permanent Edition, for all other definitions of "Wharfing Out".

14. Municipal corporations 🔑719(4)

The right of "access" as applied to a private wharf on public lands merely means that there may not be built an obstruction separating the lands from the navigable highway, and does not mean that the owner may wharf out or build on submerged lands which are property of the state, for which a city is the agent, without a license, grant, lease, franchise, or some form of governmental permission.

See Words and Phrases, Permanent Edition, for all other definitions of "Access".

15. Navigable waters 🔑43(2)

There may be no interference with the right of a littoral property owner to access to an abutting navigable channel except by governmental power and for lawful use and purpose, and the right to wharf out or construct on land between the littoral owner's property and navigable water may not be maintained except by grant from the owner of the intervening property.

16. Municipal corporations 🔑719(4)

Under deed of 1852 purporting to convey entire water front of the town of Oakland to grantee and granting exclusive right and privilege of constructing wharves, docks, and piers at any point within corporate limits of town with right of collecting wharfage and dockage for a period of 37 years, whatever right to wharf out was conveyed expired within a period of 37 years.

17. Navigable waters 🔑37(2)

Submerged lands, the property of the state, are held in its limited sovereignty for the public, and when conveyed to an individual are merely received as a trust subject to police power, power of taxation, and right of eminent domain, and to that extent the lands are incapable of being placed beyond the state's or the state agents' control.

18. Statutes 🔑158

The repeal by implication of an earlier statute by a later section is not effectuated unless it appears that there is no possibility of concurrent operation or that the later section is a complete revision of the earlier statute.

19. Navigable waters 🔑36(1)

The provision of the State Lands Act giving the State Lands Commission exclusive jurisdiction over all ungranted tidelands and submerged lands was intended to give the commission exclusive jurisdiction only with respect to state lands or submerged lands for the purpose of reserving minerals, and was not intended to remove jurisdiction over tidelands from control of counties, municipalities, harbor and port commissions which for years have been intrusted with the establishment and improvement of harbors and to that extent with the maintenance and operation of wharves and other structures necessary or convenient for navigation. St.1938, Ex.Sess., p. 23; St. 1939, p. 1479, § 522; p. 2074, § 48.

20. Municipal corporations 🔑719(4)

Where the charter of the city of Oakland does not specifically set up procedural provisions for the granting of wharfing out privileges, the city may rely on the provisions of state law not inconsistent with other provisions of the charter. Civ.Code, §§ 528, 531; St.1937, pp. 883-885, §§ 4000-4002, 4003, 4005, 4006.

21. Statutes 🔑231

The section of the Civil Code providing in substance that a corporation may not con-

struct a wharf without authority from the governing body, and the section making that section applicable to natural persons, should be read in conjunction with certain sections of the Harbors and Navigation Code setting up a procedure necessary to obtain a franchise. Civ.Code, §§ 528, 531; St.1937, pp. 883–885, §§ 4000–4002, 4003, 4005, 4006.

22. Municipal corporations ⟹719(4)
Quo warranto ⟹24

The City of Oakland Board of Port Commissioners, acting under city charter as the legislative body in charge of the development and promotion of the Port of Oakland, had jurisdiction to grant or withhold a franchise to operate a private wharf erected in part on public lands and extending from ordinary low tide line out, over, and on state property for a distance of 300 feet involving no tolls or fees, and as such legislative body could maintain quo warranto proceedings against alleged usurpers of a wharfing out franchise. St.1927, p. 1980, § 212, subds. 26, 27; St.1931, p. 2677, § 216; Code Civ.Proc. § 811.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Quo warranto proceeding by the City of Oakland, acting by and through its Board of Port Commissioners, against Thomas P. Hogan and others. From a judgment for defendants, plaintiff appeals.

Reversed and remanded with instructions.

Markell C. Baer (former Port Atty.), and W. Reginald Jones, Asst. Port Atty., both of Oakland, for appellant.

Donahue, Richards & Hamlin, of Oakland, for respondents.

WARD, Justice.

An appeal from a judgment in favor of defendants following an order sustaining their demurrers to an amended complaint which plaintiff, although granted leave to do so, did not elect to further amend.

The proceeding was instituted by the City of Oakland, a municipal corporation, by and through its Board of Port Commissioners; it is in the nature of quo warranto and was brought under the provisions of section 811 of the Code of Civil Procedure (Stats. 1937, chap. 575, p. 1616) to determine the authority of respondents to operate and maintain a wharf within the territorial limits of the City of Oakland, upon public tidelands owned by the state of California, without having obtained therefor from said city or state a franchise or other right. All respondents except Thomas P. Hogan are interested only as trustees or creditors under a deed of trust on the property. The wharf is constructed upon and extends from property owned by said Thomas P. Hogan, the defendant primarily interested.

The complaint alleges the capacity of plaintiff as a municipal corporation of the state of California, organized and existing under the Constitution and laws of this state and a freeholders' charter; that the Board of Port Commissioners is a department and legislative body of the city, having the powers and duties granted it by the charter; that the state is the owner in trust for purposes of commerce and navigation of certain tidelands and submerged lands, described in the complaint, along the north side of San Antonio estuary, a navigable arm of the San Francisco bay; that the property in question is located within the port area as such area is described in the charter of the City of Oakland, and that said estuary has been improved by the city in cooperation with the United States government by deepening the channels for the use and accommodation of ships and different types of watercraft navigating along the shores of said city and along the wharf maintained by respondent Hogan; that the wharf is used for private purposes of storage and the unloading and loading of lumber and other materials, and of docking ocean going and other watercraft.

The complaint also alleges: "That said littoral property is a part of the tidelands which were granted by the State of California to the Town of Oakland by Statutes of 1852, page 180, and which were afterwards granted by said Town to one Horace W. Carpentier pursuant to an ordinance of said Town adopted May 27, 1852 and entitled as follows, to-wit: 'An Ordinance for the Disposal of the Water Front Belonging to the Town of Oakland and to Provide for the Construction of Wharves,' and a deed from said Town to said Horace W. Carpentier recorded on January 12, 1853; that said deed and ordinance were confirmed by an Ordinance adopted by the City of Oakland on April 2, 1868, pursuant to the provisions of Statutes of 1868, page 222; * * * that the rights granted to said Horace W. Carpentier, or his successors, by such instruments for the construction of wharves for a period of thirty-seven (37) years were never renewed by the said Town or by the City of Oakland as its successor. * * * That neither defendant nor any predecessors of defendants have ever applied for or received from the State of California, Board of Supervisors of Alameda County, the City Council of the City of Oakland, or the Board of Port Commissioners of said City, or any other body or agency representing said State, City or County, any license, lease, easement, permit, grant, wharfing-out right, franchise, or other privilege, *to maintain the said* wharf above mentioned, nor do said defendants pay to the said State, City, County or Board, or other public body or agency, any rentals, franchise payments, fees or other sums whatsoever for the right, permit, franchise or privilege of maintaining, using or occupying such wharf existing from the said littoral property out over the said state-owned tide and submerged lands and over the waters of said Estuary." (Italics added.)

In brief, the Port Commissioners seek to ascertain by what warrant respondents claim to "have, exercise, use and enjoy the liberty, privilege, license and franchise" referred to in the body of the complaint.

The deed, a copy of which is attached to the amended complaint, is dated May 31, 1852, and is from the president of the board of trustees. It set out the provisions of an ordinance for the disposal of the waterfront belonging to the Town of Oakland, then in Contra Costa county, and transferred, granted and released to Horace W. Carpentier all of the land lying within the corporate limits of the town, situated between high tide and ship channel, for the purpose and exclusive privilege of constructing wharves, docks and piers, with the right to Carpentier of collecting wharfage and dockage for a period of thirty-seven years. It provided also that Carpentier or his legal representatives should, within designated periods, construct wharves at the foot of certain named streets. Provision was also made that two per cent of the receipts for wharfage should be paid by Carpentier to the Town of Oakland. Carpentier agreed to carry out the objects and purposes of the conveyance, and evidently by a prior arrangement, referred to in Carpentier's acceptance of the deed, agreed to build for the Town of Oakland a public schoolhouse. In addition the deed recited a consideration of five dollars.

The briefs of the respective parties have been directed in some instances to historical data, interesting, but not pertinent to the question involved. Respondent Hogan states that "it has always been considered by respondent and by his father, who built the wharf and who is his predecessor in interest, to be well within the low tide line". This and other statements not appearing in the record must be eliminated in determining the propriety of the order sustaining the demurrers to the complaint. As we view the matter, the question is, are the allegations of the complaint sufficient to show the necessity of obtaining a franchise from the Board of Port Commissioners of the City of Oakland to maintain a private wharf, not involving the collection of tolls, over state submerged lands? In the absence of the complaint to so allege, we are assuming that tolls are not collected. If an allegation that they were had been made, one phase of the question here under consideration would have been more simple.

It is necessary that the complaint herein establish through its allegations that the owner of tideland or littoral land has no right to maintain a private wharf over submerged land to navigable water in the absence of a grant so to do emanating from the City of Oakland, and that the port commission is in fact "the legislative body" of the municipal corporation of the City of Oakland having jurisdiction to grant or withhold a franchise to maintain this particular wharf. As above stated, the complaint alleges that the property is within the port area as described by the charter of the City of Oakland.

The City of Oakland is properly interested in the character of its harbor and therefore in the location of wharves upon public tidelands, unregulated construction and operation of which might interfere with the growth of the port. Concentration of particular types of craft might increase or decrease the commerce passing through the port. It seems to be essential to the interests of the public that harbors be operated under governmental control, with jurisdiction to direct their development in relation to commerce. In consonance with this idea the state has transferred to the city its interest in certain salt marsh and tidelands and empowered the city to control the water front. Stats. 1911, chap. 654, p. 1254; chap. 657, p. 1258; Stats. 1911 S. C. R., chap 20, pp. 1551–1582. The rights of the City of Oakland with regard to the Oakland port are recognized by the Supreme Court in City of Oakland v. Williams, 206 Cal. 315, 319, 274 P. 328, 329, where the court said: "The importance of the development of the natural harbor and seaport advantages which the city of Oakland, situate on the easterly side of the San Francisco Bay, with direct and spacious connection with the Pacific Ocean, offers to the immense agricultural and commercial districts of Northern and Central California, is not questioned"; and in Board of Port Commissioners v. Williams, 9 Cal.2d 381, 390, 70 P.2d 918, 922: "It should be kept in mind at every step in the consideration of this proceeding that it is the paramount duty of government to zealously guard the public interest, unhampered by private contracts which may hinder its control of or impair the full beneficial use of its harbor, ports, waterways, and tidelands which are held in trust for the promotion and improvement of navigation and commerce." The subject of this litigation is of concern to the respondents and the City of Oakland.

In 1927 the charter of the City of Oakland was amended by establishing a port department, under the direction of five commissioners, for the purpose of promoting and developing the Port of Oakland "through continuity of control, management and operation". The Board of Port Commissioners was given the complete and exclusive power to sue and defend in the name of the City of Oakland in all actions involving matters under its jurisdiction relating to the port area; to make provision for the needs of commerce and navigation, including the construction, reconstruction, repair and maintenance of wharves, with the right of inspection for the purpose of requiring owners of water terminal properties to repair and maintain them, with particular reference to fire hazard and nuisances; to regulate anchorage and the loading and unloading of vessels; to enter into contracts, leases, agreements or stipulations germane to the scope of its powers, and to exercise all of the powers theretofore conferred upon the city and the city council by subdivisions 5 and 7 of section 49 of the charter. Stats. 1911, pp. 1581, 1582; Stats. 1927, pp. 1978–1982, secs. 206, 207 and 212. Under the provisions of the charter, the construction, extension, alteration, improvement or erection of a wharf or harbor structure within the "Port Area" are prohibited, unless a permit is obtained from the board. Stats. 1927, pp. 1978, 1984, sec. 213.

[1, 2] The complaint alleges that the wharf in question extends from the ordinary low tideland "out, over and upon the said waters and state property". So far appellant has a right, in administering its public trust, subject to and in conformity with the delegation of power from the state, to control the proper maintenance of the wharf, at least in so far as it extends above or over the waters of the bay. Newcomb v. City of Newport Beach, 7 Cal.2d 393, 60 P.2d 825; Atwood v. Hammond, 4 Cal.2d 31, 48 P.2d 20; Wattson v. Eldridge, 207 Cal. 314, 278 P. 236. The adoption of a charter by the people, and its ratification by the legislature, is all that is required to make it a legislative enactment repealing all laws inconsistent therewith which might otherwise be applicable within its jurisdictional, territorial confines. Const.Calif., art. XI, sec. 8; Taylor v. Cole, 201 Cal. 327, 257 P. 40; People v. City of San Buenaventura, 213 Cal. 637, 3 P.2d 3.

Under the provisions of chapter V of part 2, title 10, of the Code of Civil Procedure, when a franchise or any portion thereof is usurped, intruded into, or unlawfully held or exercised by any person, an action may be brought against the offender by the board of supervisors of such county, city and county or "the legislative body of any municipal corporation", respectively, in the name of and within the territorial limits of such county, city and county or municipal corporation, such violations being of a kind within the jurisdiction of such board or body to grant or withhold. Code Civ. Proc. sec. 811. It may be conceded that the grant of a franchise may be in the exercise of administrative, legislative and judicial powers. Newsom v. Board of Supervisors, 205 Cal. 262, 270 P. 676.

Respondents contend that the Board of Port Commissioners is not a legislative body of the City of Oakland; that it is primarily an administrative body. They contend that if it is a legislative body, it is not *the* legislative body as contemplated by section 811, Code of Civil Procedure, but simply a legislative body of the port Department.

The fact that the board has certain administrative business to perform, or even certain judicial functions, as exemplified by its discretionary power, after formal hearings to grant or deny privileges is not inconsistent with legislative power on its part to be exercised independently of such administrative or judicial authority. The Port Commission is a legal entity, created by charter and empowered by approval of the state legislature to act as an agency of the municipality. Under such circumstances whatever rights may be given to the municipality may be bestowed upon the agency. It is not necessary to enter into a lengthy discussion of this subject as the general powers of the Port Commission of the City of Oakland have been recognized by the Supreme Court of this state in City of Oakland v. Williams, 206 Cal. 315, 320, 274 P. 328, 330 where the court said: "Said charter amendment provides for the creation of a board of port commissioners, consisting of five members, vested with the exclusive control and charge of said harbor, as the successor of all the rights and powers formerly exercised by said city, and it is charged with the performance of all the duties formerly imposed upon said city, and is given such legislative and administrative powers as were deemed necessary * * *." Oakland v. Larue Wharf, etc., Co., 179 Cal. 207, 176 P. 361. Since the board acts as the agency of its principal, the city, it is *a* legislative body *of* the municipal corporation.

[3] The next question to consider is, if the port commission is a legislative body, is it *the* legislative body with power to legislate relative to the affairs of the "Port Area", or must such power be held under section 811 to apply only to the city council. It is contended that the definite article "the" may apply only to one determinate thing, not to one of several. The respective sides argue strenuously, and many citations have been submitted holding that the definite article "the" is often used as the indefinite article "a", and conversely. Sufficient precedent appears in California and elsewhere to hold technically with appellant (Craig v. Boyes, 123 Cal.App. 592, 11 P.2d 673; Noyes v. Children's Aid Society, 70 N.Y. 481; State ex rel. v. Board of Levee Commissioners, 109 La. 403, 33 So. 385), but an examination of the citations *pro* and *con* leads to the conclusion that its context and the apparent intent of the party or parties responsible for the use of the italicized word control in its interpretation and construction rather than the strict grammatical definition of the word. In Howell v. State, 164 Ga. 204, 138 S.E. 206, at page 211, the court said: "In the construction of a statute we should apply common sense, and not apply the logical refinement of the schoolman." Section 232, Stats.1937, p. 2634, of the charter refers to the City of Oakland or its legislative bodies, and particularly mentions "Board of Port Commissioners".

Under our modern form of government, particularly in larger communities, legislative functions are often bestowed upon more than one commission or board, as for instance, boards of health, education, park, police, waterway or other public bodies, which give to the matters before them specialized study and enact and enforce ordinances in the interests of the public with the same effect and in the same manner as if enacted by the principal legislative body of the corporation. McQuillin on Municipal Corporations, 2d Ed., Revised, vol. 2, pp. 742-743, § 707. In the present case the "Port Department" is not only a legislative body of the municipality of Oakland, but it is the body given exclusive control over port matters. Section 212, subdivisions 26 and 27 of the charter, Stats.1927, p. 1980, provide: "To have and exercise on behalf of the City of Oakland all the rights, powers and duties in respect to the subject matters herein provided for, that are now or which may hereafter be vested in the City, or any of its departments or officers, or which may be provided for by general law." "To do and perform any and all other acts and things which may be necessary and proper to carry out the general powers of the City, or any of the provisions of this Article, and to exercise all powers not in conflict with the Constitution of the State, or with this Charter, germane to the scope of its powers, purposes and duties."

[4] The board has the power to take over and either withhold or "grant, all leases, concessions, easements, privileges, spur tracks and other permits, wharfing-out rights, and waterfront or other franchises relating to the harbor or port and located within the 'Port Area'" with control thereof, and may sue in the name of the City of Oakland. Charter, sec. 216, as amended by Stats.1931, p. 2677. From the foregoing, we conclude that the Port Commission has authority to control wharfing-out rights and franchises relating thereto, and to sue in the name of the municipality

for the usurpation, intrusion or unlawful holding or maintenance of the whole or any part of the wharf referred to in the complaint, unless the complaint alleges certain facts which negative the Port Commission's authority to control the particular wharf in question.

[5] Section 811 of the Code of Civil Procedure gives the right to a board of supervisors or the legislative body of a municipal corporation, in the name of the county or in the name of the municipality, to bring an action in quo warranto for unlawful holding, etc., within the territorial limits of the county municipal corporation "which is of a kind that is within the jurisdiction of such board or body to grant or withhold". The Board of Port Commissioners is a legislative body of the Oakland municipality and holds jurisdiction to grant or withhold franchises, and to that extent has the legal capacity to bring this action in quo warranto without the presence of the attorney general appearing "in the name of the people, of this state". Code Civ.Proc. secs. 803, 811. There does not seem to be any uncertainty or ambiguity in the allegations of the complaint.

[6] Attention has not been called to the particular grounds upon which the demurrers herein were sustained, but from the briefs we assume it was held that the complaint does not state facts sufficient to constitute a cause of action, or perhaps they were sustained upon the theory that the complaint alleged unnecessary facts indicating that plaintiff did not have capacity to sue or to ask the court to determine the issues raised. In substance the complaint sets forth that respondent Hogan is maintaining and operating a private wharf for ocean going and other watercraft. In the absence of an allegation that tolls are collected, we must assume that if such fact existed the complaint would have so alleged.

[7] A grant of rights in tidelands or submerged lands is subject to a public easement. Though the grant be absolute, still there were vested in the public authorities the right to administer the public trust pertaining to said lands, and the right to make changes and improvements in the interests of navigation and commerce. Newcomb v. City of Newport Beach, supra. The present action, however, was not brought on the theory that the private use of the wharf interferes with public interest. The paramount question involved is whether a private owner of tidelands, who charges no fee for the use of the facility, must obtain a franchise to wharf out to navigable waters.

Under the law of England, a littoral owner had no right to wharf-out. Structures built by such owners were purprestures. No one had a right to build a wharf without a license. After the American revolution, title to lands under tide water vested in the state subject to rights surrendered by their respective constitutions to the United States. New states admitted were accorded the same rights as the original states. Except in cases of public emergency, or national interest, the United States has left this problem to the determination of the respective states. The decisions rendered in such states are not uniform and are primarily based upon conditions found therein or on the particular facts in dispute. In some of the early decisions it appears that, due to the inability of the government to erect wharves, etc., or because only one person would be in a position to use the wharf for dockage purposes, and as an inducement to benefit navigation and commerce, greater rights and privileges were created by statute or rested upon usage than is necessary in this period when public authority provides this service and at the same time protects the public from abuse in connection therewith. An interesting treatment of this subject is found in Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331. There is involved simply a matter of altering rules to fit changed conditions. This may be easily effectuated because at no period in the evolution of these rules has the principle that navigable waters belong to the public been lost sight of.

[8] A great many authorities based upon varying facts have been called to our attention, but we must be mindful that the California rule is controlling as the law of this case. In Shively v. Bowlby, supra, 152 U.S. at page 26, 14 S.Ct. at page 557, 38 L.Ed. 331, the court said "that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great cau-

tion, therefore, is necessary in applying precedents in one state to cases arising in another."

[9-12] Respondents contend that the maintenance of a wharf for the private business of the owner does not constitute the exercise of a franchise. A franchise is a special privilege conferred upon a corporation or individual by a government duly empowered legally to grant it. If the privilege is one that any individual may enjoy without a permit from the government, or if it is a right which one individual may grant to another without approval of the government, it is not a franchise. The first distinguishing feature of a franchise is that it must arise from the power of the government to bestow. In accordance with statutory provisions, the government may or may not require the payment of wharfage charges for the privilege, but a franchise is granted upon the theory of some accruing benefit to the public. In protection of the public, the government retains the right of regulation. It was never intended that the privilege granted to one individual should rebound to the disadvantage of the public, or that the privilege should extend into a sphere beyond the control of the creator. In this case we are not dealing with a privilege that may be held indefinitely, without constraint, against the state, such as the right to vote, to a trial by jury, or freedom of speech, privileges sometimes referred to as franchises, and which are in fact rights emanating from the constitution, nor is this a franchise granted to a body for the purpose of permitting its corporate existence. Here there is a tangible substance, land in part covered by water, with the privilege of using the water for purposes of navigation. The privilege is statutory and not constitutional. The right to vote may be enjoyed by all within a class. The right to the use of land under a franchise is a special privilege in which the public may be interested; it is therefore not exclusive unless expressly so declared in the grant. A franchise is property, but not "more sacred than other property". Spring Valley Water Works v. Schottler, 62 Cal. 69.

Respondents cite cases to the effect that a franchise would involve the right to collect tolls for wharfage, and argue that since tolls are not collected for the use of the wharf in question, no franchise is involved. A franchise for a wharf may be for the purpose of taking tolls or it may simply involve the use and occupation of public lands. A municipality having control of tidelands may act as an agent of the sovereign, or as a proprietor, depending upon the municipality's rights as fixed by the state or by special statutory provision. Whether respondent Hogan holds under a lease is not of special consequence in the present proceeding as the amended complaint to which the demurrers were sustained is to determine by what warrant respondents exercise and enjoy the privilege of the use of this wharf constructed partly upon public submerged lands. If the complaint alleged that the wharf was constructed wholly upon lands owned in fee by respondents, this action would be at an end. There is a difference between (1) a public wharf on public lands; (2) a public wharf on private lands; (3) a private wharf on public lands, and (4) a private wharf on private lands. This case comes within the third classification. According to the complaint, respondent Hogan is using public lands for private purposes. The municipality is entitled to know whether this use is by way of a lease, license, franchise or otherwise, and respondents should answer unless the complaint negatives the right of the municipality to make the inquiry and requests a judicial determination of the question.

[13] The complaint alleges that the wharf, used for dockage purposes, extends from certain littoral property, occupied and used by respondents and adjacent to the line of ordinary low tide, waterwardly therefrom, out, over and upon the tidelands and the navigable waters of an estuary. Respondents contend that as owners of property bordering navigable water, they have the right to wharf out to deep water. The right of "wharfing-out" is a right to the exclusive use of submerged lands as by the affixing thereto, or the establishment thereon, of a permanent structure to some point within the navigable body of water, deep and wide enough to dock ocean-going vessels. It presupposes exclusive use and to that extent may interfere with fishing or navigation. "Navigable waters" have been likened to public highways. Newcomb v. City of Newport Beach, supra, 7 Cal.2d at page 404, 60 P.2d 825. Owners of land abutting a highway may build on their own land and enjoy the right of access, also of light and air, but this right is dis-

tinct from their right of passing upon the street, which is a right common to the public and with which the owner of abutting land may not interfere. Brown v. Board of Supervisors, 124 Cal. 274, 57 P. 82. The owner of abutting land may not build upon the highway without some form of governmental approval.

[14] The government may not deprive an owner of a portion of his property by obstructing his means of access to a highway. The confusion in respondents' position is due to a failure to distinguish between "a right of access" and "a right to wharf-out". The right of access, as applied to the facts of this case, merely means that there may not be built an obstruction separating the owner's land from the navigable highway. It does not mean that the owner may wharf-out or build on the submerged lands, the property of the state, for which in this instance the municipality is the agent, without a license, grant, lease, franchise or some form of governmental permission.

In Dana v. Jackson Street Wharf Co., 31 Cal. 118, 120–121, 89 Am.Dec. 164, the court said: "It is claimed, however, that the plaintiff is a riparian owner, and as such has a right to 'wharf out' against his own land; and therefore that the wharf, though built by the defendant, inures to the plaintiff's advantage; and that the present right of entry thereon is vested in him and not in the people. A riparian proprietor on navigable water has no right at common law to wharf out against his own land. By the common law any erection below high-water mark, without license, is regarded as an encroachment and intrusion on the King's soil, which the King may demolish, seize or arrent at his pleasure. (Ang. on T.W. 199.) This shows decisively that in cases of purpresture, the right of entry is not in the adjacent land-owner but in the crown. It has been held in some of the States that the riparian proprietor owns the soil between high and low water mark, or that he is at least so far interested in it that he can wharf out to the line of low water as against the people, if the wharf does not amount to a nuisance. But these decisions are all of them based upon local legislation or local usage."

In People v. Southern Pac. R. R. Co., 166 Cal. 627, 629, 138 P. 103, 104, the court said: "The defendants have a parcel of upland adjoining the tidelands in controversy, and they claim the right, as riparian proprietors, to wharf out and use the tideland in front of their upland for navigation in connection with the upland. It is settled by the decision of the Supreme Court of the United States in the case of United States v. Chandler-Dunbar W. P. Co., 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063, decided May 26, 1913, that, when the riparian proprietor holds title to the soil under the water in front of his upland, and holds it by virtue of his riparian ownership, in fee, such title is subject to the public easements of navigation and fishery; that, when the public authorities see fit to make improvements on the land below high-water mark for purposes of navigation, the riparian owner must yield thereto; and that his right is subordinate to the public rights. There are many other decisions of the Supreme Court of the United States substantially to the same effect. Under these authorities it is apparent that the littoral rights of the defendants cannot impinge upon the control by the state of tidelands for the public purposes of navigation and fishery, or affect the public easement for those purposes."

In Henry Dalton & Sons Co. v. Oakland, 168 Cal. 463, 143 P. 721, the court approved People v. Southern Pac. R. R. Co., supra, and at page 466 of 168 Cal., 143 P. at page 722, said: "* * * under our laws plaintiff as littoral or riparian owner has no right of access as to the deep waters of the bay over intervening tidelands." In City of Oakland v. Wheeler, 34 Cal. App. 442, at page 453, 168 P. 23, at page 28, the court said: "* * * owners of land upon the littoral of a navigable bay have no right of access to deep water over intervening tide lands." In Boone v. Kingsbury, 206 Cal. 148, 273 P. 797, it was held that littoral owners may not do that which they deny others the right to do on lands held in trust for all the people. In Oakland v. E. K. Wood Lumber Co., 211 Cal. 16, 23, 292 P. 1076, 1079, 80 A.L.R. 379, the court said: "The erection of a wharf, dock, or other construction over tidelands by individuals without license is an encroachment upon the sovereignty or a purpresture which belongs to the state as the owner of the soil to which it is affixed." In City of Newport Beach v. Fager et al., Cal.App., 102 P.2d 438, 441, the court said: "We are satisfied that the correct rule is that the littoral owner of uplands upon a navigable bay has no right of access to the waters of the bay over intervening tidelands, whether filled or unfilled, which have been granted by the state to a city in trust for the purpose of improving such navigable bay in furtherance of commerce and navigation. * * * Although it is true that as against a stranger a littoral owner of upland bordering upon navigable waters may not be deprived of his right of access to such waters, no such right exists in favor of such littoral owner as against the state or its grantee in the exercise of a lawful use or purpose."

[15] In brief, we hold that there may be no interference with the right of a littoral property owner to access to an abutting navigable channel except by governmental power and for a lawful use and purpose. The right to "wharf-out" or construct on land between the littoral owner's property and navigable water may not be maintained except by grant from the owner of the intervening property. The complaint alleges that the wharf maintained by respondents extends from ordinary low tideline out, over and upon state property for a distance of 300 feet.

The cases cited by respondents are not in point. In People v. Monstad, 209 Cal. 658, 289 P. 847, it was held that the Broughton Act had no application to the leasing of tide or submerged land for the purpose of the erection thereon by the lessee of a private wharf. In Pacific Coast Steamship Co. v. Kimball, 114 Cal. 414, 46 P. 275, in dealing with tidelands, it was held in substance that a governmental power might act as a proprietor or as agent of the sovereign in the giving of a lease, and that, unless there was an express grant, the lessee might not usurp the right of a franchise to conduct a public utility. It was pointed out that in its very nature a wharf is not necessarily a public utility.

In the instant case we are not dealing with a public utility wharf as such, but rather with a wharf built upon state property, which respondents contend does not involve the exercise of franchise rights. The cases cited by them merely recognize the possibility of the existence of the right to wharf-out as incidental to littoral ownership. It was not essential to those decisions to determine the precise question involved here, namely, the necessity of obtaining a franchise to maintain a private wharf, not involving the collection of tolls, over state owned submerged lands. In Oakland v. E. K. Wood Lumber Co., supra, the court held that the lease in that case did not expressly grant a franchise. In this case, the question is, by what authority does respondent Hogan maintain this wharf.

We now approach the question whether or not the complaint alleged facts which negatived the Port Commission's authority to grant a franchise, and control the wharfing-out rights of respondents. Upon this question the legal effect of the Carpentier grant, copy of which is attached to the complaint, and its specific provisions, are vital. The Carpentier grant of 1852 purported to convey the entire water front of the Town of Oakland to the grantee. The act of 1854 (Stats. 1854, p. 184) reincorporated the Town of Oakland as the City of Oakland and provided that the boundary lines of the city should remain the same as those of the former town. Under the statutes of 1861, page 386, the corporate boundary of the city seems to have been enlarged. Discussing this phase of expansion, the Supreme Court in Oakland v. Oakland Water Front Co., 118 Cal. 160, 171, 50 P. 277, 280, commented as follows: "Whatever effect this amendment may have had in extending the municipal limits of the city of Oakland from and after the date of its passage, it cannot be allowed any retroactive effect upon the property rights of the city or of her grantees; and if the construction which it attempts to place upon the act of 1852 is erroneous, as it clearly is, the courts, in determining the rights of the parties to this action, not only may, but must, disregard it. The same remarks are applicable to the act of April 24, 1862 (St.1862, p. 337), by the second section of which the legislature again sought to give a more particular definition to the original boundaries of the town of Oakland, and in so doing extended it to the highest tide line of the estuary, thereby including a wide expanse of salt marsh above the level of ordinary high tide." The Oakland Water Front case contains an exhaustive record of historical, legislative and judicial proceedings in connection with the dispute between the City of Oakland and Carpentier. Relative to the 1852 grant, the court reached the following conclusion (118 Cal. at page 196, 50 P. at page 290): "The attempted transfer to him of the water front was void, and the city of Oakland was free to assert her rights by any action or other proceeding appropriate to that state of the case." However, claims, demands, controversies, disputes and litigation (Oakland v. Carpentier, 13 Cal. 540; Oakland v. Carpentier, 21 Cal. 642) continued. In 1868 a compromise was effected. In the same decision (Oakland v. Oakland Water Front Co., supra) the court said (118 Cal. at page 201, 50 P. at page 292): "The conclusion, I think, necessarily follows that from and after the 2d day of April, 1868, the city of Oakland ceased to be the owner, as trustee or otherwise, of any portion of her water front except those portions secured to her by the compromise of that date, and such streets, thoroughfares, and other parcels as may have been previously dedicated to public use. As to all such places the transfer to the water-front company and its assigns was subject to the public easement, and the city, as trustee for the public is no doubt entitled to a decree in this action defining her right of control over the lands so dedicated." The compromise was a confirmation of the validity and effect of the 1852 deed, with a possible variation of certain boundary lines. Any rights or interests held by Carpentier or his successors must be determined basically by the 1852 deed, in connection with which it was held in City of Oakland v. Wheeler, supra, 34 Cal.App. at pages 453-454, 168 P. at page 28: "Appellants and their predecessors in ownership of this property exercised for 37 years, from some time in June, 1852, until a corresponding date in 1889, the wharfing-out privilege granted by the town of Oakland to Carpentier in his deed of the former date. The exercise of the right conferred by this instrument, whether it be termed a lease or by whatever designation it be characterized, estopped the defendants and their predecessors so exercising it from claiming title to or right or easement in the land below low tide on which the wharf stood as against the city of Oakland from whom they derived the right so exercised during those years. Assuming that it was possible for the defendants to have acquired title to this land below low tide, or any privilege to use it for wharfing-out, by adverse possession under any circumstances—which we do not concede to have been possible in this instance—still they did not so acquire either title or wharfing-out privilege, because before the termination of their privilege or lease under the Carpentier deed this land was withdrawn from sale by the Constitution of 1879 (Const. 1879, art. 15, § 3), and it has been held that the title to tide lands withheld from sale cannot be acquired by adverse possession. Patton v. City of Los Angeles, 169 Cal. 521, 147 P. 141; People v. Southern Pacific R. Co., 169 Cal. 537, 147 P. 274. So that having no deed to this property, and having acquired no title thereto or privilege of using this land, or user thereof, below the low tide line by adverse possession, the defendants show no wharfing-out rights belonging to them at the time this summons was issued upon which they could stand in a claim for damages to or compensation for the taking of land below the low tide line, for the defendants had no right of access to navigable water from their property."

In City of Oakland v. Buteau, 219 Cal. 745, 752-753, 29 P.2d 177, 180, the court said: "* * * the town of Oakland could not convey to Carpentier more than it had received from the state, and it had received from the state only the lands 'between high tide and ship channel.' When, therefore, the town granted the 'water-front,' it must be deemed to have granted only what it possessed; namely, the lands between high tide and ship channel. For many years the meaning of the term 'ship channel' was uncertain and undefined. It was indicated, if not definitely decided, in City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 P. 277, that the term meant the ordinary line of low tide. The defendants claimed on the prior appeal in this case, and now claim, that the definition of the term as the low tide line is too restrictive and limited; that it means something more than a mere boundary line, and imports a right of access to navigable waters. But it was definitely decided on the former appeal in this case that the term meant the line of low tide. That determination has become the law of the case, and the defendants would seem to be now foreclosed from contending otherwise. We think that the term as so used and now defined indicates no more than a boundary line, and the term has no significance other than to form the southern boundary of the defendants' land as confirmed to it in the judgment, and cannot be enlarged to import a right of access to navigable waters."

[16, 17] The following language in the deed of 1852 is worthy of comment: "* * * have granted unto Horace W. Carpentier and his legal representatives, the exclusive right and privilege of constructing wharves, docks and piers, at any

point or points within the now corporate limits of the town of Oakland, with the right of collecting wharfage and dockage for a period of thirty-seven years." The word "exclusive" was not necessary and did not enlarge the scope of the wharfing-out right as the entire water front was conveyed to Carpentier. Whatever right to wharf-out was conveyed, it expired within "a period of thirty-seven years". Assuming that this conclusion is incorrect, still submerged lands, the property of the state, are held in its limited sovereignty for the public, and when conveyed to an individual are merely received as a trust, subject to police power, power of taxation and the right of eminent domain. To that extent the lands are incapable of being placed beyond the state's or the state agents' control. Such lands differ from lands open to preemption and sale in that the submerged lands may be of use to the public for fishing purposes, or, as a navigable highway, for commerce. Parcels of such land may be disposed of without impairing the interests of the public and for the great benefit of the entire community, and then only subject to the right of control by the state or its agency. Whatever the rule may have been in other states during the early period of this country's history, the growth of commerce and navigation requires continuity of governmental control as a condition to the maintenance of a private wharf in public waters—this being essential to a scheme for the development of harbors and ports as opposed to a rule requiring the governmental authority to stand idly by while a wharf is being erected, and thereafter, upon a showing that it interferes with the public interest, to bring suit to abate the nuisance upon the theory that the wharf interferes with navigation. If, on the other hand, the governmental authority should act or threaten to act in a discriminatory or arbitrary manner, the party in interest has a remedy by appeal to the courts.

During oral argument, and subsequently in briefs, attention was called to Political Code, section 675 relative to the power of the director of finance to convey title to real property belonging to the state of California whenever its sale or exchange is authorized by law and there is no other agency specifically directed and empowered to execute such grants, it being contended in this connection that jurisdiction over tidelands thus passed from the various bodies formerly controlling its disposition. The State Lands Act of 1938 (Extra Session 1938, p. 23) creating and vesting in the state lands commission the power and duty of acquiring by purchase or condemnation interests in privately owned lands to facilitate the operation and purpose of the act, particularly with reference to the control of mineral and oil lands, was amended in 1939, Stats.1939, chap. 646, p. 2074, by adding a new section, designated as section 48, providing: "The commission shall have exclusive jurisdiction over all ungranted tide lands and submerged lands owned by the State, and of the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits. All jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been or may be made is vested in the commission. The commission shall exclusively administer and control all such lands, and may lease or otherwise dispose of such lands, as provided by law, and in accordance with such rules and regulations as the commission shall adopt." Respondents contend that all statutes theretofore entrusting to any other agency or public body power in connection with tide or submerged lands, or which are in conflict with section 48, were thereby repealed.

[18, 19] The above section (48) must be irreconcilable, repugnant and inconsistent with other statutes before repeal by implication may be favored. The general rule is that it must appear that there is no possibility of concurrent operation or that the section is a complete revision of the earlier statute before a repeal is effectuated. Hammond v. McDonald, 32 Cal.App.2d 187, 89 P.2d 407; Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252; Washington Lumber, etc., Co. v. McGuire, 213 Cal. 13, 1 P.2d 437. The meaning of section 48 is that when minerals are to be extracted from tide or submerged lands the power or control is given exclusively to the state lands commission. This conclusion is borne out by the call of the Governor, providing in part: "To consider and act upon an act relating to lands owned by the State, creating a State Lands Commission and prescribing its duties and powers with respect to such lands, and particularly the protection and extraction of oil and gas deposits and other minerals from such lands of the State." The title does not refer to each and every parcel of land owned by the state, but it does refer to oil and gas and all mineral deposits. The section,

when read in its relation to other sections of the act, indicates that the state lands commission holds exclusive jurisdiction only in those matters which are specially delegated to it, namely, state lands or even submerged lands for the purpose of reserving minerals. It is inconceivable that the legislature intended that which it did not say, namely, to remove jurisdiction over tidelands from the control of the numerous counties, municipalities, harbor and port commissions in existence in this state, which bodies for years have been entrusted with the establishment and improvement of harbors, and to that extent with the maintenance and operation of wharves and other structures necessary or convenient for navigation. The legislature has generally treated the construction of docks, piers, etc., as a local matter. In 1939, the same year as the passage of section 48, a new section 522, was added to the Harbors and Navigation Code. Stats 1939, chap. 226, p. 1479. By such section recognition was given to the continued jurisdiction of the legislative body having control over publicly owned submerged lands. The conclusion must be reached that section 48 of the State Lands Act has no application to this proceeding.

Appellant contends that respondents' lands are not littoral or riparian. We refrain from passing on this phase of the controversy as the complaint alleges in reference to the situs of the property: "That said littoral property so occupied and used by defendants is located", etc.

Appellant also urges that in addition to the power under the charter provision to inaugurate this proceeding, authority to control the port, tide and submerged lands, and bring this suit, is found in certain sections of the Civil Code and the Harbors and Navigation Code. It is not necessary, in view of the authorization under the charter, to consider the provisions as applicable to this appeal except as they relate to the procedure involved in granting a right to erect or construct a wharf or impose a penalty for failure to keep the structure in repair.

[20, 21] The charter does not specifically set up procedural provisions for the granting of wharfing-out privileges. In that situation, the municipality may rely upon the provisions of state law not inconsistent with other provisions of the charter. City of Oakland v. Williams, Cal.Sup., 103 P.2d 168; City of San Diego v. Kerckhoff, 49 Cal.App. 473, 193 P. 801; Key System Transit Co. v. City of Oakland, 124 Cal.App. 733, 13 P.2d 979; Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal. 265, 118 P. 796. Eliminating the question of tolls, section 528 of the Civil Code provides in substance that a corporation may not construct a wharf without authority from a governing body. Section 531 makes this provision applicable to natural persons. These sections should be read in conjunction with certain sections of the Harbors and Navigation Code, division VII, chapter 1, sections 4000-4002, 4003, 4005, 4006, St.1937, pp. 883–885, which set up a procedure necessary to obtain a franchise. City of Oakland v. El Dorado Terminal Co., Cal.App., 106 P.2d 1000, filed this date. Respondent cites Vallejo, etc., R. Co. v. Reed Orchard Company, 169 Cal. 545, 147 P. 238, to support the contention that these sections apply only to toll franchises. In the Reed Orchard case, the court was considering section 2921 of the Political Code, the basis for the enactment of section 4017 of the Harbors and Navigation Code, which relates specifically to railroad corporations in their relation to the construction of wharves as terminal bases. The statement in that case may be correctly construed to mean that a private wharf may not be erected on public lands except by a railroad company under special circumstances, and so construed only when the section is read in connection with other code sections. Civ.Code, sec. 465. In Santa Cruz v. Southern Pac. R. Co., 163 Cal. 538, 548, 126 P. 362, 366, the court said: "Sections 465 and 475 of the Civil Code, in effect, give the privilege of constructing and operating a railroad over any public bay or roadstead in the state, not within a city or town, to any railroad corporation that accepts the privilege and uses it. As to the waters of such bay or roadstead which are within a city or town, a grant from the council is necessary." The question of procedure is not vital in the instant case. The sufficiency of the complaint is the question on this appeal, and further consideration of the "procedure" will not be pursued as, assuming that the code sections do not apply (which we do not hold), the form of petition and manner of granting or withholding franchises may with propriety be provided by ordinance. (Oakland City Charter, sec. 46, subd. 7; Stats.1911, p. 1579; Stats.1927, secs. 211, 212, 216, pp. 1980-1981, 1984.

[22] Appellant, acting under the charter, as the legislative body in charge of the development and promotion of the Port of Oakland, is vested with jurisdiction to grant or withhold a franchise to operate a private wharf erected in part upon public lands, involving no tolls or fees, and as such legislative body within the meaning of Code of Civil Procedure, section 811, is entitled to maintain quo warranto proceedings against alleged usurpers of a wharfing-out franchise.

The judgment is reversed and the cause remanded to the superior court with instructions to overrule the demurrers and allow the respondents a reasonable time within which to answer.

We concur: PETERS, P. J.; KNIGHT, J.

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41 Cal.App.2d 320

CITY OF OAKLAND v. EL DORADO TERMINAL CO.

Civ. 11202.

District Court of Appeal, First District,
Division 1, California.
Nov. 6, 1940.

Rehearing Denied Dec. 6, 1940.
Hearing Denied Jan. 2, 1941.

1. Quo warranto 🔑33

The City of Oakland Board of Port Commissioners, which under the city charter is the legislative body empowered to grant or withhold franchises for the operation of wharves, is the "legislative body" authorized by statute to bring quo warranto proceeding to determine defendant's right to maintain a public wharf on its privately owned submerged lands in Oakland estuary and to collect tolls without a franchise from the board. Code Civ.Proc. § 811.

See Words and Phrases, Permanent Edition, for all other definitions of "Legislative Body".

2. Franchises 🔑1

Where property involved is held for public use or is usable by the public generally with a charge such as a toll paid for such use, it comes within the classification of a "public utility", and permission generally in the form of a franchise from governmental authority is necessary.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Utility".

3. Municipal corporations 🔑719(4)

The operation of a public wharf on privately owned submerged lands in Oakland estuary and the taking of tolls brought the wharf within the category of a "public utility" which was required to obtain a franchise from the Board of Port Commissioners of the City of Oakland.

4. Quo warranto 🔑49

In quo warranto proceeding to determine defendant's right to maintain a public wharf on privately owned submerged lands in Oakland estuary and to collect tolls without a franchise from the Board of Port Commissioners, it was not necessary to set forth in the complaint facts supporting allegation of the operation of a public utility wharfage business, since in quo warranto it is sufficient to plead the ultimate fact in general terms.

5. Public service commissions 🔑18

The conclusion of the Railroad Commission on fact questions including classification of enterprises is final. Const. art. 12, § 23.

6. Statutes 🔑231

The code sections requiring an authorization before constructing or operating a wharf or collecting tolls in connection therewith should be read in conjunction with sections of the Harbors and Navigation Code relating to the manner in which such privileges or franchises shall be granted. Civ. Code, §§ 528–531; St.1937, pp. 883–886, §§ 4000–4017.

7. Municipal corporations 🔑719(1)

The section of the Harbors and Navigation Code conferring on a board of supervisors power to grant to any railroad corporation authority to construct a wharf on or in front of lands owned by it bordering on any navigable arm of the sea situated in or bounding county with right to take tolls, but excluding from the operation of its provisions all territory under jurisdiction or control of any incorporated city or town, evidences legislative intent to permit municipalities as agencies of the state to control their own harbors as local affairs. St.1937, p. 886, § 4017.

8. Public service commissions 🔑6

The statute providing that a public utility cannot convey its plant, system, or other property necessary or useful in the performance of its duties to the public without an order from the Railroad Commission refers to property dedicated to public use and presupposes legal title thereto. St.1927, p. 78, § 51.

9. Wharves 🔑12

The taking of tolls for wharfing facilities without a permit from or regulation by the duly constituted authorities does not constitute a dedication of wharfing facilities for public use within statute prohibiting a public utility from conveying property dedicated to public use without the consent of or at the order of the Railroad Commission. St.1927, p. 78, § 51.

10. Navigable waters 🔑37(4), 43(3)

Whatever title to submerged lands vested in grantee under deed granting certain tidelands and right to construct wharves and collect wharfage for 37 years did not by implication continue a right to construct wharves and take tolls beyond the limited period.

11. Navigable waters 🔑36(2), 43(2)

The right of a riparian owner of land abutting on navigable water does not include the title and possession of submerged lands nor wharfing privileges thereover.

12. Commerce 🔑24

The privilege of operating a wharf is primarily a local matter, and federal authorities take over its regulation directly or indirectly only when the power exercised by the local government is incompatible or inharmonious with the interests of the federal government as relates to interstate or foreign affairs, particularly with reference to commerce. U.S.C.A.Const. art. 1, § 8, cl. 3.

13. Commerce 🔑10, 24

The operation of a wharf is a local affair, the control of which inheres in the governmental board or commission authorized to grant or withhold franchises, and that power continues until Congress acts.

14. Commerce 🔑24

The operation of a public wharf, even when used in interstate or foreign commerce and even on private property, should not be left to the unchecked and uncontrolled action of the owner. U.S.C.A.Const. art. 1, § 8, cl. 3.

15. Wharves 🔑12

The unrestrained berthing, loading, and unloading of vessels under the direction of one owner at one wharf is not in conformity with the purposes of the legislature in the creation of a port department, which through its commission, appointed to promote commerce for the harbor, should have the exclusive control and management of the port unhampered by those whose interests might tend to hinder the adequate and comprehensive development of the entire harbor.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Quo warranto proceeding by the City of Oakland, acting by and through its Board of Port Commissioners, against the El Dorado Terminal Company. From a judgment for plaintiff, defendant appeals.

Judgment directed to be modified in part, and in other respects judgment affirmed.

Hearing denied; CARTER, J., dissenting.

Williamson & Wallace, W. F. Williamson, and Richard P. Norton, all of San Francisco, for appellant.

W. Reginald Jones, Asst. Port Atty., of Oakland, for respondent.

WARD, Justice.

This proceeding in quo warranto is to determine the right of defendant El Dorado Terminal Company, a subsidiary of El Dorado Oil Works, to maintain a public wharf on its privately owned submerged lands in Oakland estuary, and to collect tolls from persons availing themselves of the facilities of the wharf, without a franchise from the Board of Port Commissioners of the City of Oakland. The action was tried upon an agreed statement of facts after the defendant's demurrer to the complaint, and the plaintiff's demurrer to the answer, had been overruled. From a judgment in favor of the City of Oakland, defendant prosecutes this appeal.

Many of the legal questions herein are identical and others very similar to those in the case of City of Oakland v. Hogan et al., Cal.App., 106 P.2d 987, filed this date, which was a suit to determine the authority of defendants therein to operate and maintain a private wharf within said Oakland estuary, upon public tide lands owned by the state of California, and not involving any payment of tolls. The Hogan case will be referred to herein, and what is there said on such identical or similar points, including argument and citation of authorities, is by reference made applicable here and determinative of those points.

[1] The Board of Port Commissioners of the municipality of the City of Oakland is, under the terms of the city charter, the legislative body empowered to grant or withhold franchises for the operation of wharves, and is, under the provisions of section 811 of the Code of Civil Procedure, the legislative body authorized to bring this suit. City of Oakland v. Hogan et al., supra.

The complaint in the present action alleges that "defendant has exercised and used, and does now exercise and use, without any lawful warrant, grant or charter the following liberty, privilege, license and franchise, to-wit, the operation of a public utility wharfinger business, including the maintenance of a public wharf and the taking of dockage tolls and other terminal charges thereon and including the performance of accessorial services in connection therewith * * *."

In the statement of facts upon which the cause was submitted, it was agreed, for the purpose of this particular proceeding, that the wharf and terminal is a substantial structure erected by appellant within the "Port Area" for the purpose of docking, and receiving and discharging cargo of "ocean carriers"; that there had been issued by the defendant and filed with the railroad commission of the state of California a wharfinger tariff, amended from time to time, but similar in form and style to tariffs filed by public utility wharfingers operating in the San Francisco bay; that the tariffs have been open for inspection by the public, including operators of steamship lines, and shippers and consignees of cargo moving to and from ocean-going and other vessels; that services customarily rendered by public utility wharfingers and shipside terminals are rendered to various vessels and persons other than the parent company of defendant; that the charges for such services are substantially the same as observed by public utility wharfingers in the vicinity, and in accordance with charges approved by the railroad commission; that such services are rendered in connection with cargo moving in interstate, foreign and intrastate commerce; that the railroad commission in an investigation of appellant company found it to be "engaged, among other things, in the wharfinger business as a public utility"; that appellant is complying with the provisions of the public Utility Act; that it has paid a license tax, such as is imposed upon all businesses and professions; that it has never applied to the port commission of the City of Oakland for a license, privilege, permit or franchise to maintain a public wharf, but has complied with all other license and regulatory laws. The agreed statement of facts further set forth that it should "not be construed as an admission by the plaintiff that defendant possesses any franchise to operate or maintain such wharf or facility, nor preclude the contention that the obtaining by defendant of such franchise is necessary."

The trial court adopted the stipulation of facts as its findings, and judgment was entered that appellant be "excluded and ousted from the exercise of the franchise for the *construction* and operation of a public wharf at that certain wharf occupied by defendant on the Estuary of San Antonio, in the City of Oakland, County of Alameda, State of California, and near the foot of Adeline Street in said City, and the taking of tolls thereon and for its use, and from operating a public utility wharfinger business, including the maintenance of a public wharf thereat, and the taking of dockage, wharfage and other terminal charges or tolls thereon and for its use, and including the performance of accessorial services in connection therewith * * *." (Italics added.)

[2, 3] The stipulation of facts supports the findings and judgment relative to the nature of the business carried on by appellant, namely, a public utility wharfinger business. Appellant urges that in principle there is no substantial difference between a public utility wharf and a non-public utility wharf. It is often hard to distinguish between them. If the property involved is held for public use, or is usable by the public generally, with a charge, such as a toll paid for such use, it comes within the classification of a public utility and permission, generally in the form of a franchise from governmental authority, is necessary. The operation of this wharf, and the taking of tolls, as appears from the stipulated facts, brings it within the category of a public utility. 1 Farnham on Waters and Water Rights, § 119. "While the right to collect tolls for wharfage and dockage is stated by some authorities to be an incident to the ownership of land abutting on a navigable body of water, the better view is that such a right is a

franchise which must have its origin in a legislative grant. Dillon, Municipal Corporations (5th Ed.) vol. 1, p. 504, and cases cited. The right to collect wharfage and dockage tolls is a franchise. De Witt v. Hays, 2 Cal. 463, 468, 56 Am.Dec. 352; Pacific Coast S.S. Co. v. Kimball, 114 Cal. 414, 417, 46 P. 275; Pol.Code, § 2906. * * * The erection of a wharf, dock, or other construction over tide-lands by individuals without license is an encroachment upon the sovereignty or a purpresture which belongs to the state as the owner of the soil to which it is affixed." Oakland v. E. K. Wood Lumber Co., 211 Cal. 16, 22, 23, 292 P. 1076, 1078, 1079, 80 A.L.R. 379.

[4, 5] It was not necessary, as contended by appellant to set forth in the complaint facts supporting the allegation of the operation of a "public utility wharfinger business". In quo warranto it is sufficient to plead the ultimate fact in general terms. People v. Hayden, 9 Cal.App.2d 312, 49 P.2d 314. However, the conclusion of the railroad commission on questions of fact, including classification, is final. (Const. of California, art. XII, sec. 23; Live Oak W. U. Ass'n v. Railroad Commission, 192 Cal. 132, 219 P. 65; Goodspeed v. Great Western Power Co., 33 Cal.App.2d 245, 91 P.2d 623, 92 P.2d 410.

Appellant admits that in conducting a wharf, situated upon lands not entirely owned by the operator, it may well be that as an incident to complete ownership, it is necessary to obtain a franchise to operate the wharf, but contends that the right to so operate and to collect tolls is an incident to the title and possession of submerged lands. It may be conceded that the erection of a strictly private wharf on private lands, a matter not involved herein, does not require a franchise, but a wharf on private lands, with wharfage facilities offered to the public, if it be a public utility, is subject to control and regulation by the railroad commission as provided by the legislature. However, section 23, article XII of the Constitution of California specially provides that such regulation shall not affect the right of an incorporated city or town to grant franchises for public utilities in the manner prescribed by law. Whether complete power, other than the fixing of rates, shall vest in the railroad commission depends upon an election called by the local authorities to determine whether the city shall retain such powers or surrender them to the railroad commission. The electors of the City of Oakland have determined to retain its power of control over wharfingers in conformity with article XII, section 23, providing: "* * * that this section shall not affect the right of any city and county or incorporated city or town to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law."

This brings us to a consideration of those terms and conditions. The charter confers jurisdiction upon the port commissioners to grant or withhold franchises. In addition, however, corporations and natural persons are prohibited from constructing wharves or taking tolls in connection therewith until granted such right or privilege by the governing body having authority in that behalf, Civ.Code, secs. 528–531, and the president and secretary of such wharf corporation must annually, under oath, report to the governing body certain information relative to the wharf, including the cost of construction, money expended for repairs, the amount received for tolls, etc. Civ.Code, sec. 530. Section 529 provides for the dissolution of corporations not complying with the requirements. When division 1, point 4, title 6, is read in its entirety, and the above sections applied one to the other, a detailed plan for the procurement of a permit from the authorized governing body to construct a public wharf appears. Likewise a permit must be obtained to collect tolls on a wharf already constructed.

Assuming for the moment, as appellant contends, that "construction" of the wharf is not an issue in this case, nevertheless the taking of tolls, a part of the operation of the business of public wharfage, is an issue; and a penalty is provided for the taking of such tolls without authority from the proper governing body. The complaint charges appellant with the "operation of a public utility wharfinger business" since February 23, 1934. The judgment decrees that defendant "be and it is hereby excluded and ousted from the exercise of the franchise for the construction and operation of a public wharf", etc. The variance seems immaterial, but as a safeguard to appellant's rights, and to obviate a possible interpretation of the judgment as an order to remove the wharf already constructed, the trial court is directed to modify the judgment in that respect.

[6, 7] Returning to a consideration of the code sections requiring an authorization before constructing or operating a wharf, or collecting tolls in connection therewith, the substantive law, as it appears in sections 528–531 of the Civil Code, should be read in conjunction with Harbors and Navigation Code, sections 4000–4017, St.1937, pp. 883–886, which relate to the manner in which such privileges or franchises shall be granted and are recodifications of Political Code, sections 2906–2921. Harbors and Navigation Code, section 4000 provides that upon approval of the railroad commission, the board of supervisors of any county may grant authority for the construction of a wharf on any lands bordering on any navigable bay, with the right to collect tolls. The municipal authorities of any lands situate within the limits of an incorporated town or city may grant authority to construct wharves or chutes, with the additional right to collect tolls, in the same manner as is provided for the supervisors of a county. Harbors and Navigation Code, secs. 4000, 4016. If the wharf is not kept in good repair, or if it is unsafe or dangerous, a penalty may be recovered by order of the board which granted the authority. Harbors and Navigation Code, Sec. 4014. Section 4017 confers upon a board of supervisors the power to grant to any railroad corporation, authority to construct a wharf on or in front of lands owned by it bordering on any navigable arm of the sea, situated in or bounding the county, with the additional right to take tolls, etc. This section seems to be more liberal than the preceding sections, but even here all territory under the jurisdiction or control of any incorporated city or town is excluded from the operation of its provisions, thus evidencing once more the intention of the legislature to permit municipalities as agencies of the state to control its own harbor as a local affair.

[8, 9] Appellant contends that a public utility may not abandon or cease its operations except with the consent of or at the order of the railroad commission. The rule is that a public utility cannot convey "its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public" without an order from the railroad commission. Stats. 1927, p. 78. The section refers to property dedicated to public use. Crum v. Mt. Shasta Power Corp., 220 Cal. 295, 30 P.2d 30. The taking of tolls without a permit from or regulation by the duly constituted authorities may not be said to constitute a dedication of wharfing facilities for public use. In this case a right has been usurped; and the wharf is being operated illegally. The provision prohibiting public utilities from conveying rights, property or accessories, presupposes legal title thereto. Why it should be necessary to obtain the approval of the railroad commission to cease violating the law is not made plain in appellant's brief. The railroad commission holds to the view that it has no jurisdiction to compel the continuance of a wharf upon the expiration of a franchise. In Application of Pacific Electric R. Co., 23 C.R.C. 767, it said "that authority therefor must be obtained from the board of trustees of the city of Redondo Beach". People v. Northwestern Pac. R. Co., 20 Cal.App.2d 120, 66 P.2d 697, cited by appellant, is not in point. That was a "nonuser and abandonment" matter. The court held that a franchise of a public utility within the purview of the Public Utilities Act (Deering's Gen.Laws 1931 and Supps. 1933, 1935, Act 6386; Const., art. XII, secs. 22, 23), once fully exercised, and we may add, legally, may not be forfeited for abandonment without the decision of the railroad commission determining that the service was inadequate. In that case it was held that the railroad commission did not have jurisdiction to cancel a franchise "under any circumstances". The question of nonuser is not involved in this case.

[10, 11] Section 4015 provides: "Authority shall not be granted under this chapter which will interfere with vested rights, or interfere with or infringe grants made by State authority * * *." Appellant derives title to its land through one Carpentier, who was granted certain tidelands and the right to construct wharves and collect wharfage. However, the privilege was limited to thirty-seven years, and has long since expired. Whatever title to the submerged lands vested in Carpentier did not by implication continue a right to construct wharves and take tolls beyond the limited period. City of Oakland v. Wheeler, 34 Cal.App. 442, 168 P. 23; Board of Port Commissioners v. Williams, 9 Cal.2d 381, 70 P.2d 918. The right of a riparian owner of land abutting on navigable water does not include the title and possession of submerged lands, nor wharfing privileges thereover. In Oakland v. E. K. Wood Lumber Co., supra, 211 Cal. at

pages 22, 23, 292 P. at page 1079, 80 A.L.R. 379, the court said: "It is recognized that the owner of land riparian to a navigable body of water has no right below the high-tide line as against the state, the property in and dominion and sovereignty over the soils 'covered and uncovered by the flow and ebb of the neap or ordinary tides' having been reserved to the states subject to the rights granted to the United States by the Constitution (Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331), and on the same equality to California (Weber v. State Harbor Com'rs, 18 Wall. 57, 85 U.S. 57, 21 L.Ed. 798), which holds the title in trust for the benefit of the people for purposes of navigation and fishing (Ward v. Mulford, 32 Cal. 365, 372)."

Appellant company contends that, since it is to a large extent engaged in interstate and foreign commerce, it cannot be required to obtain from respondent a franchise or other authority as a condition precedent to operating and maintaining its wharf. U.S.Const., art. I, sec. 8, clause 3. In other words, that one who operates a wharf entirely upon his own premises, and whose business is that of furnishing services to vessels engaged in interstate and foreign commerce is protected by the commerce clause in the federal constitution. No claim is presented that appellant has received authority, by franchise or otherwise, from any federal, state or municipal government to operate this wharf, or that Congress has seen fit to regulate the subject in any way affecting either appellant or respondent. In Clyde Mallory Lines v. Alabama ex rel. State Docks Comm., 296 U.S. 261, 267, 56 S.Ct. 194, 197, 80 L.Ed. 215, the court said: "State regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress, they are not forbidden."

[12] The privilege of operating a wharf is primarily a local matter, and the federal authorities take over its regulation, either directly or indirectly, only when the power exercised by such local government is incompatible or inharmonious with the interests of the federal government as relates to interstate or foreign affairs, particularly with reference to commerce. Parkersburg & O. R. Transportation Co. v. Parkersburg, 107 U.S. 691, 2 S.Ct. 732, 27 L.Ed. 584; Cooley v. Board of Wardens, 12 How. 299, 53 U.S. 299, 13 L.Ed. 996; Covington, etc., Bridge Co. v. Kentucky, 154 U.S. 204, 14 S.Ct. 1087, 38 L.Ed. 962; Detroit International Bridge Co. v. Corporation Tax Appeal Board, 294 U.S. 83, 55 S.Ct. 332, 77 L.Ed. 777. No decision has been called to our attention that has gone so far as to hold that local boards or commissions do not have power to regulate the type and the location of wharves upon lands that are solely within local areas and not under some form of federal jurisdiction.

Appellant seeks support by citation of two highway carrier cases. People v. Yahne, 195 Cal. 683, 235 P. 50, and Meyers v. Railroad Commission, 218 Cal. 316, 23 P.2d 26. The facts in the instant case and in the cited cases are not parallel. A facility with a fixed permanent location, such as a wharf, is hardly comparable with one that travels within and without the state. In the Meyers case, wherein Meyers was engaged in the business of transporting goods from wharves to other points, the railroad commission directed him to desist operation as a common carrier until he obtained a certificate of public convenience. The refusal of the commission to issue the certificate was not predicated upon considerations of traffic safety or congestion, but was rather a determination of who should engage in transporting interstate commerce. The operation of the wharf, from whence goods were taken, played no part in the conclusion reached in the majority opinion annulling the order of the commission.

[13] We are not directly concerned here with appellant's business as a common carrier, if such it is, in transporting passengers or merchandise within or without the state, but simply with its maintenance and operation, without governmental authority therefor, of a structure affixed to land within a municipality. The operation of a wharf is a local affair, the control of which inheres in the governmental board or commission authorized to grant or withhold franchises. Such power continues until Congress acts.

Considering this point further, it may be noted that ferries, bridges and wharves have often been treated upon the same legal basis. However, a ferry or a bridge, particularly if it is operated or extends from one state to the short in a foreign state or land, is not, as a transportation facility, factually in the same category as a wharf, which does not physically touch a sister or foreign state and is used simply as a landing place for passengers or merchandise. Some support for appellant's theory is found, particularly in opinions deciding tax or rate issues in ferry or bridge cases. An illustration is Sault Ste. Marie v. International Transit Co., 234 U.S. 333, 34 S.Ct. 826, 58 L.Ed. 1337, 52 L.R.A.,N.S., 574, wherein it was held in effect that a municipality could not require a ferry company, enfranchised by Canadian authority and operating across international waters, to take out a license as a condition to its operation. In that case, the court said (234 U.S. at page 341, 34 S.Ct. at page 828, 58 L.Ed. 1337, 52 L.R.A.,N.S., 574): "The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce." There, as here, it is the immediate problem that determines the necessity of a license, permit or franchise. The language quoted from the Sault Ste. Marie case, standing alone, written as it was by Mr. Justice Hughes, would probably be determinative of this case but for another opinion by the same eminent authority handed down the same day, namely, Port Richmond & Bergen Point Ferry v. Board of Chosen Freeholders of Hudson County, 234 U.S. 317, at pages 330, 331, 332, 34 S.Ct. 821, at page 825, 58 L.Ed. 1330, where the court said: "That principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive; that, in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and that, when Congress does act, the exercise of its authority overrides all conflicting state legislation. * * There are a multitude of such ferries throughout the country, and, apart from certain rules as to navigation, they have not engaged the attention of Congress. We also put on one side the question of prohibitory or discriminatory requirements, or burdensome exactions imposed by the state, which may be said to interfere with the guaranteed freedom of interstate intercourse, or with constitutional rights of property. The present question is simply one of reasonable charges. It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates, because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. Quarantine and pilotage regulations may be said to be quite as direct in their operation, but they are not obnoxious when not in conflict with Federal rules. * * * It thus presents a situation essentially local, requiring regulation according to local conditions. * * * The practical advantages of having the matter dealt with by the states are obvious, and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will, of course, control."

[14, 15] As noted above, Congress has not attempted to make any regulations with reference to wharves. The operation of a public wharf, even when used in interstate or foreign commerce, and even on private property, should not be left to the unchecked and uncontrolled action of the owner. The unrestrained berthing, loading and unloading of vessels, under the direction of one owner at one wharf, is not in conformity with the purposes of the legislature in the creation of a port department, which through its commission, appointed to promote commerce for the harbor, should have the exclusive control and management of the port, unhampered by those whose interests might tend to hinder the adequate and comprehensive development of the entire harbor.

The trial court is directed to modify the judgment by striking therefrom the words "construction and"; in other respects the judgment is affirmed, respondent to recover costs.

We concur: PETERS, P. J.; KNIGHT, J.